

# The State Factor

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*Jeffersonian Principles in Action*

## *The Asbestos Litigation Crisis in a Nutshell*

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### A Letter from the National Chairman

The American Legislative Exchange Council (ALEC) has developed the *Asbestos and Silica Claims Priorities Act*, model legislation to help provide timely compensation to people who have developed a physical impairment as a result of asbestos or silica exposure. The model legislation also includes a number of reforms to promote fairness and sound public policy in asbestos and silica litigation.

Asbestos litigation has reached crisis proportions. In one recent year, more than 100,000 new cases were filed. At least 300,000 asbestos claims are now pending – more than double the number of a decade ago. Recent studies have shown that up to ninety percent of the claimants who file asbestos claims today are not sick. They have no medically evident injury or impairment.

The presence of unimpaired claimants on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from claimants with severe asbestos-related disabilities. Sick claimants may face a depleted pool of assets in the future unless action is taken now to prioritize the treatment of claims.

Already, asbestos lawsuits have bankrupted over seventy companies. As a consequence, more companies have become ensnared in the litigation as plaintiff attorneys look for new “deep pockets.” Today, over 8,500 defendants have been named in asbestos-related actions. The litigation now touches firms in industries engaged in almost every form of economic activity.

As the *Wall Street Journal* has reported, “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”

Before it ends, the litigation may cost upwards of \$200 billion. Recent reports indicate that some asbestos personal injury lawyers are now using their litigation-generating mechanisms to recruit plaintiffs to file claims alleging exposure to silica. Silica, commonly known as quartz, is an ubiquitous mineral that covers beaches and fills children’s sandboxes. All soil contains silica; it is the major portion of rocks, sands, and clays.

Under the *Asbestos and Silica Claims Priorities Act*, sick claimants would receive trial priority. No longer would they be forced to wait in line behind the unimpaired to have their cases heard. Individuals who cannot demonstrate actual impairment under objective medical criteria would have their claims suspended and preserved on an inactive docket until such time that they may become sick from asbestos or silica exposure. In addition, the model legislation would curb forum shopping and stop improper joinder of “apples and oranges” claims.

We look forward to working with you to create a fair and expedient process for addressing the asbestos and silica litigation environments in your state.

Sincerely,

Mississippi Senator Billy Hewes  
ALEC 2004 National Chairman

## The Asbestos Litigation Crisis in a Nutshell

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be dealing with what the U.S. Supreme Court has called an “asbestos-litigation crisis.” Many believed that asbestos litigation would be a serious but diminishing problem in the years to come. Instead of declining, however, “the crisis is worsening at a much more rapid pace than even the most pessimistic projections,” according to former U.S. Attorney General Griffin Bell

The number of asbestos cases pending nationwide doubled between 1993 and 1999, from 100,000 cases to more than 200,000 cases. In 2003, more than 105,000 new claims were filed. The RAND Institute for Civil Justice (“RAND”) predicts that as many as one million additional claims may be filed.

RAND recently estimated that \$70 billion had already been spent in asbestos litigation through year-end 2002. Tillinghast-Towers Perrin estimates that the litigation will cost an additional \$130 billion. To put these costs in perspective, total asbestos litigation costs may be ten times greater than the \$20 billion in property damage caused by the massive 6.7 magnitude earthquake that hit Los Angeles in 1994. The litigation may cost almost seven times more than Hurricane Andrew, which pounded Florida and Louisiana in 1992, one of the most expensive natural disasters in U.S. history, with a cost of about \$30 billion. Attorney General Bell has said that asbestos litigation costs will exceed the cost of “all Superfund sites combined, Hurricane Andrew, or the September 11<sup>th</sup> terrorist attacks.”

Present trends in asbestos litigation have set off a chain reaction. Payments to individuals with little or no physical impairment have encouraged more lawsuits. Recent reports indicate that as much as ninety percent of new asbestos-related claims are filed by the non-sick. These filings have forced scores of so-called “traditional” asbestos defendants into bankruptcy, costing workers and communities billions of dollars in direct and indirect costs.

These bankruptcies, in turn, have created ripple effects throughout the entire business community. Companies with only a peripheral connection to asbestos increasingly are being named as defendants. The downward spiral will continue to play out on a broad scale for many more years unless something is done.

The current asbestos litigation system is not working

for anyone. Changes are needed, but federal legislation to solve the problem remains speculative. Therefore, state legislatures and courts are now reevaluating the way they handle asbestos claims and working to make improvements. ALEC developed the *Asbestos and Silica Claims Priorities Act* to provide legislators with a sound model to improve the way asbestos and silica cases are handled by state courts. The reforms in the model have received the support of the National Association of Insurance Commissioners and National Conference of Insurance Legislators.

## Inactive Asbestos Docket — Giving Trial Priority to the Sick

### A. The History of Asbestos Use

For much of the 20<sup>th</sup> Century, asbestos was a staple of construction because of its resistance to heat and fire. For example, the Navy and other government agencies required the use of asbestos in ships after uncontrollable fires added to the devastation of the Pearl Harbor attack in World War II. Asbestos also was widely used in factories, commercial buildings, homes and some everyday products, including insulation, pipe wrapping, spackle, plastics and roofing tiles.

### B. The History of Asbestos Litigation

Because of the widespread use of asbestos, the U.S. Supreme Court warned of a looming asbestos litigation problem as early as 1991. Many of the early lawsuits were brought on behalf of plaintiffs with actual disease against companies that made and sold asbestos-containing products. Today, the asbestos litigation environment is radically different.

### C. The Current Asbestos Litigation Crisis

#### 1. The Explosion in Filings by “Unimpaired Claimants”

In the past, workers who developed disease from asbestos exposure filed most asbestos claims. The most debilitating form of disease was mesothelioma, a type of cancer. That is no longer the case.

Today, as much as ninety percent of new asbestos claims are filed by unimpaired claimants — people who have been exposed to asbestos, and who often have some marker of exposure, but who are not impaired by an asbestos-related disease and likely never will be.

Various factors are driving the avalanche of filings by

unimpaired claimants. One explanation for the “file now” trend is that many claimants may feel compelled to file for remedial compensation because of fears that state statutes of limitations will bar their claims if they do not file soon after the first markers of exposure become detectable. Another reason may be that plaintiffs are aware that many asbestos defendants are going bankrupt, and may seek compensation now out of fear that it will not be available later. Some plaintiffs and their lawyers also may be aware that other unimpaired plaintiffs are obtaining settlements. They may question, “why wait for an injury to manifest itself if I can receive compensation now?”

## 2. *Lawyers in Search of Plaintiffs*

Mass screenings conducted by entrepreneurial plaintiffs’ law firms and their agents are fueling the number of filings by unimpaired claimants. The lawyers and the screening firms recruit plaintiffs through exaggerated claims, such as “Find out if YOU have MILLION DOLLAR LUNGS!” Often, the screenings take place in areas with high concentrations of workers who may have been exposed to asbestos. Attorney General Bell has pointed out, “These screenings often do not comply with federal or state health or safety law. There often is no medical purpose for these screenings and claimants receive no medical follow-up.”

Several federal judges have described this phenomenon. The manager of the federal asbestos docket, Senior U.S. District Judge Charles Weiner of the Eastern District of Pennsylvania, has said: “Oftentimes, [asbestos] suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.” Similarly, Senior U.S. District Court Judge Jack Weinstein and Bankruptcy Court Judge Burton Lifland have explained: “Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media.”

Professor Lester Brickman of Cardozo Law School in New York recently wrote that the number of construction and plant workers that have undergone attorney-sponsored screenings over the past seventeen years “undoubtedly exceeds 1,000,000. Currently,

hundreds of thousands of potential litigants are screened each year.”

## D. *The Impact of “Unimpaired Claimants” on Asbestos Litigation*

### 1. *The Truly Sick*

Mass filings by unimpaired claimants have created judicial backlogs and are exhausting scarce resources that should go to the sick and the dying, their widows and survivors. As Steven Hantler, assistant general counsel for DaimlerChrysler Corp., has explained: “The tragedy is that as plaintiffs’ lawyers enroll the healthy into their lawsuits in order to line their own pockets, less money is available for those who are actually sick and dying.”

Cancer victims have a well-founded fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed. For example, consider Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company’s bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990, and did not resume again until 1995. According to the Manville trustees, a “disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.” As a result, the Trust is now paying out just *five cents on the dollar* to asbestos claimants. Consider also:

- ✓ The widow of one man in Washington State who died from mesothelioma has been told that she should expect to receive only fifteen percent of the \$1 million she might have received if her husband had filed suit before the companies he sued went bankrupt.
- ✓ The widow of a mechanic in Ohio will recover at most \$150,000 of the \$4.4 million dollar award that she received for her husband’s death.

Lawyers representing sick and dying plaintiffs have endorsed mechanisms to give trial priority to the truly sick. Here is what some of them have said:

- ✓ Richard Scruggs, renowned Mississippi plaintiffs’ lawyer: “Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy.”

- ✓ Matthew Bergman, Seattle plaintiff's lawyer: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system ... the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."
  - ✓ Peter Kraus, Dallas plaintiffs' lawyer: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."
  - ✓ Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.
  - ✓ Randy Bono, a prominent Madison County, Illinois, asbestos plaintiffs' attorney: "I welcome change. Getting people who aren't sick out of the system, that's a good idea."
  - ✓ Terrence Lavin, Chicago personal injury lawyer: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an x-ray."
- liability defendants. They are named in litigation because they provide fresh "deep pockets." As plaintiffs' attorney Richard Scruggs has remarked, the litigation has turned into the "endless search for a solvent bystander."
- The spread of asbestos cases can be charted simply by looking at the number of defendants brought into the litigation.
- ✓ More than 8,500 defendants have been named in asbestos cases – up from 300 in 1982.
  - ✓ RAND recently found that asbestos litigation "has spread to touch firms in industries engaged in almost every form of economic activity that takes place in the American economy."
  - ✓ Former Attorney General Griffin Bell speculates that half of the companies in the Dow Jones Index may soon be affected.
  - ✓ Senior U.S. District Court Judge Jack Weinstein has said that "[i]f the acceleration and expansion of asbestos lawsuits continues unaddressed, it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy."
  - ✓ Some "peripheral defendants" have themselves begun to collapse under the great weight of claims against them.

## 2. Defendants and Their Employees

Over seventy companies have been driven into bankruptcy due to asbestos litigation. The large number of major employers that have declared bankruptcy as a result of asbestos litigation reinforces the concern that, unless something is done, sick claimants may face a depleted pool of assets in the future.

Moreover, when "traditional" asbestos defendants, the makers and sellers of asbestos-containing products, seek the protection of the bankruptcy courts to deal with mounting numbers of claims, experience shows that the plaintiffs' personal injury bar simply will cast its litigation net wider and bring in "peripheral defendants." These defendants are diverse, ranging from oil companies, to automobile manufacturers, to utilities, to hospitals and colleges. Many newer asbestos defendants are household names. Many others are small businesses facing potentially devastating liability. Some may have participated in the chain of distribution of the sale of an asbestos-containing product; others are premises

## 3. Workers, Retirees and Communities

As the Enron collapse illustrated, bankruptcies represent more than the demise of a business. They can cost employees their jobs and ordinary citizens their retirement savings, as well as have a deep impact on entire communities.

- ✓ Joseph Stiglitz, a Nobel Prize-winning economist, and two colleagues found that bankruptcies from asbestos litigation put 52,000 to 60,000 people (many of them union laborers) out of work between 1997 and 2000. Those workers and their families lost \$175 million to \$200 million in wages, and roughly twenty-five percent of their retirement assets.

- ✓ Professor Stiglitz and his colleagues estimated the aggregate direct costs of bankruptcies on the bankrupt firms to be between \$325-\$625 million.
- ✓ National Economic Research Associates (NERA) has estimated that workers, communities, and taxpayers will bear as much as \$2 billion in additional costs, due to indirect and induced impacts of company closings related to asbestos.
- ✓ NERA also found that for every ten jobs lost directly, communities tend to lose eight additional jobs, leading to a decline in per capita income, real estate values, and lower tax receipts. Additional costs brought upon workers and communities include up to \$76 million in worker retraining, \$30 million in increased healthcare costs and \$80 million in payment of unemployment benefits.
- ✓ Goldman Sachs Managing Director Scott Kapnick has testified that “the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their shareholders and employees, and the economy as a whole.”

### **Inactive Silica Litigation Docket**

ALEC’s *Asbestos and Silica Claims Priorities Act* includes an inactive silica docket to address the dramatic recent increase in the number of lawsuits arising out of the use of industrial sand. It appears that plaintiffs’ lawyers filing cases on behalf of people who may have breathed in silica dust are trying to use the same litigation generating techniques used in asbestos litigation. In many instances, plaintiffs’ lawyers file claims against both asbestos and silica manufacturers.

#### **A. The History of Silica in the Workplace**

The dangers of working with silica have been known for centuries. The health risk of industrial sand lies in its use in certain industries, such as in sandblasting, where tiny dust particles are produced that can be hazardous when inhaled. According to the National Institute for Occupational Safety and Health (NIOSH), silica currently is found in nearly all mining operations. Those inhaling silica can get silicosis, a respiratory disease.

#### **B. The Use of Protective Measures**

The American Foundrymen’s Society has distributed literature to its members on foundry hazards, including silica exposure, for more than 100 years. In 1908, the U.S. Bureau of Labor recognized the health risks of dust for hard-rock miners, stonecutters, potters, glass workers, sandblasters, and foundry workers. By the 1930’s, the federal government launched a silica awareness campaign after investigating, testing, and certifying respiratory protection equipment for abrasive blasting. Over the next several decades, awareness of the potential hazards of silica exposure and greater protection of workers largely led silica to fade from the national spotlight.

#### **C. A Sudden Rise in Silica Litigation**

After years of relatively manageable dockets, the number of silica cases has jumped. One large insurance company has seen a tenfold rise from August of 2002, and is now handling more than 25,000 silica claims. U.S. Silica Company, one of America’s largest suppliers of industrial sand, was hit with more than 15,000 new claims during the first six months of 2003 – up from 5,000 claims for all of 2002 and 1,400 claims in 2001. One company that makes masks designed to protect people from silica dust now has over 17,000 suits against it.

Tellingly, the same lawyers and law firms who for years specialized in asbestos cases are bringing many of the new silica suits. The tactics these lawyers have used to generate asbestos claims are now being applied to the industrial sand context, such as plaintiff recruitment through Internet websites, mobile x-ray vans, and mass screenings. Law firm-sponsored screenings of potential silica plaintiffs have increased “immeasurably” in recent years. Some have speculated that asbestos personal injury lawyers are developing silica cases as a way to “diversify” out of asbestos in the event there is legislation on that issue.

#### **D. Rise in Lawsuits, But Not Mortality**

The view that much of the new silica litigation appears to be lawyer-driven is supported by the lack of evidence of a burgeoning silica medical crisis. In fact, NIOSH reports that over the past thirty years, the annual number of silica-related deaths has dropped nearly eighty-four percent, from 1,157 in 1968, to 308 in 1990, to 187 in 1999. To put the NIOSH figures in

