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Asbestos & The Sleeping Constitution

Griffin B. Bell

This piece formed the basis of the keynote address delivered by Judge Griffin Bell at Pepperdine Law Review's April 5, 2003 Symposium on Asbestos Litigation and Tort Law. The speech has been revised to reflect a small number of updates pertinent to the original presentation.

It is said of Voltaire that, in his old age, a priest asked him to renounce the Devil. Voltaire replied: "This is no time to be making new enemies. . . ."

I will speak today of some hard truths regarding asbestos litigation; but it is not my intention to cast blame. I hope to leave here having made only new friends. Most of us, lawyers and judges alike, remain idealists who believe that justice is real and obtainable.

That is why the subject of today's talk should be troubling to us all—the way in which asbestos litigation is distorting due process and other constitutional protections. Asbestos cases also have caused considerable damage to the economy, innocent employees, and shareholders—60 bankruptcies and counting—as well as to our confidence in the litigation system.

The latest wave of asbestos cases has been characterized by one overwhelming fact: the vast majority of new claims are filed by people who are not sick from asbestos. Asbestos litigation now stands as the only part of our tort system in which people who can show no real physical injury are routinely allowed to recover.

A common reaction is: "This can't happen in our litigation system."

As important observers and participants in asbestos litigation, you may play a vital role in either helping to solve the asbestos dilemma or allowing it to continue. Either way, asbestos cases are with us, and something must be done.

For as difficult as this litigation has become, important progress has been made recently. Certain courts and legislatures deserve recognition for these efforts, but there is a long way to go.

In an article written earlier this year, Professor Lester Brickman, a conference panelist at this symposium, offered a candid assessment of the future. He said:

Asbestos litigation will go on until the last dollar is extracted from an ever-widening group of defendants . . . [a]sbestos litigation today has come to consist, mainly, of unimpaired people reaping compensation at the expense of the genuinely injured, on the basis of prepared scripts with perjurious contents, backed by bogus medical evidence.¹

One obvious solution would be federal legislation that would impose fair and reasonable standards. The Senate Judiciary Committee has prompted multiple hearings and negotiation sessions since September 2002, which gives me some optimism. I hope Congress *will* act, but we should not hold our breath.

Given this ongoing crisis—a crisis concentrated in state courts—I expect that defendants in asbestos litigation will begin asserting their rights under the U.S. Constitution. These rights often have been casualties of the effort to relieve court dockets jammed with asbestos claims.

My own view is that the Constitution has been ignored by state court systems administering asbestos litigation, and that defendants are only just now beginning to explore how those limits should be applied. It is as though the Constitution has been asleep during the first several decades of this litigation. Perhaps now the Constitution is about to wake up at the insistence of the litigants.

I want to discuss with you three rights conferred by the Constitution that have potential implications for the asbestos litigation:

- The Commerce Clause, which prohibits discriminatory burdens on interstate commerce.
- The rule against ‘extraterritoriality,’ which confines the scope of judicial power.
- The limits on aggregations of claims under the Due Process Clause.

First, the Commerce Clause. The Commerce Clause authorizes Congress to “regulate Commerce . . . among the several States.”² A state law that places an “undue burden” on interstate commerce can be held to violate the Commerce Clause even where it does not conflict with any federal legislation.³ As case law has evolved under this “dormant” Commerce Clause, a key consideration has become whether a state law discriminates against out-of-state businesses. The Supreme Court has made clear that a state law may be discriminatory even if, on its face, it appears neutral.⁴

1. Lester Brickman, *The Great Asbestos Swindle*, WALL ST. J., Jan. 6, 2003.

2. U.S. Const. art. I, § 8, cl. 3.

3. See *Morgan v. Virginia*, 328 U.S. 373 (1946).

4. See *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333 (1977).

In recent years, the asbestos litigation has become increasingly concentrated in a few states, which I will refer to as the “forum states.”

The Rand Institute recently estimated that five states accounted for sixty-six percent of asbestos filings by the late 1990s. For example, in one Mississippi county, the number of plaintiffs filing lawsuits over a recent five-year period was more than double the entire population of the county. While these numbers may change depending on the effect of Mississippi’s recent efforts at tort reform, it is safe to say that asbestos claims will continue to gravitate to a handful of states.

The defendants in this litigation are business corporations that, generally speaking, are located in other states and do not have a strong local presence in the forum states. The litigation has shifted billions of dollars from the defendants into the forum states. While perhaps there is nothing explicitly discriminatory in the adjudication of asbestos cases in these states, there can be no serious question that interstate commerce has been affected for the worse. My own view is that such a Commerce Clause challenge will have a very good chance of success.

The second aspect of the Constitution that I think has special relevance to asbestos litigation is the Rule Against Extraterritoriality.

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,⁵ the Supreme Court, in a six-to-three decision written by Justice Kennedy, imposed substantial due process limits on the authority of a state to use conduct taking place outside that state as the basis for an award of punitive damages.⁶ The Court held that, “as a general rule,” a state lacks “a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”⁷ In this respect, *State Farm* builds upon the Court’s 1996 decision in *BMW of North America, Inc. v. Gore*,⁸ where the Court held that any award of punitive damages “must be supported by the State’s interest in protecting its *own* consumers and its *own* economy.”⁹ This constitutional principle has come to be known as the Rule Against Extraterritoriality.

This rule, as developed in *State Farm*, is likely to have significant consequences for future punitive damages cases, both in the asbestos context and in other areas of tort law.¹⁰ I expect that asbestos defendants will argue that the Rule Against Extraterritoriality precludes a forum state from awarding punitive damages in any case that lacks a strong factual connection

5. 123 S. Ct. 1513 (2003) (reversing a \$145 million award of punitive damages).

6. *See id.*

7. *Id.* at 1522.

8. 517 U.S. 559 (1996) (reversing a \$2 million award of punitive damages).

9. *Id.* at 572 (emphasis added).

10. *See generally* James D. Miller, *Ending the Punitives ‘Riot,’* 25 NAT’L. L. J. A16 (May 5, 2003) (noting that *State Farm* “should dramatically limit the evidence in most punitive damages cases, especially where the defendant is a large, national business enterprise”).

to the forum state, and I also expect the courts ultimately will find this argument persuasive. More broadly, it may be that the courts will expand the scope of the Rule Against Extraterritoriality to implicate compensatory damages, at least in some contexts, in addition to punitive damages.

The final aspect of the Constitution that I see as important for the asbestos litigation is the due process limitation on the grouping of asbestos claims. Some states permit the joinder of dozens or even hundreds of asbestos plaintiffs into a single complaint. Last year, Justice Maynard of West Virginia acknowledged that this bundling of dissimilar cases has grave constitutional consequences. He observed that mass trials, or even small-group trials, would involve a “myriad of highly individual facts” and create a “Frankenstein’s Monster.”¹¹ Many jurists outside West Virginia are facing this same grouping problem.

Less obvious, but no less real, is the harm such consolidations bring to plaintiffs with meritorious cases. The claims of sick plaintiffs often are used as leverage to obtain settlements for the plaintiffs who are not sick. Of course, the trading off of one plaintiff’s claim for that of another violates the most fundamental rule of legal ethics—loyalty to each individual client. But I think it also has due process implications.

In *Amchem Products v. Windsor*,¹² where the Supreme Court overturned a nationwide asbestos class action settlement, the Court was troubled that plaintiffs with serious asbestos-related diseases had been lumped together with plaintiffs who had no disease at all.¹³ The Court concluded that “[t]he settling parties . . . achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.”¹⁴

I expect that the global settlement of aggregated asbestos cases will become a major field of constitutional litigation over the next few years. Individual plaintiffs have a clear incentive, as well as clear standing, to challenge the aggregation of asbestos claims on the due process ground that there is no “structural assurance” that all plaintiffs will be treated fairly in a settlement.¹⁵ The defendants also may have standing to challenge the aggregation of claims on the ground that individual plaintiffs may not be bound by a settlement that violates due process.

Earlier, I described the Constitution as “sleeping” because these important concepts have yet to be tested in the context of asbestos litigation. The Commerce Clause, the Rule Against Extraterritoriality, and the due process limits on aggregation of claims are potential constitutional forces that may—or may not—be brought to bear on the asbestos litigation in the next few years. I submit, however, that we are close to seeing courts fully awoken to the Constitutional realities of asbestos litigation.

11. West Virginia *ex rel.* Mobil Corp. v. Gaughn, 565 S.E.2d 794 (W.Va. July 5, 2002) (Maynard, J., concurring).

12. 521 U.S. 591 (1997).

13. *Id.* at 627 (1997).

14. *Id.*

15. *Id.*

Until this happens, I would like to recommend a number of modest remedies that jurists could adopt now to protect litigants' constitutional rights while helping resolve the asbestos crisis. I also believe that it is important to commend those courts that have made recent progress in handling asbestos claims. While much more needs to be done, these efforts prove that solutions do exist to this problem.

First, mass X-ray screenings in mobile vans have driven the flow of new asbestos claims by healthy plaintiffs. These screenings often do not comply with federal or state health and safety law. There often is no medical purpose for these screenings and claimants receive no medical follow-up. I believe that X-rays are best left to the practice of medicine, and that proper medical standards should not be abandoned simply to generate lawsuits.

The concern for screened claimants is not mere conjecture. One example should suffice: a St. Louis newspaper reported in February that a screened person was told by his lawyers that he had a disease caused by asbestos. Seven months later, he killed himself with a shotgun. A suicide note to his son said it had been a long seven months and that "I don't want to be an invalid." The note was written on the back of the forms the law firm wanted him to complete so a lawsuit could be filed. The physicians who examined his X-rays said that the man had no sign of an asbestos related disease.¹⁶

Our courts should put an end to mass X-ray screenings and the unreliable medical evidence they generate as the source of claims.

Second, the vast majority of asbestos plaintiffs today are either healthy or they suffer from medical conditions not caused by exposure to asbestos.

Imagine if each of us were allowed to sue for our exposure to the many substances we use every day—soap, fast food, sugar substitutes, for instance—even though we are not yet sick. We may be headed towards the day when each of us has a "phobia" of some sort, if we don't already. It would be unfortunate if our tort system allowed every citizen to sue based on these subjective worries in the absence of any serious physical impairment. Every citizen would be a walking lawsuit. The asbestos crisis would pale in comparison to the number of lawsuits that would be filed for exposure to thousands of products we use everyday.

The Supreme Court, in a recent five-to-four decision in *Norfolk & Western Railway Co. v. Ayers*,¹⁷ allowed claimants with asbestosis to recover damages for fear of cancer under FELA, but only if the fear is "genuine and serious."¹⁸ The Court also reestablished an important point: a claimant must have actual physical symptoms before recovering broader

16. See Andrew Schneider, *Asbestos Lawsuits Anger Critics*, ST. LOUIS POST-DISPATCH, Feb. 9, 2003.

17. 123 S. Ct. 1210 (2003) (permitting fear of cancer claims under the Federal Employers' Liability Act (FELA)).

18. *Id.* at 1223.

damages for pain and suffering. In assuming that the claimants in this case actually had symptoms from asbestosis, the Court had the wisdom to differentiate the relatively few sick claimants from those who have been exposed to asbestos but are not sick.

I am sympathetic to people who have been exposed to asbestos and believe that they may become sick sometime in the future, and I do not downplay their concern. They should have a right to file a claim when, and if, they become sick—but not before that point. Unimpaired plaintiffs should see their cases dismissed or placed on an inactive court docket—a strategy adopted by Judge Charles Weiner of the Eastern District of Pennsylvania. Judge Weiner presides over the federal MDL asbestos litigation, and has seen almost 100,000 cases transferred to his court since 1991 for pre-trial management. Judge Weiner’s inactive docket order tolls the statute of limitations so people who have been exposed to asbestos can still sue if a disease should later develop. This balanced approach preserves claimants’ day in court if they get sick, while still recognizing that legal injury is required for a recovery. This may sound like common sense, but in some states the application of common sense seems to be missing.

This pragmatic rule should now be adopted by state courts. Most recently, Judge Freedman in New York City¹⁹ and Judge Armstrong in Washington State²⁰ have implemented similar, pragmatic asbestos case management techniques. More courts should follow their example.

Third, court-appointed medical experts would help determine if plaintiffs are truly impaired—and help eliminate the bias of both plaintiff and defense experts.

A doctor who has testified primarily for *plaintiffs* wrote last year that he was amazed to discover that in some of these screenings, the worker’s X-ray had been “shopped around” to as many as six radiologists until a slightly positive reading was reported by at least one of them.²¹ He noted that the radiologist is often paid based on the reading result, a higher price for a higher reading of exposure. I doubt that this incentive-driven X-ray review encourages objectivity.

In February of this year, the American Bar Association’s Commission on Asbestos Litigation issued a report supported by ten medical experts, which recognized a disturbing pattern of biased X-ray reading in asbestos litigation. Similarly, two respected experts in radiology have documented dramatic instances of exaggerated X-ray reading by plaintiffs’ experts after arranging for a blinded review of their readings by six B-readers.²² The

19. See *In re New York City Asbestos Litigation*, No. 40000/88 (N.Y. Sup. Ct. Dec. 19, 2002) (Freedman, J.)

20. See Letter from Superior Court of King County to Counsel of Record, Moving and Responding Parties (Dec. 3, 2002) (Armstrong, J.) (establishing an inactive docket “to give priority to the cases of plaintiffs who are the most ill”).

21. David Egilman, *Asbestos Screenings*, 42 AM. J. INDUS. MED. 163 (2002).

22. See Viewpoint of Senator Kyl at 96 (including Attachment D, July 28, 2003 letter from Otha Linton and Joseph Gitlin to Senator Grassley regarding review of X-rays submitted by plaintiffs’ counsel), Senate Committee on Judiciary Rep. No. 108-118, Fairness in Asbestos Injury Resolution Act of 2003, S. 1125 (July 30, 2003).

plaintiffs' experts concluded that almost ninety-two percent of over 500 X-rays reviewed had a positive reading of 1/0 or higher (generally the cutoff for receiving a settlement), while the blinded review panel found that only 4.5 percent of these same X-rays should have been classified as 1/0 or higher.

One federal judge in Cincinnati dealt with this problem of physician bias by appointing independent experts. After these experts determined that up to sixty-five percent of claims before the court were not valid, these cases were dismissed.²³ More courts should consider this method of ensuring reliable medical evidence.

Fourth, the courts need to crack down hard on improper witness coaching. Of course, one judge alone could not possibly monitor each asbestos case in sufficient detail to detect whether product identification is valid. The use of Special Masters would provide courts with the help they need.

Finally, the courts need to return to fundamental tort principles and require individualized treatment of cases. It is telling to me that many asbestos plaintiff lawyers use the name "inventory" for the people they represent. "Inventory," not "clients." The courts should not permit clients to be treated as "inventory" as though they were inanimate objects.

It will also be interesting to see if Mississippi's recent tort reform reduces filings by out-of-state plaintiffs in Mississippi.²⁴ Regardless of that outcome, I submit that if the Mississippi legislature can pass asbestos reform, then any state can do it.

A case in point is West Virginia, which has been long known as a dumping ground for asbestos claims by out-of-state plaintiffs. Earlier this year, West Virginia enacted a venue bill providing that nonresidents may not file suit in West Virginia unless all or a substantial part of the acts or omissions giving rise to the claim occurred in West Virginia. We likely would see much more individualized treatment of claims if other states followed this example and preserved their courts for their own citizens.

Yet, for every example of a jurisdiction that has improved, another exists where the situation is getting worse. I want to single out a jurisdiction that has allowed itself to become a Mecca for asbestos lawsuits, many of which have no relationship to this locale. Some members of the judiciary have abandoned tort principles and permitted cases to be filed and managed

23. See Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (Oct. 1991).

24. Under Mississippi's recently altered venue statute, an out-of-state plaintiff who commences a lawsuit in Mississippi shall bring his suit in one of three Mississippi locations. These locations include: (1) "the county where the defendant . . . may be found"; (2) "the county where the cause of action may occur"; or (3) the county "where the event that caused the injury occurred." Miss. Code Ann. § 11-11-3(1) (2002).

in a manner that deprives defendants of their due process rights. I am talking about Madison County, Illinois, right in the heart of our country.

What is so troubling about this jurisdiction? Among other things: multiple trials are set for the same day and cases are frequently expedited months ahead of schedule without notice. This effectively forces settlement because defendants typically are forced into trial with little or no meaningful discovery.

Courts routinely strike all defenses on the eve of trial on dubious grounds. The consequences of such motions are devastating—the settlement leverage is extraordinary and unwarranted. Plaintiffs are not required to respond in writing to summary judgment motions. Plaintiffs typically respond by referring defendants to generic lists containing thousands of witnesses, some of whom are deceased, without any indication of whom, if anyone, will offer product identification evidence against a particular defendant. Not only is this response insufficient as a matter of discovery, but some judges have improperly allowed this response to defeat summary judgment as a matter of law.

Plaintiffs file claims from all over the country even though many have no connection whatsoever to Madison County. For example, in March 2003, an Indiana plaintiff, who worked at an Indiana U.S. steel facility and had no significant connection to Illinois, filed suit in Madison County and obtained a \$250 million verdict. Such plaintiffs file claims in this jurisdiction because they know that multiple trial settings and lack of due process will make it virtually impossible for defendants to prepare for trial and will force settlements far higher than a plaintiff could recover at home.

Why has Madison County degenerated this way? How has this jurisdiction become such a “judicial hellhole?” Commentators have pointed to substantial contributions by plaintiffs’ attorneys to the judges’ campaigns. Whatever the reason for the abandonment of tort principles and, as a consequence, due process, this injustice should not continue.

I hope that some of the suggestions I have made today help judges control runaway asbestos litigation in Madison County and other select jurisdictions.

To summarize, our courts should:

- dismiss cases based only on mass X-ray screenings
- adopt inactive dockets for the nonsick
- appoint independent medical experts
- require pretrial, credible identification of specific products
- return to fundamental tort principles and individualized treatment of claims.

Asbestos litigation has been treated like a special branch of the law in which customary rights and legal rules do not apply. It should not be treated this way any longer. The Supreme Court in *Ayers* recently captured this sentiment, concluding that courts must resist pleas “to reconfigure established liability rules” simply because a crisis exists.²⁵ It is time for

25. *Norfolk & West. Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003).

courts to stop compromising Constitutional rights and normal rules of injury in the name of processing claims.

I submit to you that lasting solutions will require the participation of the entire legal community. But this effort must begin with our nation's judges. Judges have the responsibility to take the lead.²⁶

26. For a more extensive discussion of judicial approaches to managing asbestos litigation, *see generally*, Griffin B. Bell, J. Sedwick Sollers III & Mark A. Jensen, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, BRIEFLY, Vol. 6, No. 6 (June 2002) (available at www.nlcpi.org and 2002 WL 1900065 (body), 2002 WL 1926601 (table of contents), and 2002 WL 1926600 (preface)).

