OPINION

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ASBESTOS LITIGATION

When the walking well sue

By Mark A. Behrens SPECIAL TO THE NATIONAL LAW JOURNAL

IN A WELCOME MOVE, the U.S. Supreme Court in *Norfolk & Western Railway Co. v. Freeman Ayers* will review a West Virginia state court jury's award of $5.8 million to six retired railroad workers who alleged that they are entitled to emotional distress damages under the Federal Employers' Liability Act for exposure to asbestos at the railroad and elsewhere. The case presents the court with an important opportunity to address what the court has called an "asbestos-litigation crisis."

The court should reverse the judgment below and send a strong message that unique asbestos-only distortions of the law shall not be tolerated. By doing so, the court also can send a clear signal that it is time to stop the hemorrhaging in asbestos cases so as to preserve assets needed to compensate the truly sick.

The efficient administration of justice for the truly sick should be given priority in our system of justice. Unfortunately, some courts, like those in West Virginia, have forgotten this basic principle. In an effort to control bulging dockets, these courts have substituted efficiency for fairness as their overriding goal. Instead of making the litigation situation better, however, they have actually made it far worse.

The number of pending asbestos cases nationwide doubled from 1993 to 1999, from 100,000 cases to more than 200,000. Up to 700,000 more filings are expected by 2050. The number of future claimants could reach 2 million. More than 56 major companies have been driven into bankruptcy—12 within the past two years. More companies will fall.

Present trends in asbestos litigation have set off a chain reaction. Payments to individuals with little or no serious physical illness have encouraged more lawsuits. Some reports suggest that as many as 90% of new asbestos-related claims are filed by the unimpaired or mildly impaired. The Supreme Court has noted that "up to one half of asbestos claims are now filed by people who have little or no physical impairment."

Dozens of bankruptcies

These filings have forced dozens of so-called traditional asbestos defendants into bankruptcy, including Owens Corning, Armstrong World Industries Inc. and W.R. Grace & Co. This year, Kaiser Aluminum Corp. and Porter-Hayden Co. filed for Chapter 11 reorganization. RHI Refractories Holding Co., a steel industry leader, was forced to seek bankruptcy protection for two U.S. subsidiaries.

These bankruptcies have ripple effects throughout the entire business community. When traditional defendants are forced into bankruptcy, experience shows that the asbestos personal injury bar will cast its litigation net wider and sue more defendants. Now more than 2,000 companies or individuals have been named as asbestos defendants. Many are household names, such as Ford Motor Co., Campbell Soup Co. and 3M. These companies, including the railroad defendant in *Ayers*, have only attenuated connections to asbestos, but they provide fresh deep pockets; this has caused them to become targets of litigation.

Some of the new attenuated class of defendants, the so-called "peripheral defendants," have themselves begun to collapse under the great weight of claims against them. The downward spiral will continue to play out on a broad scale for many more years unless something is done.

The epitome of asbestos cases

Ayers is a paradigm of the nationwide asbestos-litigation crisis. The case essentially involves a bare claim for emotional distress by plaintiffs who are, at best, mildly impaired, against an attenuated peripheral defendant. It also arises from a state that has developed a notorious reputation for stripping defendants of their basic rights—such as the ability to bring dismissal motions at the outset of a case—in order to promote what some consider a more efficient handling of asbestos cases.

The issue before the court is whether Federal Employers' Liability Act plaintiffs must follow the accepted common law requirement that emotional injuries are compensable only if manifested in an objective form. As the court explained in *Consolidated Rail Corp. v. Gottshall*, such proof traditionally has been required to prevent "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability."

The court is also being asked to decide whether liability act defendants can be held 100% responsible even if they may have been minimally at fault for a harm. At trial, the jury was instructed to make the railroad pay for harms caused by plaintiffs' exposure to asbestos on the job and while working elsewhere.

The court's ruling in *Ayers* will largely govern the liability under the law for asbestos-related claims against the major eastern railroads. It is also likely to set the tone for asbestos-related rulings by state courts. State court judges everywhere watch the Supreme Court for guidance.

The court should act to preserve assets and judicial resources for the truly sick and send a strong message about fairness in asbestos cases. Asbestos claimants and defendants no longer have the luxury of waiting for congressional or legislative action. As Judge Joseph F. Weis Jr. of the 3d Circuit wrote in an asbestos case: "It is judicial paralysis, not activism, that is the problem in this area." NLJ

Mark A. Behrens is a partner in the law firm of Shook, Hardy & Bacon in Washington, D.C.