

No: Courts Are on Course

BY KENNETH R. FEINBERG

I agree that the best, most effective way to resolve the current asbestos litigation crisis in our state and federal courts is by means of federal legislation.

Whether such legislation takes the form of procedural reform—making it easier for the courts to consolidate asbestos personal injury actions in one forum—or constitutes a national compensation scheme similar to the existing black lung program, is a matter to be debated in the halls of Congress.

But since it is extremely unlikely that, in an era of shrinking budgets and mushrooming deficits, a gun-shy Congress will enact such legislation, our federal and state judges have no choice but to come to grips with the hard reality of thousands of asbestos personal injury cases flooding current court dockets. Business as usual will not do.

Asbestos litigation, perhaps, is the best example of the growing problem of mass tort litigation, in which literally thousands of plaintiffs and hundreds of defendant companies find themselves in the courtroom. Compounding the crisis of numbers is the complex problem of causation, resulting from a latency period of 20 or 30 years between exposure to the asbestos-containing product and eventual

manifestation of injury.

The traditional tort problem taught in law school—one plaintiff, one defendant and one injury allegedly linked to the harm—is of little utility in the modern mass tort case. There are too many parties and too many conflicting causes of the injury. One can begin to appreciate the dilemma confronting our state and federal judges.

The judiciary cannot stand idly by while litigants wait 10 years for a trial date. Nor are judges comfortable with erratic jury verdicts in such cases, which resemble more a roll of the dice than principled decision-making.

Let Judges Make Reforms

Instead, judges are filling the void by initiating various reforms on their own designed to expedite the litigation and bring some consistency to the verdicts rendered. Consolidated trials, bifurcated and trifurcated proceedings, and use of special settlement masters are some of the means increasingly being used by the judiciary.

But even those creative judges who have employed these and other reforms, such as Judge Marshall Levin in Baltimore and Justice Helen Freedman in New York City, acknowledge their limited utility in securing a comprehensive resolution of the overall problem.

Other judges—such as federal Judge Jack Weinstein—have gone a step further and have tried to use the federal class action device as a vehicle for consolidating the cases in an effort to encourage a national settlement.

If these examples constitute "judicial activism" they should be welcomed. In the absence of sorely needed federal legislation, the courts have no alternative but to step into the breach and forge innovative alternatives to a "one case at a time" trial schedule. To suggest that the judiciary should wait until our system of justice collapses and Congress is compelled to intervene is to ignore the present suffering and legitimate complaints of a vast number of litigants.

The founding fathers never imagined in their wildest dreams that the specter of mass tort litigation would haunt our courts. But asbestos, Agent Orange, the Dalkon Shield and Bendectin are just the first examples of a new type of litigation that will continue to flourish and pose a threat to the fair and orderly administration of justice.

If Congress will not act, our courts will continue to develop innovative ways to deal with the litigation crisis.

To those who criticize such initiatives, a simple question is posed—what is the alternative? ■

ABA JOURNAL / MAY 1991

Judge Orders New Jury Selected in Asbestos Trial After Fax Mixup

BALTIMORE (AP)—A judge dismissed prospective jurors yesterday in the nation's largest consolidation of asbestos personal injury cases because a confidential defense document was mistakenly sent to the opposing side.

The misdirected fax, containing psychological profiles of prospective jurors prepared by defense attorneys for insulation manufacturers, was sent to attorneys for the alleged asbestos victims.

Baltimore Circuit Court Judge Marshal A. Levin ruled the document gave the plaintiffs an unfair edge and ordered that a new jury be selected, delaying the trial by weeks.

"I find that the plaintiffs' attorneys have an advantage over the defense attorneys. The plaintiffs know pretty well which prospective jurors the defense is going to strike," Levin said. "They know the innermost thinking of the defense counsel."

Levin struck all 51 prospective jurors. It had taken a month to select them from among hundreds of questionnaires and interviews.

Jury selection was expected to begin again today. The trial is expected to last several months, and lawyers

for the 9,032 plaintiffs say each delay means more asbestos victims die without receiving compensation.

Many of the plaintiffs were steel and shipyard workers in Baltimore who handled asbestos insulating materials without protective clothing. Inhaling asbestos has been linked to lung diseases, including cancer.

The defendants are 10 insulation makers, including Fibreboard Corp., GAF Corp. and Owens Corning Fiberglas Corp.

Lawyers for the insulation companies requested a mistrial after a secretary pushed the wrong button on the office fax machine, sending the report to the Philadelphia office of a law firm representing 16 plaintiffs.

Copies of the report were distributed among the plaintiff lawyers, but the lawyers then surrendered them to the judge. Levin sealed them so the jurors would not learn which were deemed unfavorable to the insulation makers.

One plaintiff lawyer agreed with the insulation companies that the mistake gave the plaintiffs an unfair advantage. Other plaintiff lawyers said the transmission, mistaken or not, made the report public knowledge.

METROPOLITAN NEWS-ENTERPRISE

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JUNE 6, 1991

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