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JUDICIAL LEADERSHIP EMERGING IN ASBESTOS AND SILICA MASS TORTS

by

The Honorable Griffin B. Bell

In 2002, I wrote a monograph calling for judges to exercise greater leadership to address what the United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997), described as an “asbestos-litigation crisis.” See Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts’ Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly (Nat’l Legal Center for the Pub. Interest, June 2002), at <http://www.nlcpi.org>. Recent evidence suggests that defense counsel and judges are now responding by taking steps to investigate and police fraud and abuse in asbestos cases, as well as claims alleging exposure to silica dust.

United States District Judge Janis Graham Jack began this trend in June 2005 with her watershed decision recommending that all but one of the 10,000 claims in the federal multi-state silica litigation should be dismissed on remand because the diagnoses were fraudulently prepared. See *In re Silica Prods. Liab. Litig.*, 398 F Supp. 2d 563 (S.D. Tex. 2005). “[T]hese diagnoses were driven by neither health nor justice,” Judge Jack said in her opinion, “they were manufactured for money.” *Id.* at 635. Judge Jack also noted the impact of for-profit screenings: “Defendant companies pay significant costs litigating meritless claims. And what harms these companies also harms the companies’ shareholders, current employees, and ability to create jobs in the future. And potentially, every meritless claim that is settled takes money away from Plaintiffs whose claims have merit. And not only are those with meritorious claims denied just compensation, they are potentially denied full and meaningful access to the courts.” *Id.* at 636.

The focus then turned to West Virginia, where attorneys for CSX Transportation uncovered apparent fraud in a medical report prepared in support of an asbestos-related lawsuit filed by the Pittsburgh-based personal injury firm of Robert Peirce & Associates. See Beth Gorczyca-Ryan, *Claimant’s Diagnosis Challenged*, STATE J., July 27, 2006, at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=11294>. It turned out that the doctor whose name appeared on the medical report, Dr. Oscar Frye, may exist only on paper. *Id.*

CSX became suspicious after its attorneys attempted to locate the doctor and learned that the West Virginia Board of Medicine, Board of Chiropractic, and Board of Osteopathy had no record of any license issued to a Dr. Frye. *Id.* Then, when CSX’s attorneys called the phone number provided on legal papers for Dr. Frye, they reached the home of a woman who had the number for over a decade. *Id.* And when CSX tried to physically contact the doctor, they found that the office address listed for “Dr. Oscar Frye” was nothing more than a vacant lot. See Juliet A. Terry, *CSX Lawsuits Could Lead to Sanctions*, STATE J., Sept. 7, 2006, at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=13865>. The Peirce firm reportedly reacted to the fraud allegations by withdrawing from the case. There are signs justice may

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prevail in this case. West Virginia Circuit Court Judge Arthur M. Recht, who is overseeing the lawsuit against CSX, is currently considering a motion to dismiss. The Peirce firm also is facing a lawsuit brought by CSX alleging the personal injury firm failed to verify the identities of prospective plaintiffs during medical testing, which allowed one former CSX worker to pose as another during an X-ray in order to get a positive test for asbestosis. *Id.* CSX's lawsuit alleges fraud, misrepresentation and negligence in the personal injury firm's asbestos screenings.

Very recently, two prominent asbestos personal injury firms were sanctioned for alleged wrongdoing and denied admission to appear in Seattle and Cleveland, two major centers of asbestos litigation.

In the Seattle action, King County Superior Court Judge Sharon Armstrong wrote the managing partner of the Dallas firm of Waters & Kraus on December 18, 2006, about potential eavesdropping on jury deliberations by a lawyer in the firm. See Mary Alice Robbins, *Judge Seeks Inquiry into Allegations that Lawyer Eavesdropped on Jury Deliberations*, TEX. LAW., Jan. 17, 2007, available at <http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1168941737395>. The information was brought to Judge Armstrong's attention by her courtroom clerk. Judge Armstrong's letter informed the parties that she would decline to admit any member of Waters & Kraus before her court pending resolution of the investigation. She also referred the matter to the Washington State Bar Association for further investigation. *Id.*

The Cleveland litigation is likely to have even broader ramifications. On January 18, 2007, Cuyahoga County Common Pleas Judge Harry Hanna wrote a scorching order sanctioning the California personal injury firm of Brayton Purcell and one of its partners for various misconduct in an asbestos case brought on behalf of plaintiff Harry Kananian against Lorillard Tobacco Co., maker of a cigarette which had an asbestos filter for a time in the 1950's. See Paul Davies, *Plaintiffs' Team Takes Hit on Asbestos*, WALL ST. J., Jan. 20-21, 2007, at A4; see also Kimberly A. Strassel, Editorial, *Trusts Busted*, WALL. ST. J., Dec. 5, 2006, at A18. Lorillard's counsel, attorneys in the Kansas City office of Shook, Hardy & Bacon, alleged in court papers that Brayton Purcell lied to the court, defrauded asbestos trust funds, and obstructed discovery. Judge Hanna concluded: "The record before this Court indicates that Brayton Purcell institutionally and [the partner] individually have failed to abide by our rules. They have not conducted themselves with dignity. They have not honestly discharged the duties of an attorney in this case. Therefore, they have forfeited their privileges to practice before this Court." See Editorial, *Cuyahoga Comeuppance*, WALL. ST. J., Jan. 22, 2007, at A14. Interviewed later, Judge Hanna remarked, "In my 45 years of practicing law, I never expected to see lawyers lie like this." James F. McCarty, *Judge Becomes National Legal Star*, CLEVELAND PLAIN DEALER, Jan. 25, 2007, at B1.

Judge Hanna's ruling may prompt courts to allow the discovery and admissibility of claim forms filed with asbestos bankruptcy trusts so that defendants can explore whether plaintiffs are attempting to tell one story to bankruptcy trusts and another story in civil litigation. Claim forms filed with asbestos bankruptcy trusts should be admissible so that juries can make fully informed decisions before assigning fault in asbestos cases.

Recent investigative work by defense counsel in asbestos and silica cases suggests that fraud may be widespread in mass torts. The evidence that has emerged may be just the tip of the iceberg. Judges have a duty to investigate allegations of wrongdoing and to act when problems are found. The actions discussed above suggest that more courts are taking this duty seriously. More courts should follow their example.