In The Courts

Opening Courtroom Doors to Lawsuits Involving Latent Diseases

by Katherine White

This regular Insight *feature focuses on how the judicial system affects public policy-making. This column examines a recent N.C. Supreme Court decision in the case of* Wilder v. Amatex Corporation, et al., *and a U.S. Western District Court decision in the case of* Gardner v. Asbestos Corporation, Ltd.

For years, North Carolina law harbored a frustrating "Catch-22" for workers who develop debilitating—and often fatal—diseases related to products used in the workplace. It allowed workers to file claims for such diseases *only* if they were detected within a certain time period. But for those who developed diseases that take longer to manifest themselves, the state's courtroom doors were locked tight.

Late last year, however, the N.C. Supreme Court opened the state courts' doors a crack for those who develop diseases caused by prior exposure to harmful substances—diseases that might not cause health problems until years later. And in March 1986, a federal district court judge in Charlotte, relying on the 1985 state Supreme Court's decision, pushed those courtroom doors wide open.

Until these two decisions, no one in North Carolina had much success with using state or federal courts to litigate claims involving diseases or other physical problems that take more than 10 years to manifest themselves. The N.C. law on which Wilder based his claim, G.S. 1-15(b), prohibited claims for bodily injuries from harmful substances unless they were filed within *10* years of the date of last exposure.

In effect, the past law of North Carolina prohibited people from claiming damages if the damages did not become apparent within the 10-year period. And, a product liability law enacted in 1979 [G.S. 1-50(6)] barred such claims unless they were filed within six years of the date of purchase of the product for consumption or use.

The two recent decisions said that these state statutes *do not apply* to claims arising out of *diseases.* By saying that the statutes involved [G.S. 1-15(b), now recodified as 1-52(16), and G.S. 1-50(6)] do not apply, the decisions have the effect of loosening the time limits on when workers can file claims for diseases developed long after exposure to hazardous substances. From now on, the time limit for filing suits begins not from the *date of the injury,* (for example, the first time the worker is exposed to asbestos), but instead from the *date the injury is discovered.* This will usually be the date a doctor diagnoses the disease. This gives plaintiffs more time to file suits.

The decisions specifically dealt with claims by plaintiffs with asbestosis (an irreversible scarring of the lung tissue caused by the presence of asbestos fibers, resulting in acute breathing problems). But the decisions may also allow court claims for *any* latent diseases caused by exposure to harmful substances, regardless of when they arise. The policy impact of the courts' decisions in these cases is to expand the number of persons who will be able to file for damages stemming from late-developing diseases caused by harmful substances.

The far-reaching scope of the state court decision moved N.C. Supreme Court Associate Justice Louis Meyer to predict doom for the state's businesses and industries. Calling asbestosis cases "the tip of the iceberg," Justice Meyer said potential claims could include damages from exposure to the defoliant Agent Orange, DES (a drug prescribed for expectant mothers in the Fifties whose children later have had health problems), radiation, birth control devices, toxic

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wastes, and formaldehyde.

"The onslaught of these cases and the accompanying increase in the number and amount of jury awards are forcing some manufacturers into bankruptcy and resulting in raised insurance premiums of hundreds and even thousands of percent for others," Meyer contends. "The business and insurance worlds have been permeated by a feeling of crisis."[1]

The N.C. Supreme Court decision, *Wilder v. Amatex Corporation*, allowed J.W. Wilder, a retired insulation installer, to pursue his claim against a number of asbestos manufacturers even though he had no exposure to their products for 10 years before he filed his suit in 1981. Wilder had worked with asbestos from 1938 until the early 1970s, but he was not diagnosed as having asbestosis until 1979. A trial court dismissed Wilder's claim because he had failed to file his suit within the 10-year period required under the old law. The N.C. Supreme Court granted a petition to review the case, allowing Wilder to bypass the N.C. Court of Appeals.

In its Nov. 5, 1985 decision, the Supreme Court concluded that G.S. 1-15(b) (passed in 1971), which ostensibly barred claims if 10 years had lapsed since the defendant last was exposed, *did not apply to latent disease cases*. "Diseases such as asbestosis, silicosis, and chronic obstructive lung disease normally develop over long periods of time after multiple exposures to offending substances which are thought to be causative agents," Justice James Exum wrote for the majority. "It is impossible to identify any particular exposure as the 'first injury'" from which to measure the 10-year period, he said.[2]

The law that Mr. Wilder's claim turned on was repealed in 1979.[3] A products liability statute was enacted the same year that required suits to be filed within six years of the purchase of the material for consumption or use. The state Supreme Court, narrowly viewing the facts in Mr. Wilder's situation, did not address the newer, product liability law and whether it covered latent disease claims.

The second decision, although not binding on the state Supreme Court, went further. In federal court, U.S. District Judge David B. Sentelle of Charlotte decided on March 4, 1986 that the new, six-year law should be construed the same way as the state Supreme Court had viewed the earlier, similar law.[4] "That decision makes it plain ... that the State Supreme Court does not consider disease to be included [within a statute of repose affected by the time limit on filing claims] ... unless the legislature expressly expands the language to include it," he wrote. The plaintiff in the case before Judge Sentelle was another asbestosis victim. On May 7, 1986, in a case involving yet another victim of asbestosis, the U.S. Fourth Circuit Court of Appeals in Richmond approved Judge Sentelle's reasoning.[5]

Laws blocking access to the courts for damages from injuries that can take decades to surface have been adopted throughout the nation. Setting a time limit for such claims, supporters argue, gives protection to defendants from stale claims made when records are lost and memories are dim. The time limit also gives companies a time "after which they could be relieved from the threat of a lawsuit and go on about their business,"[6] argued the defendants in *Wilder v. Amatex Corporation.*

However, many state courts have struck down such laws, usually on state and federal constitutional grounds. The Alabama Supreme Court, for instance, threw out a 10-year limit on such claims because it violated the Alabama Constitution's "Open Courts" provision, which guarantees all parties free and open access to the courts. The Alabama constitutional provision is similar to one in the North Carolina Constitution.[7] Other courts, including those in Florida, New Hampshire, Wisconsin, and Wyoming, have similarly concluded that such laws are unconstitutional.

The *Wilder* decision does not address the constitutional questions of closing courts to a class of plaintiffs. Rather, the decision hinges on what the General Assembly intended when it originally passed the 10-year limit in 1971. "It is inconceivable that the legislature enacted G.S. 1-15(b) in 1971 intending that claims for injuries caused by disease accrue before the disease is diagnosed," Justice Exum wrote.[8]

But the opposing view—expressed by Justice Meyer and argued by the asbestos industry—is that legislators were aware of the effect of the law. The majority view, Justice Meyer wrote, "I find naive. At that point in time, delayed manifestation injuries, together with the time-delayed product injuries, constituted a giant wave that was breaking upon the courts."[9]

Regardless of the legislative intent, the reasoning of the two courts means the issue is alive for General Assembly action. However, representatives of those companies adversely affected by the court rulings have not said whether they will seek a legislative remedy from the courts' decisions.

A recent *North Carolina Law Review* note advocates legislative action to clarify the state's

—continued page 47

public policy on latent disease claims. A law, for example, could eliminate time limits on suits for harm caused by prolonged exposure if the disease ordinarily does not manifest itself within those time limits. Legislative action to maintain time limits for filing claims would suggest "that the rights of special interests, namely insurers and manufacturers, are protected from liability for delayed manifestation diseases to an inordinate degree," the *Law Review* article says.[10]

But to Justice Exum and the four colleagues who joined him in the decision, there is no quibbling about "inordinate degree" or miraculous foresight. "...[T]he legislature and the Court have recognized that exposure to disease-causing agent [sic] is not itself an injury. The body is daily bombarded by offending agents. Fortunately, it almost always is capable of defending itself against them and remains healthy until, in a few cases, the immune system fails and disease occurs. That, in the context of disease claims, constitutes the first injury. Although persons may have latent diseases of which they are unaware, it is not possible to say precisely when the disease first occurred in the body. The only possible point in time from which to measure the 'first injury' in the context of a disease claim is when the disease is diagnosed."[11]

In other words, the Court's majority would have nothing to do with a Catch-22 provision that would require the filing of a claim for a disease before that disease could be diagnosed. That, the Court decided, would require extrasensory perception not available even to a judge, a legislator, or a worker.

FOOTNOTES

[1]*Wilder v. Amatex Corporation, et al.*, 314 N.C. 563, 336 S.E. 2d 74 (1985).

[2]*Wilder, Id.* at 557.

[3]N.C.G.S. 1-15(b), enacted as Ch. 1197, 1971 Session Laws, adopted July 21, 1971, was recodified in 1979 as 1-52(16), enacted as Ch. 654, s. 3, 1979 Session Laws. The product liability law, N.C.G.S. 1-50(6), was enacted as Ch. 654, s. 2, 1979 Session Laws, adopted effective October 1, 1979.

[4]*Gardner v. Asbestos Corporation, Ltd.*, Civil Action No. C-C-83-0723P (W.D.N.C., March 4, 1986), at p. 9.

[5]*Hyer v. Pittsburgh Corning Corp.*, Civil Action No. 83-2117 (4th Cir., May 7, 1986).

[6]*Wilder*, Defendant Appellee's Brief at p. 71.

[7]Article I, Section 18, Constitution of North Carolina: "All courts shall be open; every person for an injury done him in his lands, goods, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

[8]*Wilder*, 314 N.C. at 561.

[9]*Wilder, Id.* at 563.

[10]64 UNC Law Review 416, 441 (1986).

[11]*Wilder*, 314 N.C. at 560.

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