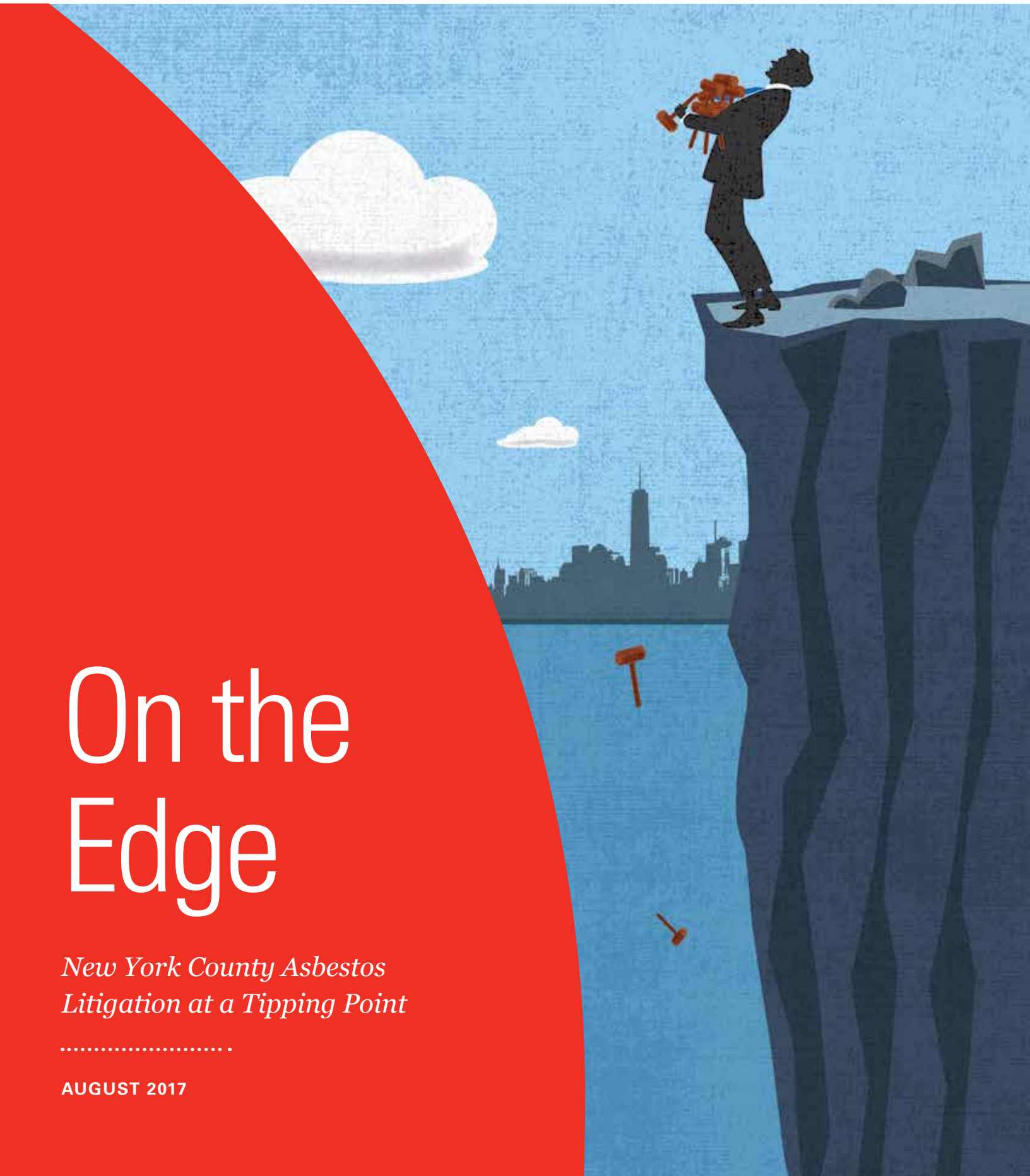




U.S. CHAMBER
Institute for Legal Reform



On the Edge

*New York County Asbestos
Litigation at a Tipping Point*

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AUGUST 2017



U.S. CHAMBER
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Executive Summary

As asbestos litigation has shifted in content and geography over the last 20 years, the New York County Asbestos Litigation (NYCAL) unit of New York City's state trial court has consistently been one of the most active asbestos courts nationally, certainly in dollars, and in some instances in numbers of cases. After years in a steady state, NYCAL is currently in a period of potentially substantial change. For many years, NYCAL's first Case Management Order (First CMO) governed the procedures for virtually all aspects of asbestos cases, from pretrial discovery, to the selection of cases for trial, to available damages. After years of negotiations prompted by the reintroduction of punitive damages to NYCAL and a new presiding judge, a new CMO (Revised CMO) has just been issued.¹

“ *The reexamination of the CMO has raised questions about what factors drive NYCAL's high verdicts and has shed light on some procedural mechanisms in NYCAL that may result in inequities among the parties to the litigation.* **”**

The reexamination of the CMO has raised questions about what factors drive NYCAL's high verdicts and has shed light on some procedural mechanisms in NYCAL that may result in inequities among the parties to the litigation. These large verdicts represent a substantial percentage of asbestos litigation costs, verdicts, and settlement values nationwide. As a result, the approach adopted by NYCAL takes on a significance that extends beyond the borders of Manhattan.

This paper explains the history and current state of NYCAL, including descriptions of the jurisdiction itself, the First CMO, the

CMO revision process, and the Revised CMO. In particular, we analyze four procedural elements of NYCAL under the First and Revised CMOs: (1) consolidation of several cases into one trial setting; (2) the availability of recklessness findings that overcome joint and several liability; (3) the availability of punitive damages; and (4) asbestos bankruptcy trust transparency. The paper notes the cumulative effects of these four areas on the due process rights of defendants in NYCAL, even with the changes made to them under the Revised CMO. We conclude that these procedural features have driven verdicts and settlements higher than those in many other jurisdictions, a phenomenon that is likely to continue under the Revised CMO

absent fresh judicial interpretation and methods of implementation that correct current problems.

Against the backdrop of these procedural features, the paper then examines the unique dominance in NYCAL of a single plaintiffs' firm, Weitz & Luxenberg LLP, and discusses research regarding the potential impact of this firm's significant advertising on case valuation. We discuss the ways advertising can shape the attitudes of the NYCAL juror pool, both towards asbestos litigation generally and Weitz & Luxenberg in particular. Finally, we consider the deleterious effect of NYCAL's procedural mechanisms and lawyer advertising on the overall fairness and consideration of defendants' due process rights in NYCAL.

The History of NYCAL

To understand NYCAL as it exists today, one must consider the history under which it developed. By the early 1990s, New York was a leading asbestos litigation venue with substantial litigation in both the local federal courts as well as the state trial court—the Supreme Court of the State of New York.²

At that time, the parties to asbestos litigation in New York and nationally were quite different from today's litigants. On the plaintiffs' side were individuals who had worked in occupations with the highest exposure potential, such as insulators and boilermakers.³ Typically, these plaintiffs asserted exposure to the most dangerous form of asbestos, the amphibole fiber, which was found in many types of industrial insulation.⁴ Due to their age and the long latency period of mesothelioma,⁵ many of these plaintiffs were exposed prior to the widespread implementation of ameliorative industrial hygiene precautions at heavy industry and military workplaces.⁶ These workers with direct exposure

to highly hazardous forms of asbestos make up a much smaller proportion of plaintiffs today, having been replaced by individuals who claim exposure from home remodeling, personal automotive repairs, and other less frequent, less dusty work during later time periods.⁷

The most active defendants prior to the 2000s were suppliers of highly dangerous amphibole asbestos and manufacturers of products that contained them.⁸ Since then, virtually all of these defendants have exited the asbestos litigation system by declaring bankruptcy and establishing asbestos personal injury compensation trusts.⁹ The typical asbestos defendant now is either: (1) a supplier or manufacturer of products

“ *These workers with direct exposure to highly hazardous forms of asbestos make up a much smaller proportion of plaintiffs today, having been replaced by individuals who claim exposure from home remodeling, personal automotive repairs, and other less frequent, less dusty work during later time periods.* **”**

containing chrysotile asbestos,¹⁰ or (2) an industrial user of asbestos, such as an owner of a premises where asbestos is known to have been present.¹¹

Asbestos Litigation in New York and the Development of the First CMO

The New York City asbestos dockets of the 1990s, already leading venues,¹² were consistent with this national picture. Many of the New York cases involved claims by insulators and related trades for clear and significant occupational exposure at the Brooklyn Navy Yard, utility powerhouses, and other New York-area industrial facilities.¹³ Unlike the present litigation, many of these claims were for non-malignant diseases such as asbestosis.¹⁴

“ The New York City asbestos dockets of the 1990s, already leading venues, were consistent with this national picture. ”

To deal with the growing numbers of asbestos claims, the New York Supreme Court created NYCAL to handle all asbestos cases filed in the five boroughs of New York City. Much of the early development of what became NYCAL occurred in cooperation between federal judges handling the federal cases and the assigned New York State judge, Helen Freedman. Under her guidance, the First Case Management Order was negotiated to handle the asbestos cases in 1996.¹⁵ Both plaintiff and defendant representatives participated in negotiations, with the leading plaintiffs’ firm in New York, Weitz and Luxenberg, intimately involved.¹⁶

In recognition of the unique aspects of asbestos litigation, the First CMO deviated, in some cases materially, from standard New York State civil procedure rules. For example, the First CMO established a “deferred docket” for non-malignant claims, whereby a plaintiff currently suffering from little or no present physical impairment could preserve his or her right to bring a later claim if an asbestos-related malignancy occurred.¹⁷

“ In recognition of the unique aspects of asbestos litigation, the First CMO deviated, in some cases materially, from standard New York State civil procedure rules. ”

The NYCAL Court also deferred punitive damages due to the remoteness in time between the conduct at issue and manifestation of injury (particularly with regard to asbestos-related cancers) as well as the limited resources available to address a burgeoning number of claims.¹⁸ The First CMO also gave priority to exigent cases; that is, those where a plaintiff seemed near death. In conjunction with the deferral of the unimpaired claims, NYCAL became largely a docket for malignancy cases, and very much a trial-driven docket.¹⁹

The level of trial activity in NYCAL, as well as other procedural anomalies discussed herein, have made NYCAL an outlier, as is readily seen in its verdicts.

Between 2014 and 2016, more than one out of every six asbestos verdicts was issued in NYCAL, with 83% of those verdicts being in favor of plaintiffs.²⁰

“ Between 2014 and 2016, more than one out of every six asbestos verdicts was issued in NYCAL, with 83% of those verdicts being in favor of plaintiffs. A study of NYCAL consolidated trial verdicts demonstrated that these cases result in plaintiffs’ verdicts 315% higher than the national average. ”

A study of NYCAL consolidated trial verdicts demonstrated that these cases result in plaintiffs’ verdicts 315% higher than the national average.²¹ The median award for NYCAL cases is also over 1.8 times that of chemical and pharmaceutical torts in New York City.²² As discussed further below, the disparity in NYCAL’s verdicts compared to those of other jurisdictions is attributable not to a difference in the types of cases brought in NYCAL, but rather to the procedural imbalances that remain in NYCAL, and also potentially to the influence of lawyer advertising on NYCAL jurors.

The CMO Revision Process

Although there were ongoing skirmishes over access to and use of bankruptcy trust materials, fights over the standard for “recklessness” necessary to trigger joint and several liability, and battles over how many cases could be tried and on what schedule, there were no widespread challenges to the First CMO for many years.

However, the practicability of NYCAL was called into question in 2013. At that point, the plaintiffs’ bar decided to mount a challenge to the deferral of punitive damages to address what they referred to as difficulties with a limited number of “recalcitrant” defendants.²³

In response, more than 300 asbestos defendants joined in challenging the plaintiffs’ motion as both ill-advised from a legal and policy perspective, as well as being an impermissible, unilateral change in the negotiated First CMO, a consensual document.²⁴ The defendants were unsuccessful; the then-presiding NYCAL judge, Justice Sherry Klein Heitler, modified the CMO to allow punitive damages.²⁵

The defendants challenged the end of the deferral on appeal.²⁶ They took issue, successfully, with the procedures for the imposition of punitive damages envisioned by Justice Heitler, which essentially would allow plaintiffs to defer a decision on whether they intended to seek punitive damages until the end of the case with little or no advance warning to the defendants. The Appellate Division agreed that these procedures deprived defendants of their due process rights.²⁷ Defendants also challenged, though unsuccessfully, the court’s power to end the deferral, as well as the ability to modify the CMO without abrogating the consent of the defendants.²⁸

In 2015, during the pendency of the defendants’ appeal, New York State Assembly Speaker Sheldon Silver was arrested on charges that, among other criminal acts, he directed \$500,000 in state grants to a New York City doctor in exchange for the doctor’s referral of

mesothelioma patients to Mr. Silver’s employer, Weitz & Luxenberg, from which he received more than \$3 million in referral fees.²⁹ His subsequent conviction and twelve year prison sentence were recently overturned by the Second Circuit.³⁰ Finding that “the mesothelioma leads ... were ... bribes or kickbacks,” the Second Circuit, nevertheless, remanded the case for possible further proceedings.³¹

That proceeding raised concerns about how the “business” of asbestos litigation in New York may lead to ethical conflicts.³² The attention drawn by the case also called into question why NYCAL asbestos verdicts tended to be substantially higher than comparable tort verdicts in New York City, the rest of New York State, and the rest of the country; and why NYCAL case outcomes so far exceeded results for asbestos cases in other courts in New York or elsewhere in the nation.³³

Shortly thereafter, Justice Heitler reached the mandatory retirement age for administrative judges and was replaced by Justice Peter Moulton, previously of the State Supreme Court of New York County, who arrived without relevant asbestos experience.³⁴ Justice Moulton

directed the parties to engage in a process to renegotiate the CMO, and on June 20, 2017, he issued a Revised CMO for NYCAL. This will likely be one of Justice Moulton’s last acts as the NYCAL presiding judge before he begins serving his appointment as a Justice of the First Department of the New York Appellate Division.

As a result of issuance of the Revised CMO, the appointment of a new presiding judge for NYCAL (necessitated by Justice Moulton’s elevation to the First Department), and the likelihood that defendants will appeal some provisions of the Revised CMO, NYCAL is at a point of inflection. The future of NYCAL has implications for the fairness of the adjudication of asbestos cases in New York and nationally.

The Revised CMO in Context

The Revised CMO will operate in a landscape shaped not only by the history of New York asbestos litigation, but also by the unique features of New York City’s venue and plaintiffs’ bar. Before discussing some of the Revised CMO’s specific elements, it is helpful to understand this landscape.

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NYCAL's Plaintiffs' Bar

One plaintiffs' firm dominates NYCAL, both in number of cases filed and tried, and critically, in advertising dollars. Weitz & Luxenberg, based in Manhattan, has historically been among the most significant plaintiffs' firms in NYCAL, filing more than half of all mesothelioma cases and nearly three-quarters of all lung cancer cases in NYCAL from 2011 to 2014.³⁵ This domination in terms of filings and cases being set for trial gives the Weitz firm significant leverage in settlement negotiations.

The firm wields influence on New York asbestos litigation in broader ways as well. For example, members of the firm sit on the governing committees of fifteen asbestos

bankruptcy trusts, which have collectively paid \$12.2 billion between 2006 and 2013.³⁶ As discussed above, former Assembly Speaker Sheldon Silver was a member of the firm, and clients were referred to the firm through his connection to mesothelioma researcher Dr. Robert Taub.³⁷

As speaker, Silver had the power to influence judicial appointments and the overall budget of the judiciary.³⁸ Speaker Silver also appointed named partner Arthur Luxenberg to the Judicial Selection Committee for the First Judicial Department, which includes NYCAL.³⁹ The firm's leading role in NYCAL cases and New York politics led to deep relationships with the presiding judges.⁴⁰

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Procedural Mechanisms in the Revised CMO

In asbestos litigation, an over 40 year-old mass tort where very few facts are truly new or unique, procedural mechanisms have the power to differentiate jurisdictions and the cases filed within them.

Four particular procedures unique to NYCAL alter the balance of power between the plaintiffs' bar and defendants, and consequently affect case value: (1) the consolidation of cases for trial; (2) frequent findings of recklessness on the part of defendants; (3) the imposition of punitive damages; and (4) the admissibility of bankruptcy trust claim forms.

“ Moreover, these procedures interact with each other (and, as discussed later, with the effects of advertising on jurors) to raise substantial questions about the fairness of NYCAL to defendants. ”

Each of these provisions raises substantial concerns for the due process rights of defendants in NYCAL. Moreover, these procedures interact with each other (and, as discussed later, with the effects of advertising on jurors) to raise substantial

questions about the fairness of NYCAL to defendants. The plain language of the Revised CMO's provisions does not necessarily signal a material divergence from the First CMO's due process failings. If reformulated following appeals or implemented in a manner focused on fairness, the Revised CMO could correct these imbalances and bring NYCAL into line with other jurisdictions across the country. However, the extent to which that may happen is as yet unknown.

Consolidation of Numerous Cases into Single Trial Settings

The First CMO provided for the increasingly rare procedure of consolidating multiple plaintiffs' cases into a single trial. The Revised CMO also allows for consolidation, but limits it to two plaintiffs. Consolidation in NYCAL is governed by New York Civil Practice Law and Rules (CPLR) 602(a), which provides:

When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may avoid unnecessary cost or delay.⁴¹

The Second Circuit Court of Appeals established a test for the commonality of questions of law or fact in asbestos cases in *Malcolm v. National Gypsum Company*.⁴² The court provided a list of factors which in its view were necessary to evaluate in order to assess the due process compliance of a proposed consolidation of an asbestos case. The “*Malcolm* factors,” as they have come to be known, are:

- (1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether the plaintiffs were living or deceased; (6) the status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged.⁴³

The court was trying to distinguish the powerhouse cases, workplace exposure claims where it determined that consolidation was impermissible as a consequence of these factors, from its prior decision supporting consolidation in the Brooklyn Navy Yard cases.⁴⁴ The *Malcolm* factors thus are very much a product of a particular state of affairs that were in place at a specific point in time.

Since *Malcolm*, small consolidations have become routine in NYCAL. From 2010 to 2014, seven consolidated trials consisting of two to seven plaintiffs each reached a verdict, compared to eight trials of individual plaintiffs over the same period.⁴⁵ The ubiquity of consolidation in NYCAL is curious because plaintiffs’ claims since *Malcolm* have become more dissimilar as to

several *Malcolm* factors, including worksite, occupation, and exposure time period.⁴⁶

CONSOLIDATION DOES NOT CREATE JUDICIAL EFFICIENCY

The primary ground advanced in support of consolidation is judicial efficiency. Under this theory, consolidated cases have “the potential to reduce the cost of litigation, make more economical use of the trial court’s time and speed the disposition of cases ... as well as to encourage settlements[.]”⁴⁷ Consolidated cases are said to take less time to try than would be needed for each plaintiffs’ case to proceed individually.⁴⁸ Thus more plaintiffs can have their cases adjudicated without an increased burden on judicial resources or juries.⁴⁹

Were this premise true, the capacity to move a large number of cases through a system has been shown to create perverse incentives that encourage more litigation.⁵⁰ Indeed, this purported time-saving effect of consolidations has been disproved by data from NYCAL itself. An empirical evaluation of trial durations for NYCAL consolidated and single-plaintiff trials indicated that consolidated trials in NYCAL took, on average, 21.2 days per plaintiff plus 8.8 days for jury selection.⁵¹ NYCAL trials with only one plaintiff took 22.9 days per plaintiff plus 5.5 days for jury selection, on average.⁵²

Consolidated trials in NYCAL, therefore, actually resulted in a small *increase* in the amount of time spent per plaintiff on the jury selection and trial process. Even NYCAL courts have recognized the illusory nature of claims that consolidations offer greater judicial efficiency. As one

“ Indeed, this purported time-saving effect of consolidations has been disproved by data from NYCAL itself. ”

court observed, “[O]f the most recent 19 asbestos trials in New York County, those with only one plaintiff last up to three weeks each, whereas those with more lasted as long as 18 weeks.”⁵³ The Revised CMO’s limitation on the number of cases that can be consolidated is unlikely to result in material changes to the length of trials, as NYCAL consolidations since 2011 with only two plaintiffs have taken an average of 44 days of trial.⁵⁴

The conclusion drawn from this evidence—that consolidation does not improve efficiency—is bolstered by the experience of other courts which have eliminated consolidation of asbestos cases. The court tasked with presiding over the thousands of asbestos cases in the federal courts determined that years of experimentation in the federal courts with various forms of consolidation and aggregation had not only raised substantial concerns regarding defendants’ due process rights, but also had failed to provide “any basis for a long-term solution to the so-called asbestos crisis.”⁵⁵ The solution was to proceed with single plaintiff trial settings.

That approach has been successful, as Judge Eduardo C. Robreno has observed:

Under a ‘one plaintiff-one claim’ process, case outcomes benefit both plaintiffs and defendants. Defendants see a decline in the number of claims which they have to defend, due to an early assessment of the merit of each claim with a concomitant reduction of costs of defense. Conversely,

plaintiffs see the more meritorious claim move to the head of the line, as unmeritorious claims are dismissed and removed from the docket. Both sides see the benefits and are prepared to support the Court’s plan.⁵⁶

Similarly, those courts that have eliminated or substantially restricted consolidations have seen no impact on their ability to efficiently handle asbestos litigation in today’s environment.⁵⁷

DUE PROCESS CONCERNS

The efficiency argument thus cannot justify overlooking the effects of consolidation that raise due process concerns. Due process, embodied in the Fifth and Fourteenth Amendments of the U.S. Constitution, seeks to promote “broad based sets of values ... (1) instrumental (or ‘accuracy’) values, (2) non-instrumental (or ‘dignitary’) values, and (3) accountability (or ‘democratic’) values.”⁵⁸

All three are implicated where, as in NYCAL, it appears that the *Malcolm* factors are not being rigorously applied. For example, in the *Dummitt v. A.W. Chesterton* consolidation, the lead plaintiff alleged that his pleural mesothelioma was caused by exposure to asbestos-containing insulation encountered during his naval service.⁵⁹ The other plaintiff in that case suffered from a different type of cancer, testicular mesothelioma, which he asserted was due to his exposure to construction products while working as a construction laborer.⁶⁰

“ *The conclusion drawn from this evidence—that consolidation does not improve efficiency—is bolstered by the experience of other courts which have eliminated consolidation of asbestos cases.* ”

The purported common issue was that plaintiffs were “exposed to asbestos in a similar manner, which was by being in the immediate presence of dust that was released at the same time as they were performing their work,”⁶¹ a similarity so broad that it could characterize most current plaintiffs. In another consolidation, five plaintiffs (two living and three deceased) alleged exposures at hundreds of disparate worksites from 1946 to 1998.⁶²

These consolidations of dissimilar cases are a natural consequence of the changing population of asbestos claimants. The cases that once dominated fillings—with common work exposures, counsel and defendants—have already passed through the legal system.⁶³ Today’s claimants are much more likely to allege episodic exposure through construction work or mechanical tasks.⁶⁴

Perhaps as an artifact of the disappearance of the primary asbestos thermal insulation defendants into bankruptcy, even those plaintiffs who might be able to claim injury by exposure to thermal insulation typically allege exposure through home repairs or back yard mechanics work to reach the current ranks of active defendants.⁶⁵ This pattern inevitably erodes the asserted basis for consolidation.

Beyond the inappropriateness of consolidation in the current plaintiff population, two effects of consolidation raise concerns as to the procedure’s fairness. As compared to individual trial, consolidated cases: (1) are more likely to result in plaintiffs’ verdicts; and (2) are likely to result in larger verdicts. Research not specific to asbestos litigation shows that these effects of even small consolidations “significantly improve outcomes for plaintiffs.”⁶⁶ There also has been research specific to NYCAL consolidations which confirms that the consolidations lead to larger verdicts, increase the odds of plaintiff verdicts and do little, if anything, to increase efficiency.⁶⁷

A useful comparison can be made to the Philadelphia Court of Common Pleas, which handles asbestos cases for that jurisdiction. Philadelphia and New York bear geographic, political, and demographic similarities, to the extent that Philadelphia has occasionally earned the moniker “the sixth borough.”⁶⁸ In 2012, the Philadelphia court imposed limits on the number of cases that could be consolidated and eliminated mandatory consolidations.⁶⁹

A comparison of asbestos verdicts in NYCAL and Philadelphia from 2012 to

ASBESTOS VERDICTS IN NYCAL AND PHILADELPHIA FROM 2012 TO 2017
SINCE LIMITS ON CONSOLIDATION WERE IMPLEMENTED

| | Philadelphia | NYCAL |
|---|--------------|---------------|
| TOTAL CASES HAVING GONE TO VERDICT | 26 | 18 |
| DEFENSE VERDICTS (PERCENTAGE OF TOTAL) | 30.8% | 22.2% |
| MEDIAN AWARD | \$650,000 | \$11,750,000 |
| HIGHEST AWARD | \$22 Million | \$190 Million |

“ There also has been research specific to NYCAL consolidations which confirms that the consolidations lead to larger verdicts, increase the odds of plaintiff verdicts and do little, if anything, to increase efficiency.”

2017 reveals that since these limits on consolidation were implemented, 26 cases have gone to verdict in Philadelphia compared to NYCAL's 18, suggesting that the limits on consolidation have not adversely impacted plaintiffs' ability to access trial settings.⁷⁰ Of these, 30.8% were defense verdicts, compared to 22.2% of NYCAL verdicts.⁷¹ The median award in Philadelphia was \$650,000, compared to NYCAL's \$11,750,000 median.⁷² NYCAL's highest award was 8.6 times higher than Philadelphia's, at \$190 million and \$22 million respectively.⁷³

This comparison illustrates that procedural differences, including consolidation, can lead to disparate results in similar jurisdictions, an arbitrariness that itself violates defendants' due process rights. Jurors in a consolidated trial may be confronted with a "maelstrom of facts, figures and witnesses."⁷⁴ This is particularly likely when the plaintiffs suffer from different diseases, allege exposure to different products, worked at different locations, or claim to have been exposed at different time periods.⁷⁵ The confusion this creates can leave jurors unable to sort which facts apply to which plaintiffs and defendants.⁷⁶

Plaintiffs with weaker cases benefit from being grouped with stronger cases, and potentially obtain higher verdicts than they would have been awarded had they proceeded to trial singularly. This

undermines a main goal of procedural due process: the "attainment of a factually accurate decision."⁷⁷ Despite these concerns, as discussed above, consolidation of cases with such disparate fact patterns has to date been routine in NYCAL.

The Revised CMO's limitation of consolidations to two plaintiffs⁷⁸ does not necessarily resolve these issues. The *Dummitt* case referenced above provides an example of a two-plaintiff consolidation where the dissimilarity of the plaintiffs raised these issues. Unless the plaintiffs for small consolidations are selected in a manner different than previously used to select the *Dummitt* plaintiffs, these problems will persist.

Consolidation has also been shown to increase awards. One examination of NYCAL jury awards for 2010 through 2014 concluded that "consolidated verdicts are 250% more per plaintiff than NYCAL awards in individual trial settings over that same span and 315% more per plaintiff than the national average award."⁷⁹ Extreme verdicts are more likely in consolidations because "[i]n consolidated trials, there is a higher probability that at least one defendant will appear callous, and this benefits all plaintiffs."⁸⁰ As discussed more fully below, this perception of all defendants as tainted by the callousness of one of them has led to routine findings of recklessness in NYCAL.⁸¹

These due process concerns rise to the level of prejudice, which under New York law

should overcome even a consolidation that meets the *Malcolm* factors. The trial courts have undervalued these objections, despite the fact that large verdicts in consolidated cases have been routinely remitted by the Appellate Division. In fact, plaintiffs have asserted that defendants' due process complaints are meritless because such excessive verdicts are typically remitted.

“ The trial courts have undervalued these due process objections, despite the fact that large verdicts in consolidated cases have been routinely remitted by the Appellate Division. ”

However, to employ a procedural structure that will require a court to reduce expected and excessive verdicts violates due process on its face; it is unfair to force the defendants to rely on the courts' willingness to reduce verdicts. It also potentially distorts the entire process of litigation: The expectation of large verdicts may cause plaintiffs to try cases they otherwise would not have brought to trial, or to inflate settlement values for defendants not willing to take the risk of going to trial. Indeed, in the year after three consolidated cases were tried to verdicts totaling \$48.5 million, mesothelioma filings in NYCAL increased by 55.8%.⁸²

The practice of routine consolidation puts NYCAL at odds with the growing trend

against consolidation in asbestos cases.⁸³ Three states have banned consolidations by statute,⁸⁴ and the courts in several others have substantially restricted the practice as well.⁸⁵ Even courts within NYCAL have recognized that the trend in asbestos litigation is away from consolidation, with one judge observing that “the trend is to prohibit the consolidation of asbestos trials absent the consent of all parties.”⁸⁶ The lack of meaningful efficiency and the due process concerns demonstrated above call into question the wisdom of continuing to treat asbestos cases differently in terms of consolidations, even if they are limited to two cases.

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The Availability of Recklessness Findings and Its Effect on Joint and Several Liability

Until relatively recently, a New York defendant found to be only 1% responsible

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“ When this evidence is excluded, defendants in asbestos trials are unable to present evidence demonstrating that a plaintiff himself has alleged that a bankrupt defendant is responsible for his asbestos-related disease. ”

could be required to pay an entire verdict no matter how large. In 1997, the CPLR was amended to provide that a defendant that was assessed 50% or less of the total liability may only be required to pay damages to the extent of its own liability share.⁸⁷ Article 16 contains several exceptions to this rule, including that a defendant found to have acted “with reckless disregard for the safety of others” could be held jointly and severally liable for the entire verdict.⁸⁸ While both the First and Revised CMOs are silent on the recklessness standard, it is yet another procedural element that exerts profound influence on asbestos outcomes.

This issue is of particular relevance in NYCAL, where there are more than 300 active defendants, as well as more than 100 companies that have gone into bankruptcy and are no longer amenable to suit. In 2015, Weitz & Luxenberg named 38 defendants per suit on average, with a maximum of 157 in a single case.⁸⁹ Plaintiffs also typically file claims against a substantial number of the more than sixty asbestos bankruptcy personal injury compensation trusts that are charged with addressing the asbestos liabilities of the bankrupt former defendants. The fair allocation of fault among all of these defendants, solvent and bankrupt, is impaired in several respects in NYCAL.

First, as discussed more thoroughly below, bankruptcy trust claims made by the plaintiff asserting exposure to bankruptcy

defendants’ products are routinely excluded. The bankrupt asbestos defendants held the largest market shares among asbestos suppliers, supplied the most dangerous kinds of asbestos and asbestos-containing products, and were involved in documented efforts to conceal the hazards of asbestos.⁹⁰ When this evidence is excluded, defendants in asbestos trials are unable to present evidence demonstrating that a plaintiff himself has alleged that a bankrupt defendant is responsible for his asbestos-related disease. Without hearing about any alternative sources of exposure to asbestos, juries are more likely to assign greater than 50% liability to a defendant who is present at trial.

Further, consolidation then exacerbates this effect by increasing the likelihood that a defendant will be viewed as callous, making it more difficult to determine which facts apply to which defendants for the purpose of fault allocation.⁹¹ While it was initially expected that findings of recklessness would be rare, the combined effects of trust exposure exclusion and case consolidation lead frequently to findings of recklessness in NYCAL.

The pressure this potential liability for whole verdicts can exert on a handful of frequently named defendants, each of whom is named in over 60% of cases,⁹² is extraordinary, leading to large settlements even where exposures to that defendant’s products may be negligible.

“ While it was initially expected that findings of recklessness would be rare, the combined effects of trust exposure exclusion and case consolidation lead frequently to findings of recklessness in NYCAL. ”

Punitive Damages

In 1996, Justice Helen Freedman, the judge presiding over NYCAL at the time, decided that punitive damages “had little or no place in the asbestos litigation.”⁹³ She based this decision primarily on four reasons: (1) punitive damages “served no corrective purpose” for asbestos defendants, because the alleged wrongs in question took place decades before the trial and no defendants were currently engaged in asbestos-related business activities; (2) punitive damages deplete resources available to compensate other injured parties; (3) NYCAL plaintiffs would be able to obtain disparate results from similarly-situated plaintiffs in jurisdictions where punitive damages were not available; and (4) punitive damages had the potential to punish defendants repeatedly for the same wrong.⁹⁴ Justice Freedman thus deferred all punitive damages claims in asbestos cases indefinitely, a system which lasted for almost 20 years.

In 2013, however, plaintiffs moved to end the deferral to encourage “recalcitrant” defendants to resolve their cases.⁹⁵ Beyond this purported need for additional leverage over defendants, the plaintiffs focused on the availability of punitive damages elsewhere in New York and the supposed right of plaintiffs to collect punitive damages.⁹⁶ They represented to the court that if the deferral ended, plaintiffs would be “sparing” in their demands for punitive damages.⁹⁷

The defendants objected on largely the same grounds that Judge Freedman had articulated 18 years earlier. They argued that punitive damages are appropriate only when they can be expected to have some actual corrective or deterrent role, which could not occur due to the long latency period of asbestos-related disease and the cessation of asbestos use in the United States.⁹⁸

The defendants pointed out that the corporate actors, corporations and shareholders in place at the time of exposure have long since retired or died, so imposing multiple awards of punitive damages for the same wrong would be unfair and unconstitutional.⁹⁹ They also argued that punitive damages increase case resolution values and deplete the money available to compensate later-arriving claimants, possibly even driving some defendants to bankruptcy.¹⁰⁰

Defendants also pointed out that punitive damages in New York outside NYCAL were extremely rare and that, to the extent plaintiffs wished to file a case outside NYCAL in order to obtain locally-available punitive damages, they were free to do so.¹⁰¹ Defendants also argued that, while the general power to award punitive damages has been long recognized, no individual plaintiff has a “right” to recover them.¹⁰² Finally, they also took the position that unilateral changes to the CMO eliminated the consent which was a precedent for the complex collection of compromises that was the CMO.¹⁰³

The then-presiding NYCAL judge, Justice Heitler, granted plaintiffs' request and ended the deferral of punitive damages.¹⁰⁴ She determined that she had the power to make such substantial modifications to the consent CMO and unilaterally created a set of procedures which allowed plaintiffs to elect to demand punitive damages deep into ongoing trials with little or no warning to defendants.¹⁰⁵ Defendants moved the court to reconsider its decision, and then appealed to the First Department.

The Appellate Division rejected the challenge to the reintroduction and the claim that such a unilateral amendment to the CMO was impermissible.¹⁰⁶ It also ruled that the procedures for seeking punitive damages were insufficient and unfair, and it directed NYCAL to institute appropriate procedures.¹⁰⁷ The Revised CMO continues to permit punitive damages in NYCAL,¹⁰⁸ which will likely lead to further appeals.

“ The Revised CMO continues to permit punitive damages in NYCAL, which will likely lead to further appeals. ”

In the absence of any appellate intervention in the present situation, punitive damages are yet another procedural aspect of NYCAL which, in concert with those already discussed, undermines the fairness of the system. For example, the availability of both a recklessness finding and punitive damages creates not only the potential for vastly inflated verdicts,¹⁰⁹ but also for an anchoring effect whereby jurors use a recklessness finding as a means to compromise between a lower verdict and a larger punitive damages award.

“ In the absence of any appellate intervention in the present situation, punitive damages are yet another procedural aspect of NYCAL that, in concert with those already discussed, undermines the fairness of the system. ”

Availability of Bankruptcy Trust Claim Forms

The asbestos bankruptcy trust system, a parallel compensation avenue for plaintiffs that is nearly unique to asbestos, evolved in the 1980s as an ad hoc response to the conditions of the litigation at that time, when a huge volume of asbestos cases threatened to overwhelm the U.S. court system and settlements and judgments swamped the target defendants.

THE ASBESTOS BANKRUPTCY TRUST SYSTEM

In 1982, the Johns Manville Corporation filed for bankruptcy due to its outstanding asbestos-related liabilities and agreed as part of that process to compensate future claimants from a personal injury trust funded with a majority of the company's existing assets.¹¹⁰ After a failed experiment of having the Manville Trust continue to defend the company in the tort system, the trust was reformed so that asbestos cases against the company would be subject to a channeling injunction providing that the trust compensation process would be the exclusive avenue for recovery.¹¹¹

“ [T]he governing documents of an asbestos bankruptcy trust must be approved by both three-fourths of the asbestos personal injury claimants and a future claims representative, appointed by the plaintiffs’ lawyers who sit on the Trust Advisory Committees. ”

This process of channeling the liabilities of bankrupt defendants into a trust that administers and pays claimants formed the basis of the current asbestos bankruptcy trust system codified under Section 524(g) of the U.S. Bankruptcy Code. This provision gives significant power to plaintiffs’ attorneys in the governance of the trusts. For example, the governing documents of an asbestos bankruptcy trust must be approved by both three-fourths of the asbestos personal injury claimants and a future claims representative, appointed by the plaintiffs’ lawyers who sit on the Trust Advisory Committees.

The few firms that control large concentrations of asbestos claims and sit on numerous Trust Advisory Committees thus have effective control over the operations and standards of the trusts. Members of Weitz & Luxenberg, for example, sit on the governing committees of 15 trusts.¹¹² Because the same firms that stand to benefit when the bankruptcy trusts pay claims also write the requirements for payments by those trusts, the standards for claims have been repeatedly characterized, even by the plaintiffs’ bar, as lax.¹¹³

Although the proof required by the trusts is lower than that needed in the tort system, plaintiffs must allege exposure to the bankrupt defendant’s products as a precondition for payment on their claim.¹¹⁴ Bankruptcy trust claim forms are frequently accompanied by affidavits from plaintiffs

briefly explaining how they were exposed and to which products.¹¹⁵

“ Because the same firms that stand to benefit when the bankruptcy trusts pay claims also write the requirements for payments by those trusts, the standards for claims have been repeatedly characterized, even by the plaintiffs’ bar, as lax. ”

Over 60 companies have availed themselves of this bankruptcy trust system, including all the major suppliers of the most dangerous type of asbestos, amphibole fibers, and all of the amphibole-containing insulation companies that, prior to the development of the bankruptcy system, made up the lion’s share of exposure allegations.¹¹⁶ The large market share of these companies, the former ubiquity of their products, and their disease-causing potential makes evidence of exposure to their products an essential part of active defendants’ alternative exposure defenses in litigation.

Alternative exposure evidence is important for two reasons. First, it can support an argument of a supervening cause, leading a fact-finder to conclude that exposure to

the bankrupt defendant's product was more likely the cause of the plaintiffs' asbestos-related diseases than exposure to an active defendant's product. Second, as discussed above, in New York fault can be allocated to bankrupt defendants. If an active defendant is determined to be less than 50% at fault and is not found to have been reckless, the defendant must only pay the percent of the award corresponding to its fault allocation.¹¹⁷ Evidence of exposure to bankrupt defendants' products can result in lower fault allocations to active defendants.

DISCLOSURE OF BANKRUPTCY TRUST FORMS

Although some states have begun to require disclosure of bankruptcy trust forms,¹¹⁸ these efforts have been opposed by plaintiffs' counsel in every state where they have arisen. In Rhode Island, for example, three plaintiffs' firms jointly moved for a statewide protective order "preventing the disclosure of the terms and supporting documentation of any settlement entered into between any plaintiff and any named or unnamed defendant or bankruptcy trust."¹¹⁹ These firms argued that discovery of claims filed with the bankruptcy trusts were irrelevant because "[n]one of the trusts require the standard of proof that is used by a court in a civil trial."¹²⁰

The plaintiffs' bar in NYCAL has likewise historically opposed disclosure and admissibility of alternative exposure evidence from bankruptcy trust forms and

accompanying affidavits. However, in 2012, Justice Heitler issued a standing order that required plaintiffs to provide bankruptcy trust forms to defendants, but did not specify whether those materials would be admissible at trial.¹²¹ The order also requires that plaintiffs submit claims with trusts prior to trial. Defendants have sought to have these forms admitted as evidence of exposure to bankrupt entities' products, but with mixed success.

The Revised CMO could have specified that plaintiffs' bankruptcy trust submissions are admissible, and can be considered in allocating fault among potentially culpable entities, but did not. Rather, it continued the status quo whereby bankruptcy trust claim forms must be submitted to the trusts prior to trial, and is silent on both disclosure and admissibility. Justice Heitler's standing order presumably remains in force, meaning that admissibility will continue to be determined on a case-by-case basis.

These ad hoc determinations are insufficient to ensure the fair allocation of fault. Even if defendants are sometimes able to have bankruptcy trust forms admitted, the case-by-case nature of these assessments deprives the parties of certainty that can aid in preparation and pre-trial resolution of cases. This uncertainty could have been avoided had the Revised CMO recognized the importance of trust form admissibility for the fairness and accuracy of the proceedings and required it as a matter of course.

“ This uncertainty could have been avoided had the Revised CMO recognized the importance of trust form disclosure for the fairness and accuracy of the proceedings and required admission of the trust materials as a matter of course. ”

The Effect of Lawyer Advertising on Case Valuation in NYCAL

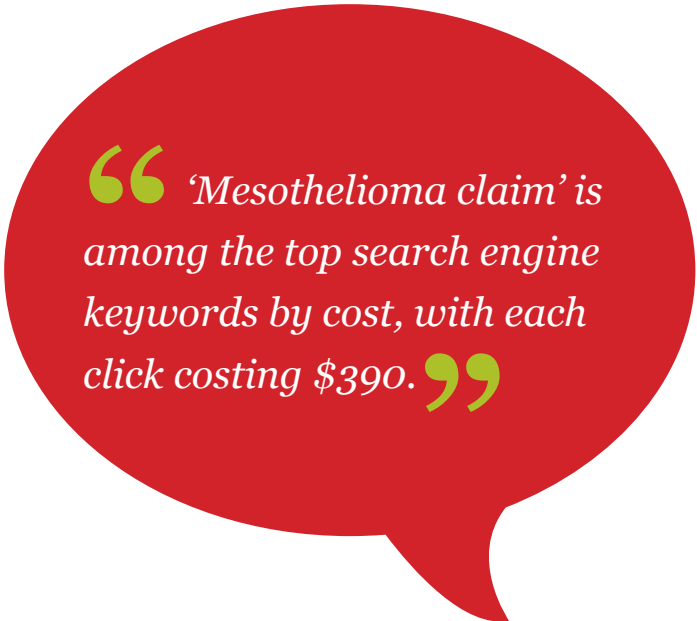
Prior to 1977, the American Bar Association and the bar associations of most states banned attorney advertising. Amid concerns that the public was underserved and unable to easily obtain legal services, the Supreme Court held in *Bates v. State Bar of Arizona* that such bans violated attorneys' constitutionally protected right to engage in commercial speech.¹²²

The Rise of Plaintiffs' Lawyer Advertising in Asbestos Litigation

Since *Bates*, all forms of attorney advertising have dramatically increased. While in 1978, only 3% of lawyers advertised their services, by 1992 that number had risen to 61%.¹²³

Advertising by asbestos plaintiffs' firms has followed this upward trend as well.¹²⁴ Nationally, five of the top six top television legal advertisers are plaintiffs' firms.¹²⁵ Asbestos plaintiffs' firms spent \$45.6 million nationally on television advertising in 2015 alone.¹²⁶ They have also expanded their advertising to internet platforms. "Mesothelioma claim" is among the top search engine keywords by cost, with each click costing \$390.¹²⁷ In many cases, the advertising attorneys do not actually handle the case, but instead refer it to firms with greater trial capabilities, such as Weitz & Luxenberg, in exchange for a fee or share of any ultimate recovery.¹²⁸

The prosecution of former Speaker Silver raised concerns regarding the competition for clients, the value that plaintiffs' counsel place on mesothelioma cases as drivers of value and market share, and the importance of advertising and referral practices in asbestos cases. Some of these concerns focused on potential negative impacts on plaintiffs.



“ ‘Mesothelioma claim’ is among the top search engine keywords by cost, with each click costing \$390. ”

For example, while advertising and the competition it fosters typically are expected to reduce costs for clients, evidence suggests that the opposite has occurred in asbestos litigation. A study conducted by the Federal Trade Commission found that “attorneys who advertised personal injury services appeared to charge about a 3 percent higher contingent fee if the case was settled before trial than those who did not advertise personal injury service.”¹²⁹ Despite extensive advertising and competition, the typical contingent fee for asbestos litigation remains at 40%, compared to the standard rate of 33% for other types of contingent fee cases.¹³⁰

“For example, while advertising and the competition it fosters typically are expected to reduce costs for clients, evidence suggests that the opposite has occurred in asbestos litigation.”

Advertising and NYCAL Juries

In addition to its intended effect of generating additional cases for plaintiffs’ firms in NYCAL and elsewhere, providing the large inventories necessary to exert leverage and demand high settlement, advertising may have another consequence. That is, to the extent that individuals who sit on NYCAL juries have viewed plaintiffs’ advertisements, they may be conditioned to have particular viewpoints on asbestos, defendants, plaintiffs, and plaintiffs’ counsel.

In addition to describing a relationship between mesothelioma, lung cancer, and asbestos exposure, the ads often specifically address viewers who may have worked in particular industries.¹³¹ They also tend to cast plaintiffs’ firms in a noble light. For instance, one Weitz & Luxenberg ad, which refers to the firm as “New York’s own Weitz & Luxenberg,” describes the firm as having “a quarter-century of asbestos litigation experience fighting for the rights of workers” while showing footage of early 20th century railroad, factory, and construction workers.¹³²

A client then describes having felt “very very safe” after taking her case to the firm and wanting to hug the attorneys there.¹³³ The ad also states that mesothelioma “can devastate [a victim’s] family’s financial stability.”¹³⁴ This is in contrast to characterizations of defendants. Advertisements often contain statements similar to this, from a Sokolove Law Firm commercial:¹³⁵ “Although federal regulations were established to keep workers safe, many manufacturers continued to use asbestos in their products, hiding the dangers of exposure.”¹³⁶

Both sides have been reluctant to question jurors on their experience with these types of ads during voir dire. Plaintiffs may fear causing otherwise favorable jurors to say something that can lead to them being struck from the jury for cause, and defendants may be concerned that a prolonged discussion of advertising will reinforce the views of jurors who have seen the ads and spread them to jurors who have not. However, because plaintiffs’ advertising is so pervasive, it is likely that a significant proportion of prospective jurors have seen these commercials, a possibility that warrants further inquiry.

“ [T]he express purpose of plaintiffs’ advertising in recent years, in addition to soliciting claimants, has been to influence the opinions of potential jurors. ”

The relatively unexplored question, then, is what impact asbestos attorney advertising has on these NYCAL jurors.¹³⁷

At least one plaintiff’s expert with lengthy experience and knowledge of asbestos litigation dynamics has expressed the view that the effect of such advertising is to precondition the jury to awarding higher damages verdicts. Mark Peterson, an expert in asbestos bankruptcies for the plaintiffs’ bar, provided testimony concerning asbestos plaintiffs’ firms’ advertising in a suit arising from the bankruptcy of auto parts manufacturer Federal Mogul. He stated:

Another matter I didn’t mention is advertising. In recent years, the decade of the 2000’s, the advertising of plaintiff’s law firms for mesothelioma claims has made mesothelioma, as odd a word as it is, a household word. People know it. They associate it with asbestos. They are told repeatedly in ads that mesothelioma is a terrible disease caused only by asbestos and basically that advertising is a public-relations campaign to the public.

So in recent years, all of that goes up. That influences jurors,

veniremen. These are the people that serve on juries. It is one of the reasons that the verdicts are going up and one of the reasons that values in general are going up.¹³⁸

Mr. Peterson later explained that the express purpose of plaintiffs’ advertising in recent years, in addition to soliciting claimants, has been to influence the opinions of potential jurors: “Many [plaintiffs’] firms began continuing increases in television and internet advertising. This brought in further claims, expanded the types of exposed workers ... and broadly educated the American public—and jurors—on the role of asbestos in causing cancers and lung disease.”¹³⁹

As evidenced by the content of the ads themselves, Mr. Peterson is correct that asbestos attorney advertisements convey to viewers a particular impression of mesothelioma, plaintiffs’ lawyers, and defendants. He is also correct that verdicts in asbestos cases, especially in NYCAL, have gone up over time.¹⁴⁰ These facts and existing research on the effect of media on jury awards merit further inquiry into the extent to which he is also correct as to the causal relationship between plaintiffs’ advertising and jury awards, particularly in NYCAL.

Combined Effect of CMO Procedures and Plaintiffs' Firm Advertising on NYCAL's Fairness

All of the issues described above interact to varying degrees. Potential jurors enter the selection process having seen numerous advertisements for asbestos attorneys. These ads imply that asbestos exposure is a virtual certainty for some occupations, all defendants are part of a scheme to conceal the hazards of asbestos and deny injured parties compensation, and plaintiffs' attorneys are underdogs opposing these behemoth conspirators.

These jurors then confront a consolidated case where multiple corporate defendants oppose a single plaintiffs' firm, often Weitz & Luxenberg. This reinforces the David versus Goliath theme of the plaintiffs' advertising, some of which may have been from Weitz & Luxenberg as well. As the trial proceeds, the consolidation of dissimilar plaintiffs obscures relevant facts from the jury, adding confusion regarding exposures, time periods, work sites, and asbestos suppliers. This is compounded in some cases by the lack of alternative exposure evidence from bankruptcy trust claim forms.

Preconditioning and confusion combine to increase the likelihood of a plaintiffs' verdict. Then these same factors also predispose the jury to find that the

defendants acted recklessly. As discussed above, plaintiffs' attorney advertising may frame defendants as bad actors and plaintiffs' attorneys as saviors, preconditioning the jury to consider defendants' actions as the result of maliciousness rather than understandable ignorance.¹⁴¹ While the evidence of each particular defendant's knowledge may be insufficient for the jury to find its actions reckless, the presentation of multiple defendants' knowledge may have a cumulative effect.

The jurors also may infer from the presence of numerous defendants that a conspiracy to conceal the hazards of asbestos was likely as to those particular defendants. This recklessness finding is then exacerbated by the lack of evidence against bankrupt

defendants, to whom some share of fault is frequently allocated when evidence from claim forms is presented. Juries are thus able to reach verdicts including recklessness findings in these cases where, absent plaintiffs advertising and a potentially misleading consolidation procedure, they might otherwise not.

The synergistic effect of these factors raises substantial Constitutional concerns for defendants. Though more research is needed, defendants may be deprived of an unbiased jury by the saturation of plaintiffs' advertising in New York. They may also

be unable to present evidence of their innocence in the form of bankruptcy trust claim forms as constitutionally provided. The procedures employed in NYCAL under the First CMO likely prevent juries from reaching fair and reasoned decisions, calling into question the substantial verdicts they frequently award. The Revised CMO has largely left these troubling procedures intact. Whether the fairness of NYCAL can be improved in light of the Revised CMO, through appellate intervention or the discretion of subsequent presiding judges, remains an open question.

Endnotes

- 1 Case Management Order, *In re: New York City Asbestos Litigation* (Dkt. To Be Assigned) (June 20, 2017) (Revised CMO).
- 2 Peggy L. Ableman, et al., The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency, 14 *Mealey's Litig. Rep. Asbestos* 9, at 4 (Apr. 2015) (Consolidation Effect).
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- 4 See Philadelphia Story at 1.
- 5 Mesothelioma is a malignant tumor associated with asbestos exposure that most commonly affects the pleura, the lining of the lungs and abdominal cavities.
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- 14 Order Amending Prior Case Mgmt. Orders, *In re New York City Asbestos Litig.*, No. 40000/88, at 1 (N.Y. Sup. Ct. N.Y. Dec. 19, 2002) (Order Amending Prior Case Mgmt. Orders).
- 15 Amended Case Management Order, *In re New York City Asbestos Litig.*, 40000/88 (N.Y. Sup. Ct. Sept. 20, 1996) (First CMO).
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- 17 First CMO at 32.
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- 20 Chris Monahan, Looking at Asbestos Litigation Verdict Trends, Risky Business Weblog, available at <http://riskybusiness.kcic.com/looking-asbestos-litigation-verdict-trends/> (Jan. 17, 2017).
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- 23 Plaintiffs' Revised Joint Brief in Support of Application to End the Deferral of NYCAL Causes of Action for Punitive Damages, *In re: New York City Asbestos Litig.*, No. 40000/88, at 2 (N.Y. Sup. Ct. Apr. 2, 2013) (Plaintiffs' Brief).
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- 25 Decision and Order, *In re: New York City Asbestos Litig.*, No. 40000/88 (N.Y. Sup. Ct. Apr. 8, 2014) (Heitler Order).
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- 31 *Id.* at 24-25.
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- 53 *Matter of New York City Asbestos Litig. (Andreadis v. ABB, Inc.)*, 2015 WL4501189, at *3 (N.Y. Sup. Ct. N.Y. Cty. July 24, 2015).
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- 107 *Ibid.*
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- 112 Susan Edelman, Sheldon Silver-linked Law Firm Has Hand in Asbestos Funds, *supra* n.36.
- 113 *See, e.g.*, Symposium Asbestos Bankruptcy Trusts and Their Impact on the Tort System, 7 J. L. Econ. & Pol'y 281, 297 (2010) (comments of Nathan Finch). *See also* Pls.' Joint Mot. for a Protective Order Regarding Settlements and Bankr. Claims at 1, *In re Asbestos Litig.* No. 96-9999, at 2 (R.I. Sup. Ct. Dec. 28, 2011) (emphasis in original) ("Many of the asbestos bankruptcy trusts do not require proof of exposure to a company's products. Rather, some trusts base their offer on medical diagnosis alone, while others care about an individual's occupation or job location. None of the trusts require the standard of proof that is used by a court in a civil trial.").

- 114 See, e.g., Armstrong World Industries Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures § 5.7(b).
- 115 See James L. Stengel and C. Anne Malik, Insights and Inconsistencies: Lessons from the Garlock Trust Claims, at 11 (Institute for Legal Reform, Feb. 19, 2016).
- 116 Naming Game at 2-4.
- 117 C.P.L.R. § 1601; see *infra* Part II.B.
- 118 Trust form disclosure is now required in Arizona, Iowa, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.
- 119 Pls.' Joint Mot. for a Protective Order Regarding Settlements and Bankr. Claims at 1, *In re Asbestos Litig.* No. 96-9999 (R.I. Sup. Ct. Dec. 28, 2011). Nonetheless, as referenced above, twelve states have passed legislation requiring disclosure of bankruptcy trust forms.
- 120 *Id.* at 2.
- 121 Decision and Order, *In re: New York City Asbestos Litig.*, Index No. 40000/88 (Nov. 15, 2012).
- 122 433 U.S. 350, 379 (1977).
- 123 Nora Freeman Engstrom, Attorney Advertising and the Contingency Fee Paradox, 65 *Stanford L. Rev.* 633, 657 (Apr. 2013).
- 124 Chris Monahan, Why You're Seeing More Advertising by Asbestos Plaintiff Firms, Risky Business Weblog, *available at* <http://riskybusiness.kcic.com/why-youre-seeing-more-advertising-by-asbestos-plaintiff-firms/> (showing that the rate of television advertising by asbestos plaintiffs' firms grew by 41% from 2004 to 2011).
- 125 Ken Goldstein and Dhavan V. Shah, Trial Lawyer Marketing: Broadcast, Search and Social Strategies, at 7 (Inst. for L. Reform Oct. 2015) (Trial Lawyer Marketing).
- 126 *Id.* at 10.
- 127 *Id.* at 12.
- 128 Marc C. Scarcella and Peter R. Kelso, Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentives Behind the New Recruitment of Lung Cancer Cases, 13 *Mealey's Asbestos Bankr. Rep.* 4, at 13-14 (Nov. 2013).
- 129 Nora Freeman Engstrom, Attorney Advertising and the Contingency Fee Paradox, *supra* n.123, at 666 (quoting William W. Jacobs et al., Cleveland Reg'l Office & Bureau of Econ., FTC, Improving Consumer Access to Legal Servs.: The Case for Removing Restrictions on Truthful Advertising, at 125) (Nov. 1984).
- 130 Some asbestos bankruptcy trusts, cap contingent fees for trust payments at 25%. See, e.g., Armstrong World Industries Inc. Asbestos Personal Injury Settlement Trust Distribution Procedures.
- 131 See, e.g., Sokolove Law Firm Advertisement, Railroad Workers and Mesothelioma, *available at* <https://www.youtube.com/watch?v=4yQl-vsWTwl>.
- 132 Weitz & Luxenberg P.C. Advertisement, Mesothelioma and Asbestos Lawyers – Commercial, *available at* <https://www.youtube.com/watch?v=YL1EzxZ5PU8>.
- 133 *Ibid.*
- 134 *Ibid.*
- 135 Sokolove Law Firm is one of the top asbestos plaintiffs' firms by television advertising, but refers its clients to other firms for the provision of legal services related to asbestos claims. See Marc C. Scarcella and Peter R. Kelso, Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts, *supra* n.128, at 13-14; Trial Lawyer Marketing at 7.
- 136 Sokolove Law Firm Advertisement, *supra* n.133.
- 137 See Claire S. H. Lim, Media Influence on Courts: Evidence from Civil Case Adjudication, 17:1 *Am. Law Econ. Rev.* 87 (discussing media influence on civil adjudication generally).

- 138 Testimony of Dr. Mark Peterson at 702, *In re Fed. Mogul Global, Inc., et al.*, Bankr. Case No. 01-10578 (RTL), Civ. Action No. 05-59 JHR (D. Del. Apr. 26, 2005).
- 139 Witness Statement of Dr. Mark Peterson ¶ 45, In the High Court of Justice Queen's Bench Div. Commercial Ct. Between: Federal Mogul Asbestos Personal Injury Trust, Claimant and Federal-Mogul Ltd., et al., Defendants, Claim No. 2012 Folio 1093.
- 140 *See, e.g.*, Chris Monahan, Looking at Asbestos Litigation Verdict Trends, *supra* n.19.
- 141 Robert Trager, et al., Selling Influence: Using Advertising to Prejudice the Jury Pool, 83 Nebraska L. Rev. 685, 696 (2005).



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