

■ ASBESTOS X-RAYS

Study points to abuse

By Mark A. Behrens & Phil S. Goldberg SPECIAL TO NATIONAL LAW JOURNAL

UNLIKE BEAUTY, medical science is not supposed to be in the eye of the beholder. A team of independent medical researchers recently found otherwise when it studied 492 X-rays used by plaintiffs' lawyers as a basis for asbestos claims. The X-ray readers hired by the lawyers found evidence of possible asbestos-related abnormalities in a staggering 95.9% of the cases. When independent radiologists reinterpreted the X-rays, they found abnormalities in just 4.5% of the cases. The study's authors said the disparity between these interpretations was too great to be explained by a reasonable difference of opinion.

Abuse and possible fraud have long been rumored to be a part of asbestos litigation, which has bankrupted more than 70 companies. The new study, published in *Academic Radiology*, is the latest confirmation that misdiagnosis of asbestos claimants is a major problem. In conducting the study, two doctors from Baltimore's Johns Hopkins University had six independent experts evaluate the X-rays. The experts were not told that the films already had been used as evidence in litigation.

The study suggests that X-ray readers used by plaintiffs' lawyers are not detached experts, but hired guns retained because they reach conclusions that support the lawyers' cases. As one commentator pointed out, "[T]he chest X-rays are not read blindly, but always with the knowledge...that the lawyer wants to file litigation on the worker's behalf." There have been reports that some plaintiffs' lawyers pay more for positive readings and shop X-rays around to numerous radiologists until they find one who will say what they want.

X-rays like those reviewed in the

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Johns Hopkins study typically result from mass, prelawsuit screenings. Workers are recruited through ads ("Find out if you have million dollar lungs!"). Former U.S. Attorney General Griffin Bell has observed that "[t]here often is no medical purpose for these screenings and claimants receive no medical follow up."

These client roundups are a key source for the increasing number of asbestos cases. More than 100,000 new claims were filed in 2003—the most in a single year. The vast majority of these claimants—up to 90%—have no impairment and may never develop an asbestos-related disease.

Workers are recruited... for 'million-dollar lungs.'

In traditional litigation, these claims might be weeded out. But few asbestos cases make it to trial. Plaintiffs' lawyers have been known to tie the claims of the truly sick to weak or meritless claims in "inventory settlements." As the judge who manages asbestos cases in the federal courts has explained: "Only

a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases."

Give the sick a chance

Lawyers who represent cancer victims have been critical of mass filings because payments to those who are well may result in their clients being left uncompensated. For example, Mark Iola, who represents asbestos victims, has complained that lawyers who bring claims for the unimpaired, "are stealing money from the very sick." Terrence Lavin, who also represents plaintiffs, has written: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an X-ray."

The U.S. Supreme Court has said that this country is in an "asbestos-litigation crisis." Efforts need to be made to police abuse in the litigation and help preserve resources needed to compensate the sick. First, state courts should dismiss all cases that are initiated through mass screenings. This has been the practice in federal court asbestos cases since January 2002. The judge who issued that order wrote that "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."

Second, state courts should exercise their gatekeeper function to ensure that only sound science is presented at trial. The recent Johns Hopkins study suggests that courts should view X-ray evidence skeptically.

Finally, courts and legislatures should use objective medical criteria to ensure that claimants who are sick with an asbestos-related illness can have their cases tried first. The claims of the unimpaired should be suspended and preserved so they can file claims in the future should they become sick. ■