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DOCKET SCIENCE

FORUM COLUMN

By Dominica Anderson and Kathryn Schultz

In this depressed economy, while businesses of all kinds are shutting their doors for lack of customers, “customer pressure” on California courts is as heavy as ever – and about to become even heavier. By the end of this year, all courthouses are expected to close once a month to help deal with the state’s financial crisis. A Sacramento judge said the closures will result in “monstrous new backlogs,” which has in the past forced civil trials into years-long delays.

Some major county superior courts, however, might carve a day or more a month from their workloads with some simple changes in handling asbestos cases.

California judges in major counties are spending more time than ever on asbestos matters. This is happening as the asbestos workload in other states has been decreasing. In those states, many asbestos claims were filed on behalf of plaintiffs who may have been exposed to asbestos fibers but were not affected by an asbestos-related disease. In response, some courts established “inactive dockets” to hold these “unimpaired” claims and prioritize the administration of claims filed by the truly impaired. Other states require that minimum medical evidence of illness be shown in order to bring an asbestos claim. California has not followed suit, increasing the incentive for plaintiffs’ firms to open shop here and bring out-of-state plaintiffs and their claims into California’s courts.

With court resources – as well as defendants’ funds – dwindling, will those with actual asbestos-related disease be protected? Is it time for California’s courts to establish some form of “inactive docket” to conserve limited resources while maintaining court access for the truly sick?

Over the past three years, mesothelioma and other cancer claims have accounted for fewer than half of the new asbestos bodily injury claims filed in San Francisco. Many of the cases on California courts’ asbestos dockets are brought by individuals who allege exposure to asbestos but have only minimal or no physical evidence of exposure, and who suffer no present asbestos-related impairment. Frequently, such individuals are recruited by persistent advertising and run through mass screenings, sponsored by lawyers, at which they are “diagnosed” as having a condition “consistent with” asbestos.

Those diagnoses are highly suspect. The resulting unimpaired claims clog the court system. Courts are unable to devote adequate time and resources to manage these cases. Countless hours and resources are poured into unimpaired, non-malignant claims, which are ultimately settled individually or wrapped into package-deal group settlements. Defense counsels’ efforts to

conduct discovery sufficient to confirm or rebut impairments result in large defense costs month after month for each unimpaired plaintiff's case.

These defense and settlement dollars deplete the funds available to those with asbestos-related cancer. Asbestos litigation has forced more than 80 companies to file for bankruptcy.

The problem of unimpaired claims is not new. Other states have addressed the issue head-on. Minimum medical criteria for asbestos claims has been adopted in Ohio, Texas, Florida, Georgia, Kansas and South Carolina. In other states, including New York, Washington, Illinois, Massachusetts and Virginia, courts have implemented inactive or unimpaired dockets. In those courts with inactive dockets, plaintiffs must meet certain medical criteria in order to be on the "active docket." Claims that do not meet the medical criteria are placed on the inactive docket, and all activity on the case is stayed. The time for filing and bringing the claim to trial is stayed so plaintiffs will not lose the ability to bring a claim if they become genuinely ill. If and when the plaintiff's condition changes such that he or she can meet the medical criteria, the claim is transferred to the active docket.

Inactive dockets and the imposition of minimum medical criteria have worked to reduce caseloads elsewhere. But in California the doors remain wide open for unimpaired claims. Of the cases on the asbestos dockets in California, approximately a third were brought by plaintiffs who do not reside in-state. Review of complaints filed over a recent 18-month period revealed that 25 percent of all plaintiffs listed an out-of-state address as their residence. At the same time, only 44 percent affirmatively listed their state residence as California.

Several out-of-state law firms, which had huge asbestos caseloads in Texas prior to medical criteria rules being established in that state, have opened offices in California. With no set medical or exposure criteria established in California, the number of unimpaired claims filed here will continue to grow. A trial court case management order establishing an inactive docket is the most effective and efficient means to deal with this problem.

An inactive docket would require each plaintiff, upon filing an asbestos case, to submit a written report and supporting test results meeting certain medical and exposure requirements. If a plaintiff meets the criteria, his or her case proceeds. If not, that plaintiff's claim is transferred to the inactive docket until such time that he or she could meet the criteria or all of the impaired claims are resolved.

An inactive docket would give priority to the most serious claims by allowing them to move to the front of the line. Those with mesothelioma and other asbestos-related cancer would benefit by getting to court sooner and valuable resources would be preserved for these claimants.

California courts have the authority to craft orders to manage their dockets, particularly with respect to cases designated as "complex." Because the courts are responsible for the daily administration of the asbestos cases, the courts are in the best position to tackle the problem.

Unfortunately, the asbestos crisis is alive and well in California. Without any procedural safeguards in place, the number of non-malignant claims, in which the plaintiff has no discernible impairment, will continue to rise in the state. As the nation's economy has demonstrated over the past year, dollars for vital government services can rapidly disappear. The

courts should not wait until their asbestos dockets are completely overwhelmed before they act. The imposition of medical criteria for non-malignant asbestos claims is the most fair and efficient means by which to preserve court resources. Moreover, the requirements would stop the flood of out-of-state plaintiffs targeting California's courts.

Dominica Anderson is managing partner of the Las Vegas office of Duane Morris. She practices in both Nevada and California in the areas of insurance and business litigation with an emphasis on complex litigation. **Kathryn Schultz** is an associate in the firm's San Francisco office, practicing in the areas of insurance litigation and appellate law.

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