



JUDGE MARK DAVIDSON
MDL ASBESTOS COURT
201 Caroline, 8th Floor
Houston, Texas 77002

August 30, 2010

Governor Rick Perry
Lieutenant Governor David Dewhurst
Honorable Joe Strauss

Dear _____

Section 90.101 of the Civil Practices and Remedies Code requires each Multi District Litigation Pretrial Court having jurisdiction over cases to which Chapter 90 of the Civil Practices and Remedies Code applies to submit a report to the Governor, Lieutenant Governor and Speaker of the House on or before September 1, 2010. The undersigned is the judge appointed by the Multi District Litigation Panel to serve as the pretrial judge on asbestos litigation. This letter constitutes the report relevant to asbestos litigation.¹

Scope of the Report

The statute requires the following data to be within this report:

- 1) The number of cases on the court's multidistrict litigation docket as of August 1, 2010.
- 2) The number of cases on the court's multidistrict litigation docket as of August 1, 2010 that do not meet the criteria of Section 90.003, to the extent known;
- 3) The court's evaluation of the effectiveness of the medical criteria established by Sections 90.003 and 90.004.
- 4) The court's recommendation, if any, as to how medical criteria should be applied to the cases on the court's multi district litigation docket as of August 1, 2010; and
- 5) Any other information regarding the administration of cases in the MDL pretrial courts that the courts deems appropriate. *Tex. Civ. Prac. & Rem. Code § 90.101.*

Number of Cases on Court's Docket

For purposes of this report, I have literally interpreted the statute, and I am providing the number of cases pending. This is different from the number of Plaintiffs pending. The reason for the difference is that prior to the adoption of Senate Bill 15's requirement that each person

seeking recovery of asbestos-related diseases have their case tried one at a time, cases were filed and tried in large groups. It has been related to me that one case in Jefferson County has or has had 12,000 plaintiffs seeking damages in the same case since it was first filed in the 1970s.

Different counties have addressed this in different ways prior to the creation of the MDL. In Harris County, the Board of Civil Judges mandated that no more than one plaintiff could have their claims considered in a case. In Dallas County, the limit was placed at three plaintiffs. In Cass County, the limit was set at ten. In Cameron County, the limit was 700. In Jefferson County, there was no limit. This observation is in no way meant to be critical of any judge or judges, but to state why the wording of the statute is not necessarily instructive of the number of claimants on the inactive docket of Chapter 90 cases.

The report of this court is that, as of August 1, 2010, there are 7,959 cases pending on the MDL Asbestos Docket. Of those, 6,451 are inactive cases and 1,517 are active cases. I have collected the number of cases that originated in each county in the state. Those figures are available on request to you, or to any member of the Legislature.

This is not the number of plaintiffs in the MDL. As stated above, there are many plaintiffs whose cases are jointly filed. The number of plaintiffs in those cases is difficult, and probably impossible, to calculate. I have heard estimates of the number of inactive plaintiffs that ranges between 25,000 and 84,000. Because many of these case files are not presently in Harris County, determination of the number of claimants with total accuracy would require a tour of the state's courthouses to examine each case file. For the most part, these are cases that are indefinitely abated until such a time, if any, that the plaintiff's breathing ability diminishes to the point that they meet the criteria. I think everyone hopes none them ever meet that criteria.

I have heard a number of cases a year in which I am asked to activate a case that was formerly inactive. Most of those cases, however, seek to convert an inactive asbestosis case into an active mesothelioma case. As stated above, those cases have different criteria in order for one to be allowed to go forward and initiate discovery.

Evaluation of the Medical Criteria

The medical criteria relevant to asbestos litigation are found in Section 90.003 of the Civil Practices and Remedies Code. *Tex. Civ. Prac. & Rem. Code § 90.003*. By its terms, it created separate procedural requirements for cases involving asbestosis from cases involving asbestos-related cancer, including but not limited to mesothelioma. Shortly after the effective date of Chapter 90's medical criteria, I heard numerous motions challenging the sufficiency of reports provided by physicians submitted to attempt to meet the requirements of the statute. Many of those objections were sustained. Many were overruled. Those rulings gave both sides of the docket definitive interpretations of how I would interpret the provisions of the statute in the context of qualifying reports.

There have been few contested hearings on Motions to Dismiss for failure to submit an adequate report since 2006. One reason for the paucity of hearings could be that the purpose of the MDL – uniformity and consistency in results of cases – has led to motions being heard once.

Plaintiffs have learned which doctors' reports will pass muster, and Defendants have learned which will not.

My opinion of the "effectiveness" of the medical criteria depends on what the intent of the Legislature was in enacting the statute. The criteria make it difficult, if not impossible, for a person with no or few pulmonary problems to seek redress. That is a legitimate public policy well within the purview of the Legislature. A public policy concern that was enunciated at the time of enactment of Chapter 90 was to allow the sickest to be able to proceed in our courts. The relative ease of meeting the criteria for cancer patients and the preference given those cases certainly has aided that goal. In summary, I cannot conclude that the medical criteria have deterred many of the sickest Plaintiffs, those with cancer or serious medical problems caused by asbestos, from effective access to the courthouses of our state.

I have no way of knowing whether there are worthy cases that have not been filed in Texas, or anywhere else, that were deterred by the criteria. Judges in other states tell me that the Texas system of administration of asbestos cases is well thought of. They also tell me that the kind of cases that the medical criteria was designed to discourage – non malignant cases of asbestosis with minor pulmonary disablement, are now largely not being filed in most states. The reasons for this nationwide diminution in the number of filings are complex and disputed – and beyond the scope of this report. It is clear that the Texas statute has been effective in what it set out to do – reduce the number of non-malignant claimants in our courts. The Texas statute, together with the administrative uniformity of the MDL, has given all parties to asbestos litigation a relatively "bright line" to walk.

Other comments on the administration of the docket

I do not intend this report to become a "State of the Asbestos MDL" report. There is one matter, however, that should be addressed that relates solely to matters of administration of cases that is governed by the abatement requirements of the statute. There are now tens of thousands of cases that have been inactive since 2005. In some of those cases, the Plaintiff may now have died of non-asbestos causes. In some of those cases, the Plaintiff may no longer want to go forward. In a few of the cases, I have allowed Plaintiff's counsel to withdraw when their clients instructed them to dismiss the case or withdraw. In no case has any discovery or motion practice been allowed, in compliance with the legislative mandate. All of this begs the question: At what point, if any, may these cases be dismissed for want of prosecution?

It would appear that at some period of time after a person dies, lack of interest in going forward on an asbestosis case filed during their lifetime could be presumed. The problem becomes that there is no way of knowing when Plaintiffs in inactive cases die. I am uncertain whether Plaintiffs' lawyers have been able to keep up with their clients' changes of addresses, or even whether the change of address is corporal or spiritual.

I do not know what the cost of maintaining inactive files is for Harris County, the locus of many of the files. I know that many more files are being kept in storage facilities around the state in other counties.ⁱⁱ

I will be glad to amplify any portion of this report on request. As I have done the last two sessions, I will also be glad to serve as a resource to any member of the Legislature on any matter relating to this docket.

Respectfully submitted,

MARK DAVIDSON

ⁱ There are two categories of cases contained with Chapter 90 of the CPRC: asbestos and silica. The MDL judge appointed to hear silica is Judge James Joseph “Tad” Halbach of the 333rd District Court.

ⁱⁱ The Supreme Court adopted Rule 13.11(h) of the Rules of Judicial Administration, which prohibited District Clerks around the state from sending files to the Clerk of the Pretrial Courts except on order of the MDL Court. To date, no such orders have been signed.