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## CSX Chases Plaintiff Firm Over Asbestos

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A railroad company's dogged pursuit of conspiracy and fraud charges against an asbestos law firm is unfolding in a federal appellate court and with a major assist from business and tort reform groups.

In an unusual role reversal, [CSX Transportation Inc.](#), the target of thousands of asbestos claims brought by Pittsburgh's [Robert Peirce & Associates](#), sued the law firm five years ago for allegedly engaging in a claims-manufacturing scheme in violation of the Racketeer Influenced and Corrupt Organizations Act.

The railroad was not successful in federal district court in West Virginia, but its luck may change in the 4th U.S. Circuit Court of Appeals. In its appeal, the company has raised a significant RICO issue, and its resolution, said some scholars, could resound well beyond this particular battle.

"Win or lose, this type of case sends a strong message to the plaintiffs' bar that this company will take an aggressive position in its litigation," said Mark Behrens of [Shook, Hardy & Bacon](#), representing the American Tort Reform Association, the National Association of Manufacturers and others supporting the company's appeal.

"If plaintiffs' lawyers or the people they work with cross the line, there will be a price to pay. It could mean a judgment, or it could mean they will incur the same losses defendants incur regularly," Behrens said.

For its appeal in *CSX Transportation v. Gilkison*, the railroad has brought on board Evan Tager of [Mayer Brown's](#) Washington, D.C., office and E. Duncan Getchell Jr. of [McGuireWoods](#) in Richmond, Va., in addition to its Huntington, W.Va., counsel, Marc Williams of [Nelson Mullins Riley & Scarborough](#).

Besides Shook Hardy, law firms representing CSX amicus parties such as the West Virginia Chamber of Commerce, the American Society of Radiologic Technologists and asbestos physicians, include [Crowell & Moring](#), [the Washington](#)



**Legal Foundation**, [Hunton & Williams](#) and [King & Spalding](#).

The Peirce law firm's counsel, Walter DeForest of Pittsburgh's [DeForest Koscelnik Yokitis Kaplan & Berardinelli](#), has asked the circuit court to reject CSX's amicus filings, calling their arguments redundant and irrelevant and a ruse to circumvent the page limits on the company's main brief.

"There is no fraud," insisted Robert Peirce Jr., who estimates that he has filed 6,000 to 7,000 asbestos claims against the railroad over the years. "What they're trying to do is send a message to any lawyers or doctors involved in nonmalignant asbestos cases that it is going to cost them money, and they will make it as difficult as possible which includes abusing the legal process."

#### **MAKING IT UP?**

If he sounds frustrated, Peirce said, "I am. The frustrating thing is: There has never been any evidence or facts cited to back up their allegations. I'm sitting here with a million dollars in legal fees, and they're just making it up."

In 2005, CSX sued the Peirce law firm and its part-time employee Robert Gilkison, a former CSX worker, alleging fraud and various counts of negligence arising from an alleged X-ray swapping scheme. The district court in 2007 granted judgment on the pleadings to the law firm on the negligence claims and dismissed without prejudice the other allegations.

The railroad subsequently filed an amended complaint against Gilkison, the law firm, Peirce and his partners individually and the firm's X-ray reader. The complaint asserted new claims arising from a broader fraudulent scheme involving manufactured asbestos claims. The new claims alleged nine separate incidents of RICO and common-law fraud as well as RICO conspiracy and common-law conspiracy.

"In this case, the Peirce firm orchestrated a screening process designed to produce false positive readings and then prosecuted claims against CSXT with no good-faith basis in fact," wrote the company in its appellate brief. "The defendants carried out this scheme by using an x-ray technician who produced low-quality films; having the x-rays read by a doctor who provided positive reads at an impossibly high rate; and then overwhelming CSXT with thousands of resulting claims."

The X-ray technician, according to the railroad, was a convicted felon who operated without proper licenses in many states when he conducted mass screenings for Peirce. The radiologist was Ray Harron, who, in 2005, was excoriated by U.S. District Judge Janis Jack for his role in mass silica litigation in Texas.

The district court dismissed as time-barred the company's RICO fraud and conspiracy claims and eight of its nine common-law conspiracy and fraud claims. It also refused to allow the company to file an amended complaint. CSX received a jury trial on only one fraud count -- stemming from the X-ray swapping allegation against Gilkison. The jury last August found Gilkison had not participated in the fraud and exonerated the law firm as well.

In the 4th Circuit, the railroad, which has refused to allow its lawyers to speak about the case, is seeking a new trial in the X-ray swapping case and reversal of the lower court's dismissal of the RICO and common-law claims. Briefing is ongoing and argument is expected this spring.

"CSX is known for its very aggressive litigation of cases in general," said Christopher Placitella of Philadelphia-based [Cohen, Placitella & Roth's](#) Red Bank, N.J., office.

Placitella, who leads an asbestos litigation group within the American Association of Justice, noted a few cases were brought against lawyers and doctors involved in silica litigation. "Some of that spilled over into asbestos, but those cases have been largely over for some time. Whatever practices were called into issue have been extinguished by practitioners and the courts. I don't recall any of those being RICO cases."

The racketeering question raised by CSX is important, said RICO "godfather" Robert Blakey of the University of Notre Dame Law School.

The company argues that the district court erred in dismissing the vast majority of its claims as time-barred by rejecting the "separate accrual" rule. Under that rule, a new RICO cause of action accrues with each new injury.

The 4th Circuit, the railroad acknowledges, has not yet adopted that rule, but the seven circuits that have considered the question have.

#### **FILING TIMES**

The railroad company's suit in 2007 focused on nine Peirce claims: one filed in 2000, four in 2001, three in 2003 and

one in 2006. The district court held that the 4th Circuit has not adopted the separate-accrual rule but instead applies the "injury discovery" rule. Under that rule, the court said, CSX was "charged with notice of its injury by March 2000 when the first alleged objectively baseless and fraudulent lawsuit was filed."

Eight of the claims thus were barred by RICO's four-year statute of limitations.

"I would be really taken aback if the 4th Circuit doesn't follow the separate-accrual rule because everyone else does," Blakey said. "The issue is: Is it a continuing injury or a separate injury? If it's separate, the statute of limitations runs anew."

**Richard Samp of the Washington Legal Foundation** and other defense lawyers contend that an asbestos lawsuit can involve thousands of claims. It is unreasonable to expect a company to have notice of fraud when a suit is filed, he said.

"Because of the massive number of suits filed, it would have been extremely expensive for CSX to carefully investigate each claim," said Samp in his brief, adding, "The Peirce firm was willing to settle for less than the cost of investigating and defending the suits."

For the railroad, the real trigger to investigate was Judge Jack's 2005 decision discrediting Harron, the silica radiologist Peirce used in his asbestos screenings, Shook Hardy's Behrens said. "It was the critical event in changing the landscape of these mass screenings," he said.

After Harron was discredited in the Texas silica litigation, Peirce said, "We had another doctor re-read all X-rays and he agreed with Harron. There's certainly no evidence he committed fraud in our case."

Although asbestos litigation now focuses primarily on malignant asbestos disease -- mesothelioma -- nonmalignant screening still occurs but not on the scale of a decade ago, according to plaintiffs' and defense lawyers.

Peirce said organizations and individuals have offered amicus support to him, but he has declined thus far.

"It's our position it's not a big case and there's no need to make it something that it isn't," he said. "It's something they made up. There's no evidence to back up what they say."