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SPECIAL COMMITTEE ON SUPERIOR COURT TOXIC TORT LITIGATION

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REPORT AND RECOMMENDATIONS

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PROLOGUE

The year 2005 brought a significant change to Delaware courts. In that year, law firms filed a large number of cases in the Delaware Superior Court seeking damages for exposure to asbestos on behalf of plaintiffs who did not live in Delaware and did not claim they were exposed to asbestos in Delaware. Although such cases had been filed in Delaware before on a limited basis, the number of cases filed starting in 2005 was a significant increase.

Some of the defendants in those cases filed motions to dismiss on grounds that Delaware was not the most convenient forum in which those cases should be heard and that the public interest dictated that the Court should decline to hear them. The defendants argued, among other things, that evidence regarding out-of-state exposures was hard to gather and manage, that the substantive law of Delaware would not apply to the cases, and that the sheer number of cases would overwhelm the Court and the defendants, thereby coercing premature and unfair settlements.

The motion to dismiss was heard by The Honorable Joseph R. Slights, who in 2005 had become the Superior Court Judge assigned to preside over all of the Court's asbestos cases. In a lengthy decision issued on March 8, 2006, Judge Slights denied the motions to dismiss. The Court concluded that it must:

* * *

> . . . apply the same liberal standard that has evolved in the context of Delaware corporate and commercial litigation to the newly-filed mass tort cases that have been brought here. The Court also has concluded that the "public interest factors" are not *ipso jure* inapplicable to [its] analysis in Delaware, and may be dispositive at some future point in this litigation if the number of foreign plaintiffs who file here grows substantially. These factors do not, however, warrant dismissal of these cases at this time given the manageable demands of the Court's current asbestos docket.

In re Asbestos Litig., 929 A.2. 373, 378 (Del. Super. 2006).

No appeal from that decision was filed. Instead, the objection to Delaware courts' asbestos litigation has now been taken to the public forum where the objectors seek to obtain their goal of ending that litigation.

INTRODUCTION

On November 1, 2007, James A. Wolfe, President of the Delaware State Chamber of Commerce (the "Chamber"), sent a letter to the Honorable James T. Vaughn, Jr., President Judge of the Delaware Superior Court, expressing the Chamber's "concern regarding the increasingly large number of toxic-tort personal injury cases now being filed in Delaware Superior Court by out-of-state law firms on behalf of out-of-state plaintiffs whose claims have no meaningful connection to Delaware."

The Chamber's logic was this: (a) the large number and the unique features of the "out-of-state" cases meant that the Superior Court was overwhelmed; (b) to alleviate this problem, the Court has inevitably imposed rules and procedures that hurt defendants in those "out-of-state" cases;[1] (c) the only way to cure the unfair effect on the defendants is to end the flow of "out-of-state" cases into Delaware; (d) which the Chamber suggested could be by accomplished by changes in Court rules and procedures.

On November 19, 2007, President Judge Vaughn appointed a committee of five lawyers (the "Special Committee") with no special background in asbestos litigation to (1) consider the issues raised in the Chamber's letter, (2) examine the procedures used by

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[1] In its letter, the Chamber noted Delaware's appearance in reports of the American Tort Reform Foundation (ATRF) on a "Watch List" for potential "Judicial Hellholes." ATRF publishes an annual list of what it considers "Judicial Hellholes," which it says "are places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits." For the past two years, ATRF has placed Delaware on its "Watch List," which ATRF reserves for "jurisdictions [showing] suspicious or negative developments in the litigation environment or histories of abuse." ATRF's sole reason, apparently, for placing Delaware on its Watch List is the growing number of asbestos cases filed in Delaware by plaintiffs with no traditional relationship to Delaware. The ATRF is a foundation affiliated with the American Tort Reform Association (ATRA), an organization sponsored by companies who feel that claims against them should be limited by the courts or legislature. *See* its website at www.atra.org.

Superior Court to manage toxic tort litigation, (3) give the bar a chance to comment on those procedures and issues, and (4) report back to the President Judge.

In view of the sterling reputation of Delaware's court system, a description of Delaware as a place "where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits," or even a place where that could happen any time soon, struck the members of the Special Committee as oddly misplaced. The Special Committee thus viewed its first task as being to examine whether the Superior Court was overwhelmed with the "out-of-state" cases and whether the application of the Court's rules and procedures to the "out-of-state" cases unfairly affected defendants.

The Special Committee did not view its charge to include the broadest issues of "tort reform" presented by the Chamber's letter. Similarly, the Special Committee did not view its task, at least in the first instance, as including suggesting jurisdictional limitations, such as those examined so recently in the Superior Court's decision denying motions to dismiss because Delaware was not the appropriate forum.

As its first item of business, the Special Committee wrote to the attorneys representing both plaintiffs and defendant in asbestos cases on November 28, 2007, and, among other things, invited the submission of written comments by December 28, 2007. The Special Committee's letter said:

> We also invite the bar, and especially those members of the bar actively involved in asbestos litigation, to submit to us in writing . . . your views relevant to our undertaking. Specifically we would like to hear from you as to (1) what aspects of the Court's management of the asbestos litigation are working well and what aspects are not working as well; and (2) what specific case management ideas the Court might usefully try that it has not yet tried.

The Special Committee met with Mr. Wolfe and other representatives of the Chamber on December 12, 2007, to make certain it knew the background of the November 1, 2007 letter and the exact nature of the relief the Chamber was requesting from the Court. During this meeting, the Chamber advised the Special Committee that it had first sought a legislative amendment that would have effectively prevented the filing of product liability cases on behalf of persons who were not residents of Delaware or exposed or injured in Delaware. That legislative effort had not gained any momentum. Not long after meeting with the Special Committee the Chamber submitted a letter setting forth some of its specific procedural concerns.

Next, on December 17, 2007, the Committee met with the Honorable Joseph R. Slights, the Superior Court Judge then assigned all of the State's asbestos cases, and the Honorable David A. White, the Superior Court Commissioner who was at the time assigned full time to manage the Court's asbestos docket. The Committee's purpose was to make certain it understood the history of asbestos litigation in the Superior Court and the Court's techniques for managing that docket.

In response to its request for written comments, the Special Committee received more than three dozen submissions, virtually all of which were filed in the asbestos master docket in Superior Court available online, and thus were and are available to all interested parties and the public.

On January 3, 2008, the Special Committee gave written notice of a public meeting to be held in the New Castle County Courthouse on January 17, 2008. Notice was also sent by email to the entire Delaware bar.

That public meeting took place as scheduled on January 17, 2008. It lasted for approximately three hours. Many people attended, and seventeen people spoke, including practicing attorneys, law professors, representatives of the Chamber, and members of the public. A transcript of the meeting was prepared. At the conclusion of the meeting, the Special Committee invited persons who felt the need to supplement earlier submissions or to supplement their public comments to do so by January 28, 2008.

After the public meeting, the Special Committee met separately with a small but representative group of asbestos defendants' counsel and then with a small but representative group of plaintiffs' counsel. Our purpose was to be certain we understood the main issues that divided the parties and to seek to bridge any gaps between the parties that might be bridged.

The Special Committee has tried to act openly and evenhandedly in its work. This is the Special Committee 's report.

HISTORY OF TOXIC TORT/ASBESTOS LITIGATION IN DELAWARE

In Delaware, the phrase "toxic tort litigation" is usually construed to refer to "asbestos litigation." In 1973, asbestos litigation began to be filed in the Delaware Superior Court. In a decision rendered March 8, 2006, Judge Slights observed that from the mid-1970s to 2005 there was a "steady asbestos docket that has ranged in size from approximately 500 to 2000 pending cases at any one time." *In re Asbestos Litig.*, 929 A.2d 373, 378 (Del. Super. 2006). As His Honor noted, "Almost all of these cases have involved plaintiffs with at least some connection to Delaware who alleged exposure to asbestos in Delaware." *Id.* Despite this relatively large number of asbestos cases pending at any time in the Delaware Superior Court, the number of cases that ever went to trial was minute.

From the start of the asbestos litigation, specific judges of the Superior Court were designated to manage the cases. In 1977, a general docket number was created for the filing of motions, orders and other materials applicable to all pending asbestos cases. In 1983, then Judge [later Justice] Joseph Walsh issued the first of what would become a series of "Standing Orders" governing and managing the litigation. Over the years the Standing Order has been amended a number of times and continues in force and effect today. In 1989, the first General Scheduling Order was issued for the asbestos cases and a Master Trial Order was created in 2004. Plaintiffs and defendants were organized by "coordinating counsel." As recently as December 20, 2007, the Court issued an Order amending its Standing Order and the Master Trial Scheduling Order and directing the defense coordinating counsel to prepare a form of Amended Master Trial Scheduling Order. The recent amendments to the basic management documents addressed some of the concerns that had been expressed to the Special Committee .

By the mid-1980s, asbestos decisions were being rendered on a variety of issues. One such decision, by former Judge Vincent Poppiti, denied a motion for summary judgment, finding there to be a material fact as to whether the asbestos supplier knew or had reason to suspect that a knowledgeable purchaser or employer failed to warn its employees of the dangers of asbestos. *In re Asbestos Litig. (Mergenthaler)*, 542 A.2d 1205 (Del. Super. 1986). In this decision, Judge Poppiti recognized the "sophisticated purchaser" doctrine, wherein the supplier has no duty to warn a purchaser who knows of the dangers of a product. The Special Committee observes that many of the attorneys who have made submissions to the Special Committee in this assignment were also attorneys of record in that asbestos litigation in 1986, twenty years ago.

In the 1990s, a number of decisions impacted asbestos litigation. The subject of contribution and cross claims among manufacturers and distributors of asbestos products was addressed. *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372 (Del. 1991). The application of the statute of limitations to such cases was clarified. *In re Asbestos Litig. West Trial Group*, 622 A.2d 1090 (Del. Super. 1992). The Delaware Supreme Court ruled that the statute of limitations may be tolled for an "inherently unknowable injury." *Collins v. Pittsburgh Corning Corp. (In re Asbestos Litig.,)* 673 A.2d 159 (Del. 1996). Our highest court determined that the two year period of limitations governing personal injury claims applies to asbestos related diseases, but declined to grant summary judgment in favor of the defendants. It found that the trial court should resolve questions as to a plaintiff's knowledge of his condition. The Supreme Court's conclusion reflects Delaware's sensitivity to an injured person's knowledge as opposed to his subjective belief. "We conclude that [plaintiff's] subjective

belief that he had an asbestos related ailment, in the absence of medical diagnostic support, did not, as a matter of law, require him to file suit prior to 1992." *Id.* at 164.

In another important decision in the mid-1990s, the Delaware Supreme Court addressed certain damages issues arising in asbestos litigation. *In re Asbestos Litig. Pusey Trial Group,* 669 A.2d 108 (Del. 1995). Because Delaware has a comparative negligence statute, the Supreme Court in that case found that the trial court had erred in not submitting the issue of contributory negligence to the jury. The jury should have been instructed on the issue of contributory negligence because cigarette smoking could also be a proximate cause of lung damage.

Beginning in 2002, the Superior Court assigned day-to-day administration of the asbestos cases to Commissioner David White. Since then (and until his recent departure), Commissioner White became extremely knowledgeable on the issues and the procedures for this litigation. The Commissioner ably managed much of the litigation, including deciding some discovery matters.[2]

In early 2005, Judge Joseph Slights was assigned as the Asbestos Judge. In May 2005, he noted that the Superior Court was receiving asbestos complaints from out-of-state plaintiffs "who alleged that they were exposed to asbestos in various states around the country other than Delaware." *In re Asbestos Litig.,* 929 A.2d 373, 378 (Del. Super. 2006). While there had been only 62 new asbestos cases filed in the 12 months prior to May 1, 2005, over the next twenty months 616 asbestos cases were filed. Of these, 480 were filed on behalf of out-of-state plaintiffs who did not allege exposure to asbestos-containing materials in Delaware.

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[2] Recently, Commissioner White resigned to return to the private practice of law.

In December 2006, defendants[3] filed motions to dismiss out-of-state plaintiffs on the basis of the common law doctrine of *forum non conveniens* that permits a case to be dismissed when the forum chosen by a plaintiff is too burdensome. *In re Asbestos Litig.*, 929 A.2d 373, 379 (Del. Super. 2006). The critical question before the Court was whether Delaware's well-settled legal standards for resolving *forum non conveniens* cases should be altered in light of the circumstances involved in these out-of-state plaintiffs bringing asbestos cases to Delaware. At the time of the filing of the defendants' motions in December 2005, there were 129 such plaintiffs' complaints. In an extremely thoughtful and complete analysis of the decisions and policies involved in *forum non conveniens,* Judge Slights denied the motions to dismiss. It is clear from his opinion that he gave careful attention to the defendants' arguments that asbestos litigation brought by out-of-state plaintiffs raised a number of issues for the Court that are probably not present in most *forum non conveniens* controversies. For example, Judge Slights dealt with the alleged problem of such out-of-state plaintiffs flooding the Superior Court docket with filings and imposing an unreasonable burden on Delaware's judiciary. Judge Slights found that such alleged burdens were not unreasonable:

> After due consideration of the previously enumerated "public interest" factors, the Court finds that dismissal of these cases is not warranted at this time. In its current state, the asbestos litigation in Delaware neither encumbers nor overwhelms the Court's judicial or administrative faculties in a manner that would adversely affect the Court's ability to administer justice efficiently and effectively in either these cases or the Court's docket as a whole. Nor do these

[3] Currently there are over 700 defendants active in Delaware asbestos litigation. Those defendants fall into numerous categories including materials suppliers, product manufacturers, distributors, contractors, land owners, successors in interest to those and additional categories of entities. They are represented by over sixty attorneys associated with dozens of local firms working in conjunction with scores of additional out-of-state attorneys.

> asbestos cases impose an unreasonable burden on Delaware citizens by hindering their access to this Court or unfairly requiring them to serve as jurors.

Id. at 389.

In the final page of his Opinion, Judge Slights observed that, should there be a "substantial increase" in asbestos filings in Delaware that "cause unmanageable congestion," it can be addressed at such future date. "If necessary, the Court will revisit this question if the asbestos landscape in Delaware changes dramatically in the future." *Id.* at 389-390.

When considering the number of cases that have been filed, there have been surprisingly few trials of asbestos cases. In the first trial that occurred after the filing of the cases by out-of-state plaintiffs, the jury rendered a $2 million verdict. In the last five years there have been only four trials, two of which settled after trial. Thus, it does not appear that sizable plaintiffs' verdicts in Delaware would explain the influx of out-of-state plaintiffs' asbestos cases.

In still another important case, Judge Slights denied a party's motion to exclude expert testimony about the effect of friction on asbestos containing products in the automotive industry. *In re Asbestos Litig.*, C.A. 77C-ASB-2 (Del. Super. Slights, J., December 13, 2006).

Before concluding the history of asbestos litigation in Delaware and the prominent role that Judge Slights has played in managing such litigation, we note his two recent decisions. First, in *In re Benzene Litig.*, C.A. Nos. 05C-09-020, 06C-05-295, 2007 WL 625054 (Del. Super. Feb. 26, 2007), the Court applied the pleading rules to various plaintiffs regarding their exposure to benzene. Here again, the Court exhaustedly analyzed the law and applied it to the facts of the specific cases. Plaintiffs might have

been disappointed in this decision, in that the Court concluded that toxic tort plaintiffs may need to plead more facts than a plaintiff in an ordinary product liability case.

> The Court attempted to strike a balance between the competing interests when it issues its oral ruling on April 3, 2006. Toxic tort plaintiffs usually cannot identify the products by brand name or the premises by address, nor should they be expected to do so. But, by virtue of the fact that they cannot provide the kind of product or premises identification typically provided in a products or premises liability action, plaintiffs must attempt to draw a picture for these defendants by pleading factual circumstances that may not otherwise be required. By necessity, this effort will require the plaintiffs to plead more facts to make the point that they could make more succinctly if they possessed a specific product name or a specific property location. Thus, notwithstanding Rule 8's endorsement of "concise and direct" pleadings, in a toxic tort case, plaintiffs may well be required to plead more than they would plead in a typical products liability complaint in order to achieve the same result: a concise statement that provides the defendants with fair notice of the claims(s) including the identity of product and/or premises at issue."

Id. at *8.

Next, in *In re Asbestos Litig.*, 2007 WL 45711 96 (Del. Super. Dec. 21, 2007), the court held that a manufacturer had no duty to protect an employee's spouse from asbestos exposure. Again, in a scholarly opinion, Judge Slights concluded that the defendant was not liable to such a plaintiff.

Effective January 1, 2008, Judge Mary M. Johnston replaced Judge Slights as the judge assigned to the Superior Court's toxic tort dockets. That change in assignments was part of the Court's normal rotation of judicial personnel. In addition, as mentioned above, Commissioner White resigned to return to private practice. The Court has appointed a Special Master for the asbestos cases, Matthew Boyer, with an order of reference very similar to the jurisidiction of the former Commissioner.

Thus, Delaware has had a long history of managing asbestos litigation. Its decisions fairly consider relevant factors and thoroughly analyze the law. Because of Delaware's reputation for judicial independence and Delaware's history of fair and thoughtful resolution of asbestos cases, it is understandable that attorneys for some out-of-state asbestos claimants might choose to file suit in Delaware.

CONCERNS EXPRESSED TO THE COMMITTEE

The Special Committee solicited the parties involved in asbestos litigation, their counsel, the Chamber and the public for a list of concerns about toxic tort litigation in Delaware. The concerns expressed to the Special Committee may be categorized as follows:

1. Multiple plaintiffs may be included in a single case, making the case more difficult to defend and permitting claims that were less meritorious to benefit from being presented to a jury at the same time as very serious claims.

2. The sheer volume of cases was imposing too much to do in the time allowed for defendants to defend themselves effectively.

3. "Stacking" several cases for trial on the same day improperly pressured defendants to settle because of their inability to defend multiple trials at the same time.

4. The process of litigating asbestos cases in Delaware is unnecessarily expensive because of various factors, such as the need to depose persons outside of Delaware, the need to prepare for trials when resolution of motions for summary judgment were delayed, and other circumstances.

5. Plaintiffs are not properly disclosing all their claims for possible recoveries for the same medical conditions, allowing plaintiffs to make inconsistent factual claims in different proceedings and leaving defendants in Delaware to pay more than their fair share.

Each of these concerns is addressed in the sections that follow.

JOINDER ISSUES

Some commentators have criticized the joining of several plaintiffs' claims in one suit. Their objection is based on the possibility that juries will award weaker claims inappropriately large amounts because the juries are influenced by sympathy for plaintiffs with more serious or fatal illnesses, when the claims of both types of plaintiffs are presented in the same trial. That is not a problem in Delaware. The Superior Court's Standing Order No. 1 (amended December 21, 2007) prohibits joinder of multiple plaintiffs with different claims:

> 4. Each asbestos action filed hereafter shall consist of one plaintiff or the personal representative and/or relatives claiming wrongful death of a deceased person and his or her spouse who has a claim for loss of consortium. No permissive intervention of additional plaintiffs will be permitted, except by a person who moves to intervene within 60 days after the filing of the original complaint asserting that an injury resulted from exposure to asbestos transmitted by the original plaintiff.

Significantly, no defendant in the Delaware asbestos litigation has directly claimed to the Special Committee that misjoinder is a problem that exists here.

TRIAL SCHEDULING ISSUES

The primary concern raised by some asbestos litigation defendants (and the concern primarily addressed by the Chamber) is the scheduling of many cases for trial on the same day. The concern is that defendants are forced to settle cases rather than go to trial because defendants are not able to prepare adequately to defend multiple cases prosecuted by multiple plaintiffs' attorneys at the same time.

Before discussing this issue directly, it is helpful first to set out some background on the practice of courts generally in scheduling trials. Second, some background on how asbestos litigation in particular is handled is also helpful.

1. Scheduling Practices in All Courts

To begin with, it is a common practice in Delaware and elsewhere for trial courts to schedule more than one case for trial on the same day before the same judge. The reality is that more than 90% of all civil cases are dismissed or settled before trial.[4] If a judge schedules only one case for trial at the start of a week, it is likely that judge will have no case to try that week because of a settlement. That would be a waste of judicial resources. It would also cause the civil justice system to grind to a halt if only one or two cases were scheduled for trial. Thus, if only one were scheduled for trial per week, a typical judicial case load of several hundred cases would never be fully concluded. More cases would be added every day and justice would be denied through delay. Cases settle when they are scheduled for trial. Without being scheduled for trial, they will not settle and the system will fail.

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[4] It has long been typical for a Delaware Superior Court judge to schedule 10 or more civil cases for a trial each week. Almost all are settled. This long-standing scheduling practice of setting 10 cases per judge for trial each week may be compared to scheduling 30 asbestos cases for a trial every 8 weeks, rather than 10 per week.

Nonetheless, it would still be wrong if trial scheduling practices prevented adequate preparation by any party. To assess whether that is a problem here in Delaware, the Special Committee reviewed with the parties what they must do to prepare to try an asbestos case in the Delaware Superior Court. In that regard, asbestos litigation has some unique characteristics that need to be understood.

2. Scheduling Practices in Asbestos Cases

To understand the scheduling of asbestos cases, it is first necessary to appreciate how unique asbestos litigation is in Delaware. For outsiders, the most important point to understand is that asbestos litigation in Delaware for the most part is conducted as a quasi-administrative proceeding by the parties themselves and without the direct involvement of the Superior Court. It works as follows.

When or soon after a case is filed, the plaintiff supplies extensive information about the plaintiff and the plaintiff's claim. Work histories, exposure histories, social security information, medical histories and tests, along with considerable other information, is given to the parties named as defendants.[5] Using that information, the defendants, through an established, detailed procedure then determine if they have a basis to be dismissed from the lawsuit. Similarly, the defendants provide extensive information to the plaintiff's attorneys, such as any records that may show if the plaintiff was possibly exposed to asbestos by the actions of the defendant.

This information exchange goes on over the course of almost a year and may also include the deposition of the plaintiff and other discovery. This process is coordinated by the Defense Coordinator, an attorney that the defendants jointly retain and whose

[5] The information required is very extensive. *See* Standing Order No. 1, ¶ 7. The initial disclosures also include stating what jurisdiction's law applies.

principal task is to make the whole process as efficient as possible. For example, as the depositions are now fairly routine, defendants may agree which of them will take a plaintiff's deposition as lead counsel on behalf of all of them. As a result, a defendant named in many suits may only need to attend a few depositions.

This whole process does not directly involve the Superior Court at all, unless there is a dispute between the parties such as over the completeness of the information a party has supplied. As the process goes on, the plaintiffs' counsel themselves decide to dismiss claims that have proved to lack support and the number of defendants in any specific case drops dramatically as defendants are voluntarily dismissed from the suit. So effective is this out-of-court process that virtually every asbestos case has been resolved without a trial and by the parties themselves. Typically, defendants will classify plaintiffs by their level of exposure, with fairly standard levels of compensation paid for similar exposures. Thus, a defendant with minimal exposure from a defendant will receive what other defendants with that level received. This system permits settlement of many claims together.

An example illustrates how this process works. The Master Trial Scheduling Order lists 42 asbestos cases for trial on October 22, 2008. Of those 42 cases, 20 name Chrysler as a defendant. This list was prepared only after it was determined in consultation with the Defense Coordinating Counsel, that the plaintiffs' disclosures were sufficient to warrant submitting these cases to the process just described to have them resolved by motion, by settlement or by trial. Of the 20 Chrysler cases, two were dismissed. For the remaining 18 cases, Chrysler was not required to file any pleadings in

response to the complaints, but instead began the review of the merits of the plaintiffs' claims.

In ten of the Chrysler cases, about an average of ten months passed without any substantive filings in Court by Chrysler. Then, between April 11 and April 18, 2008, Chrysler filed ten answers to the plaintiffs' ten complaints. At about the same time, Chrysler also filed in some of these cases a "case information statement" and a "standard witness and Exhibit List" that do not vary much among each case. Significantly, there is virtually no other filing by Chrysler in these ten cases, as of April 15, 2008. As to the other eight Chrysler cases from the list of 42 cases set for trial, Chrysler filed motions to dismiss the claims. Again, the additional limited filings in these eight cases consists of "standard" witness lists and other similar, common pleadings.

This very limited pleading in these 18 Chrysler cases indicates the expectation that these cases will not go to trial. There is just not the type and number of pleadings that heavily litigated cases going to trial typically generate. Instead, as the history of asbestos litigation in Delaware demonstrates, these cases are headed for an out-of-court resolution by either voluntary dismissal or settlement. Indeed, GM and Ford have just settled more than 100 cases against them all at the same time that were otherwise set for trial in 2008–2009.

Against this background, the following more detailed points should be noted. First, for the most part, expert witnesses in asbestos litigation are used on a nationwide basis, by both plaintiff and defense firms. The experts' testimony is largely the same in most cases, with some modification for the factual circumstances presented in the specific case. These experts have testified many times, have been deposed frequently and

are capable of getting ready to offer their testimony in any case in short order. This is true of both plaintiffs' and defendants' expert witnesses.[6]

Second, defendants in most asbestos cases have retained national trial teams. These teams are able to try an asbestos case on short notice and regularly take depositions and try cases across the United States. Thus, while the Special Committee understands that each asbestos case is potentially unique, the reality is that the parties' attorneys are capable of handling this litigation very well.

Third, and most importantly, Delaware asbestos litigation is governed by detailed procedures set down by the Superior Court that are designed to give defendants a fair opportunity to prepare for trial. Here are a few of those protections that apply in asbestos litigation in Delaware:

(1) Plaintiffs must provide extensive disclosures when they file a complaint, including work histories, exposure histories and medical records and tests;[7]

(2) Plaintiffs must disclose 300 days before trial all their witnesses and the exhibits they will offer as evidence at trial; and

(3) Plaintiffs must produce "all expert reports and disclosures" 290 days before the date set for trial

In addition to these requirements of early disclosure, the Delaware procedures also permit careful monitoring of the progress of litigation up to the trial date.

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[6] Exhibit H to the Submission of Chrysler LLC sets out a plaintiff's list of experts, all of whom have testified many times before on subjects where their testimony will be uniform on each case (e.g., "Dr. Forrester may testify as to the physiological design and function of the lungs, the effect of asbestos on the lungs," etc.).

[7] *See* Standing Order No. 1–amended on December 21, 2007, ¶¶ 5 and 7; and General Scheduling Order No. 1–amended on December 21, 2007, ¶ 4.

These and other procedures used in Delaware asbestos litigation have the effect of dramatically reducing the number of cases that will progress to the point where the trial date is imminent. This is evident from any statistical analysis that starts with the fact that only four asbestos cases have actually gone to trial and only two to verdict in the last few years. This does not depend upon settlements on the eve of trial, but rather a steady decrease in the number of defendants in each case through dismissals and summary judgments. Asbestos cases are typically set for trial every two months or so, with a block of cases schedule for each of the dates. Sixty days before the trial date, it is typical that 20 cases remain unresolved out of perhaps 30 to 50 that had been scheduled for trial on that specific date.

Moreover, the number of defendants in those cases is also greatly reduced, because of motions to dismiss, summary judgments, or settlements. Those cases are then reviewed at a pretrial conference, one of the purposes of which is to see if a case is ready for trial. Typically, at this point 60 days before trial, the remaining cases scheduled for that trial date will gradually decline to four or less in the days before trial.

Finally, the plaintiffs' attorneys understand full well that they cannot expect the Delaware Superior Court to have more than the specially assigned asbestos judge (and perhaps one other judge) available to try a case on the scheduled date. As a result, their established practice is to work with the Defense Coordinating Counsel well in advance of the trial date on what specific case(s) will more likely go to trial.[8] The Defense Coordinating Counsel, who has an official role in scheduling, plaintiffs' counsel, and

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[8] No plaintiffs' attorney wants to fly in expensive expert witnesses for trial only to be told there are no judges available and the trial must be postponed.

ultimately the Court which can entertain motions for relief, work in concert to ensure that no defendant in a Delaware asbestos case is or will be forced to go to trial unprepared.

3. Review of the Fairness of Asbestos Scheduling

Against this background of how trials are scheduled in civil litigation generally and how they are scheduled in asbestos cases specifically in Delaware, the Special Committee received extensive comments from both plaintiffs and defendants. Before reviewing those comments, however, an important distinction needs to be made.

Civil litigation is burdensome to all litigants. It is, therefore, understandable that defendants in asbestos litigation feel that it is burdensome. But the point we want to make clear is that the burdens of asbestos litigation arise out of the fact there is such litigation anywhere, not that it is in Delaware. In other words, a defendant with 500 claims to resolve has the problem of dealing with those regardless where they are filed. That the claims may now be filed in Delaware in and of itself does not alone increase the burden of dealing with those claims.

The issue for the Special Committee is whether the procedures used in Delaware ***unfairly*** add to the burdens of any defendant with many claims against it. Does the filing of these claims in Delaware, instead of Mississippi or West Virginia, for example, or elsewhere, add to defendants' burden? That is the real issue presented to this Committee.

Before turning to the analysis of certain parties' contentions on this point, it is important to stress one message sent to this Committee. Defendants and plaintiffs in the Delaware asbestos cases are overwhelmingly satisfied with the way asbestos litigation is being handled in Delaware. Indeed, some defendants might actually prefer Delaware as a forum for their toxic tort cases, preferring it to the alternative of defending the same

number of cases in multiple other jurisdictions. The reasons advanced for this support of the Delaware forum are, among others:

(1) Delaware does not permit the joinder of multiple plaintiffs in one suit.

(2) Delaware demands proof of injury at the outset of the litigation.

(3) Delaware demands disclosure of the information required to assess a claim's real merits. Such is not the case in other jurisdictions of which the Special Committee is aware.

(4) Delaware judges over the years, and Judge Slights most recently, have demonstrated their independence, diligence and willingness to improve the process of handling these cases.

These are the conclusions the parties themselves have expressed to the Special Committee. While the Special Committee is understandably impressed with the majority of the litigants' own views, the Special Committee nonetheless considered the concerns expressed by a small number of defendants and others who offered their views on asbestos litigation in Delaware. Here is a summary of those concerns:

(1) Litigation in Delaware is unnecessarily inconvenient because the plaintiffs live elsewhere and must often be deposed where they live and have their medical records produced there as well.

(2) The efficiency of litigating in Delaware leads more plaintiffs to file suit here and those suits might not be filed at all if they had to be filed in a less efficient forum.[9]

(3) The sheer volume of asbestos cases causes a decrease in important procedural protections that are otherwise available in other civil cases. Stated another way, this concern is that out of an unconscious desire to be efficient, courts with large volumes of asbestos cases will force settlements upon defendants.

(4) The volume of asbestos cases will cause delays in other civil litigation in Delaware and thereby hurt Delaware's reputation.

The Special Committee has carefully examined all these concerns. Treating them in order, the Special Committee concludes as follows:

First, there is minimal inconvenience for defendants to defend asbestos litigation filed in Delaware compared to defending those cases elsewhere. For example, depositions are usually taken by national defense counsel, traveling to an ill plaintiff's home state. That would not change if the litigation were file in that home state instead of Delaware. Other complaints, such as the need to obtain subpoenas in other states to obtain records from hospital or other parties not directly involved in the litigation, would also not change if the litigation were filed in those states. A subpoena would still be needed.[10]

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[9] Professor Victor E. Schwartz has characterized this as the "build it and they will come" problem. Professor Schwartz is associated with ATRA.

[10] One complaint has been that there is not enough time under the Delaware scheduling orders in asbestos cases to get information. However, if the cases were filed in multiple jurisdictions all subject to different schedules, a defendant's burden would only increase.

Second, there is no indication that the asbestos cases filed in Delaware are by plaintiffs who lack a serious illness. The fear that efficiency itself generates more litigation is premised on statistics that more cases are being filed elsewhere by plaintiffs who lack real injuries. That does not appear to be true in Delaware.

Moreover, the strict and somewhat burdensome requirement to bring a claim in Delaware (such as early disclosure of medical records) has discouraged claims from being filed here when the expected recovery is not large enough to warrant the expense to be incurred. The filing of completely meritless claims does not appear to a problem in Delaware at this time.

Third, as already discussed, Delaware has provided procedural protections for asbestos defendants. There is no need to settle a Delaware asbestos case any more quickly or for any less meritorious basis than a similar claim filed elsewhere. This last point warrants a more expansive discussion.

It is undoubtedly true that some civil cases are settled just to avoid the expense of a trial and all that comes with preparing for trial. That is true in every jurisdiction. It is true in Delaware. This does not mean the system is "broke," however. To proceed past the point of surviving motions to dismiss and motions for summary judgment after discovery of the evidence, a plaintiff's case must have support in both fact and law. Under those circumstances, it has some value. That this value is then quantified by a settlement is not to disprove its value, but only to recognize the practical advantage to compromise honest disputes. That is the case in the large majority of civil suits, including purely business disputes between companies. Asbestos suits are no different. Hence, merely because most asbestos cases are settled does not prove the settlements

were forced upon helpless defendants. No defendant told this Special Committee it had been forced to settle meritless litigation because of the procedures used in Delaware asbestos litigation.[11]

Fourth, we have not been presented with any factual basis to be concerned that the asbestos cases have prejudiced the ability of the Superior Court to effectively and efficiently resolve other civil litigation. Given that only four asbestos cases have actually gone to trial in the last three years, it is evident that the ability of the Superior Court to hold trials in other cases has not been diminished by the asbestos cases. To be sure, the Superior Court has a heavy case load and more judges are needed, as the Governor has recently proposed. However, that would still be largely true even if there were no asbestos cases. We see no principled basis to point to one type of litigation as the cause of the judicial workload that should be eliminated.[12]

* * *

The Special Committee is aware that a few parties believe that it is good public policy to discourage asbestos claims from being filed. We accept that the proponents of that policy believe the costs of asbestos litigation outweigh its benefits to society as a whole. We also take note of the thousands of American workers who have died or will die from exposure to asbestos containing products. However, as we noted at the outset of this report, the Special Committee is not charged with considering "tort reform." The public policy issues are for the elected legislature, not us, to decide.

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[11] To be sure this was not the result of fear of retaliation, the Committee had confidential meetings with defense counsel.

[12] For example, the Superior Court currently has major business litigation to resolve that is very time consuming. No one has suggested it decline those business cases to free up time for other matters.

None of this is to conclude that Delaware asbestos litigation is perfect. As noted elsewhere in this report, the procedures used in Delaware have been repeatedly modified to make improvements, at the request of the parties. Further suggested changes have been suggested to the Special Committee and are noted in this report as worth consideration by the Court and the parties.

DISCLOSURE ISSUES

The defendants' counsel raised two issues concerning pretrial disclosure by plaintiffs. First, there were some complaints that plaintiffs are not meeting their disclosure obligations under the existing Standing Order No. 1. Second, some defendants felt that plaintiffs should disclose all claims made or to be made for compensation.

With respect to the first complaint that the disclosures required by Standing Order No. 1 were not made, the Special Committee believes that any failures to follow the required procedure should be remedied by a motion to compel disclosures and, in egregious cases, by the imposition of sanctions. We understand that the Court is fully committed to enforcing the procedures, including dismissal of cases.[13]

As to the second request that plaintiffs be made to certify all compensation claims made ***or to be made***, some explanation is required. The Special Committee understands that some plaintiffs are entitled to seek compensation from the various asbestos trusts. Disclosure of those claims is appropriate, both to be sure there is no "double" recovery and to insure a plaintiff has consistently presented the facts to support a claim. There seems to be no serious disagreement on that point by any party.

The only disagreement is whether plaintiffs must disclosure claims that they may make in the future, particularly after the litigation is concluded. It is thought by some defendants that plaintiffs are delaying making claims to asbestos trusts because there is no effective limitation on when those claims may be made and those plaintiffs intend to seek a double recovery for the same illness or otherwise not tell the truth. Of course,

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[13] We are aware that some commentators contend that the Court is not enforcing the rules governing pleading and mandatory disclosures. That contention is disputed, but one suggestion by the Committee is directed to addressing any problem that may exist in this area. (*See* "Committee Recommendations" at 30).

some plaintiffs understandably respond to these charges that they may not really know or recall during the litigation that they have a possible claim against an asbestos trust. They argue that they should not automatically be barred from making a claim later, particularly if they only discovery the claim later.

The Special Committee suggested that defendants seek this "to-be-made" claim discovery by interrogatories that, of course, must be answered under oath. The Special Committee recognizes that good faith errors and even deliberate misrepresentation may occur. Those are risks in all litigation and are not peculiar to asbestos litigation. The use of properly framed interrogatories would seem to adequately address all the disclosure requests made by any defendant to the Committee.[14]

[14] For example, a party requested that plaintiffs disclose all asbestos exposures (including those involving non-parties and non-occupational exposures) and their contentions as to what state law applies. There is no reason why interrogatories cannot ask for that information.

SUMMARY JUDGMENT ISSUES

A number of concerns and suggestions were presented by some asbestos litigation defendants in connection with the existing procedure for summary judgment, including:

1. The settlement negotiation requirement and related certification before a party may argue a summary judgment motion should be eliminated (and, as a corollary thereof, the commencement of mandatory settlement conferences and mediation should commence 20 days after the Court has ruled on a summary judgment motion);

2. Summary judgment motions should be heard and decided substantially before trial or, alternatively, that the pre-trial discovery and preparation period be expanded to 450 days so that the date for completion of summary judgment briefing and a date for summary judgment oral argument may be moved to a point earlier in the case; and

3. A weekly dispositive motions calendar be established and that one day each month be set aside for arguments on summary judgment.

Initially, the Special Committee notes that General Schedule Order No. 1 permits the filing of Rule 12 Motions [such as to dismiss pursuant to (b)(6) or for judgment on the pleadings (c)] 330 days prior to trial with Plaintiffs' Answers thereto due 20 days thereafter (310 days prior to trial). Accordingly, there is a mechanism by which a defendant can challenge a plaintiff's ability to state a claim.

Next, the Special Committee perceives that some counsel have misinterpreted the requirement for mandatory settlement conferences and mediation prior to argument upon any summary judgment motion. The Special Committee has confirmed that nothing required a defendant to offer even a nominal amount in settlement but, instead, that the

parties at least communicate in good faith in connection with settlement before the Court devotes time to reviewing summary judgment submissions.

Third, the perception of the Special Committee is that resolution of summary judgment motions has, pragmatically, moved closer to the date set for trial; however, the Special Committee could not discern any aspect of the Scheduling Order which prevented counsel for the parties briefing summary judgment motions prior to the deadlines set forth. Of course, it appeared to the Special Committee that summary judgment proceedings would, as in almost any civil case, be dependent upon completion of discovery necessary to permit those motions to be decided.

In conclusion, the Committee's suggestion is that counsel for plaintiffs and defendants in asbestos litigation attempt to agree upon modifications to the summary judgment procedures and present those to the Court or, alternatively, certainly any party may propose to the Court the merits of any general or case-specific modifications.

COMMITTEE RECOMMENDATIONS

The Special Committee has one basic recommendation: the parties to Delaware asbestos litigation should address amongst themselves how best to solve any remaining concerns over how that litigation is being conducted. The history of Delaware asbestos litigation is a testament to the ability of those parties and the Delaware Superior Court to resolve problems satisfactorily. Indeed, the very high level of acceptance of the current system by the defense bar is but more confirmation that the system is working well.[15] Moreover, the recent amendments to Standing Order No. 1 have already addressed some of the concerns raised with the Special Committee again showing that the system's self-adjustment works.

While the Special Committee does not believe it should make any specific recommendations in light of this history of successful adaptions to address problems, the Special Committee does note a few areas where it recommends further action by the parties themselves:

1. The defense bar may want to consider requesting additional form interrogatories designed to require disclosure of any claims for asbestos injuries to be filed in the future.

2. The role of the Commissioner and / or Master might, in time, be expanded to include case dispositive motion practice, even if the Court may still need to do a full review of the Commissioner's or Master's recommendations.

3. The time for summary judgment motions and rulings on those motions might be advanced so as to occur earlier in the process.

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[15] In a poll conducted by the Defense Coordination Counsel, the vast majority of the asbestos defendants expressed satisfaction with the existing procedures and results.

4. Regular hearing dates for discovery disputes to the heard by the new Master might be established.

CONCLUSION

This Special Committee has listened carefully to all views on the actual workings of Delaware asbestos litigation. We were particularly concerned over the allegations of abuses in other jurisdictions that it was alleged may appear in Delaware because of the increased filings here. After that careful review, we are satisfied that the Delaware asbestos litigation is fairly conducted for both defendants and plaintiffs and is effectively resolving claims. It works and works very well.

POSTSCRIPT ON JUDICIAL INDEPENDENCE

"Judicial Independence" is the principle that judges should be free to fairly and impartially decide cases based solely on the facts and the law. That does not mean that judges may do as they please, but that they are duty bound to follow their oaths to uphold the law. Chief Justice Myron T. Steele recently stated:

> Public opinion is never far away, especially in the small, highly personalized environment that is Delaware. But being aware of the community in which one lives in order to find pragmatic solutions to disputes must ultimately be balanced with the independence and objectivity each jurist must possess. If there is anything that would impugn the vital integrity of our court system, it would be the perception that external pressures could affect our decision–making process.[16]

"Judicial Independence" does not mean that a Court should be free from criticism. In fact, when a Court makes a controversial decision, public comment and criticism should be expected in a free and open society. It is appropriate and even necessary for judicial opinions to be subject to criticism from newspapers, public interest groups, citizens, and appellate courts.[17]

The threat to judicial independence, however, comes from criticism predicated on a Court's personal or political motivation for a decision as opposed to a fair disagreement as to the application of the law. Accusing a court of making decisions based, in part, on alleged yet unsubstantiated political motives does a disservice to the Court and is an attack on judicial independence.

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[16] *Consistency and Balance: A Judges Job*, UVA LAWYER, Fall 2007, at 90.

[17] *See Judicial Independence: A Cornerstone Of Democracy Which Must Be Defended*, AMERICAN COLLEGE OF TRIAL LAWYERS (Sept. 2006). www.actl.com/content/navigation menu/publications.

We have found throughout the process of listening to all parties in this matter that the Superior Court, acting through Judge Joseph R. Slights, has done an admirable job in handling these difficult cases. Judge Slights not only volunteered for this assignment but agreed to stay on an additional year in order aid all litigants and the Court.

Two of our most distinguished corporate citizens, E. I. DuPont de Nemours and Company and AstraZeneca, have weighed in on how Judge Slights has handled these cases. DuPont, through counsel, has stated that under Judge Slights' direction the procedures for asbestos cases have been "substantially improved." Counsel went on to state: "[B]ut for this Court's capable management of this influx of cases, the Delaware Court system might have lost its number 1 ranking for 'Fairness in Litigation Climate for Business in the United States'."[18] AstraZeneca through its Vice President and General Counsel, has stated that the Court has, "effectively managed the Delaware cases using existing local Court rules and practices and state statutes. . . . The Delaware judiciary continues to deserve the national acclaim it routinely receives."[19]

These two companies have had extensive experience with our Superior Court, and, along with the vast majority of the other defendants in the case have voiced the opinion that they are not only satisfied with how the Court has been handling these cases but have spoken of a system that worked well when there were two thousand asbestos cases several years ago and is working efficiently now to handle the much fewer cases that it currently has on its docket. The defense coordinating counsel has stated that, "When efforts to reach agreements fail, our Court has always been ready and willing to

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[18] Letter of John C. Phillips, Esq. to the Committee dated January 4, 2008.

[19] Letter of Glenn M. Engelmann, Esq. to the Committee dated January 17, 2008.

consider the relative positions of the parties and craft new Orders, revise existing Orders, and create new vehicles and mechanisms through which issues are addressed."[20]

The Delaware Chamber of Commerce and the U.S. Chamber Institute for Legal Reform have also commented that our courts continue to have the reputation as an "efficient court system which is nationally renowned for its balance, fairness and integrity—a fact ILR has noted in repeated Harris surveys of State court systems in the United States."[21]

We have received suggestions for changes from many different sources. They include representatives of plaintiffs and defendants, the Chamber, academics, and various interest groups. These suggestions were all welcome and formed the basis of other sections of this report. However, there were items that have caused us concern.

In a motion to dismiss a case, one defendant suggested that Delaware was being used as a forum because of inappropriate political pressure being brought by plaintiffs' counsel. The argument was that political contributions to our Governor, who appoints judges, will create a climate where our judges will be particularly helpful to plaintiffs in this litigation. There was no evidence to support these allegations other than out of state newspaper articles.[22]

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[20] Letter of Loreto P. Rufo, Esq. to the Committee dated January 4, 2008.

[21] *Delaware Non-Domestic Asbestos Litigation*, THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM submitted to the Committee on January 17, 2008.

[22] Transcript of Hearing in Superior Court before The Honorable Joseph R. Slights (September 28, 2005). The following exchange between the Court and counsel is instructive. **The Court:** Do you have any support for the notion that members of the [Plaintiffs Law Firm] have somehow improperly sought to influence the outcome of these cases? **Counsel:** Absolutely not, Your Honor.

These allegations were repeated in a different newspaper article used as an exhibit to a submission that was made to us by a different defendant. That exhibit alluded to the allegations of political manipulation that were in the previous articles. Such unsubstantiated allegations by counsel are an attack on judicial independence. They have no place in any courtroom, let along a courtroom in Delaware where professionalism is not an aspiration but a requirement. The Delaware Judiciary has been treated poorly by these few defendants.

Some of the groups that have submitted material to us have repeated the judgment of the ATRF, which put Delaware on its "Watch List" as a "Judicial Hellhole". As noted above, ATRF defines a "Judicial Hellhole" as a place "where judges systematically apply laws and court procedures in an inequitable matter, generally against defendants in civil law suits."[23] Our review of the asbestos litigation and the opinion of some of Delaware's most distinguished corporate citizens and counsel for both plaintiffs and the vast majority of defendants in these cases would strongly disagree with this interest group's designation.

The reputation of the Delaware Judiciary is well established. To some that reputation is threatened because of the ATRF's designation. While ATRF is entitled to its opinion, our investigation has proven quite the opposite. The information that we have gathered from all parties makes it clear that the Delaware Judiciary is even more deserving of its national reputation, given how it has handled these cases.

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[24] *See* www.atra.org/report/hellholes.