



# Asbestos Litigation Reform In 2004 and Beyond



By Mark A. Behrens



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## About the Authors

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## I. Introduction

Asbestos litigation has clogged the courts with more than 300,000 pending cases. More than 100,000 claims were filed last year alone. The RAND Institute for Civil Justice has said that as many as one million more claims may be filed. These filings have led to a well-documented litigation crisis. For example, lawyers who represent cancer claimants have expressed concern that trends in the litigation may have the effect of threatening the ability of their clients to obtain adequate timely compensation.

Already, asbestos lawsuits have bankrupted over seventy companies, and counting. As a consequence, more companies have been pulled into the litigation. At least 8,400 defendants have been named in asbestos cases – up from 300 in 1982. Before it ends, the litigation may cost upwards of \$200 billion.

Below is a summary of key federal and state efforts to address and improve the asbestos litigation environment. This article also highlights state judicial races that may influence the litigation environment for the next several years in some states.

## II. Federal Action

### A. Asbestos Litigation Reform

In May 2003, Senate Judiciary Committee Chairman Orrin Hatch (R-UT) introduced S. 1125, the Fairness in Asbestos Injury Resolution Act (the "FAIR Act"), to create a federal trust fund, financed by defendant companies, insurers, and existing private trusts, to compensate asbestos claimants. The level of compensation would vary based on the claimant's documented exposure and injury.

In July 2003, after a series of markup sessions, the Senate Judiciary Committee favor-

ably reported the FAIR Act, largely along party lines. Although the bill moved out of the Committee, there were many unresolved issues, such as the fund's impact on pending claims, compensation levels, how the fund would handle a large volume of expected claims in early years, and whether claims would return to the tort system should the fund become insolvent. Serious discussions occurred over a period of many months between employers, insurers, labor, the trial bar, Senate Democrats, Majority Leader Bill Frist (R-TN), Judiciary Committee Chairman Hatch, Senator Arlen Specter (R-PA), and former Chief Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit.

On April 7, 2004, Chairman Hatch, in close coordination with Majority Leader Frist, introduced a substitute bill, S. 2290, to establish a \$124 billion asbestos claimants compensation fund to be administered by the Department of Labor. The new bill reflected agreement on some difficult issues and attempted to address a number of concerns that had been raised but not resolved in negotiations.

In particular, the substitute bill raised claims values, created an administrative system that could be up and running quickly, provided increased liquidity and upfront funding so that claims could be paid in short order, and provided for a planned approach to directing claims to federal court should the fund not be able to meet its payment obligations at some point.

During the week of April 19, Majority Leader Frist fulfilled his commitment to bring the asbestos litigation reform legislation to the Senate floor. On April 22, S. 2290 failed to gain the sixty votes necessary to limit debate on a motion to take up the bill (50 yeas and 47 nays). In a colloquy on the Senate floor later that evening,

Majority Leader Frist and Minority Leader Tom Daschle (D-SD) recognized a "legislative impasse on asbestos," but pledged to continue negotiations toward a bipartisan solution.

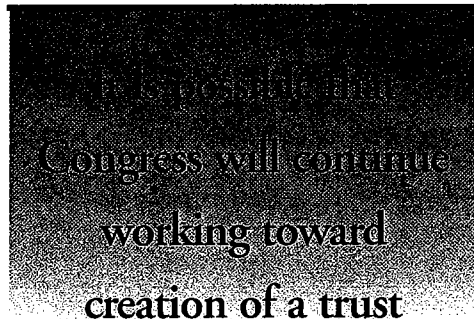
If legislation is not enacted, we expect federal legislative reform efforts to resume next year. It is possible that Congress will continue working toward creation of a trust fund. Congress also may be open to pursuing less complex and comprehensive approaches. For example, Congress may reconsider a medical criteria bill along the lines of that proposed by retiring Senator Don Nickles (R-OK) in 2003. That bill, S. 413, would give trial priority to the sickest claimants and preserve the claims of the currently unimpaired from being time-barred in the future. In 2003, this approach had the support of lawyers who represent cancer victims and significant elements of the business community.

Congress might also consider reforms to address forum shopping abuse so that asbestos claims are no longer channeled into courts that plaintiffs' lawyer Richard Scruggs has called "magic jurisdictions" – and the American Tort Reform Association calls "judicial hellholes." For example, Congress could require asbestos claims to be brought in the county in which the claimant lives or was exposed.

In the alternative, Congress could require asbestos claims to be filed in federal court. This approach would come with a new set of issues, including concerns about federalism and the workload of the federal judiciary. But, this is the approach taken in S. 2290 for resolving asbestos claims should the trust fund become insolvent.

### B. Mass Action Reform

Class Action Fairness Act legislation being considered by Congress (H.R. 1115 / S. 1751 (formerly S. 274)) would improve the asbestos litigation climate by giving federal courts jurisdiction to hear "mass actions" – consolidated trials of 100 or more people, each satisfying the traditional \$75,000 amount in controversy requirement. (There



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is a carve-out for mass actions that "arise from an event or occurrence" that took place in the forum state (e.g., hotel fire or tank leaking toxic chemicals)). The core part of the legislation would allow defendants to remove what were formerly nondiverse state law class actions if minimal diversity exists (i.e., one member of the class and one defendant are citizens of different states), the class involves more than 100 people, and the aggregate amount in controversy exceeds \$5 million. This effectively would foreclose the fraudulent joinder of nondiverse defendants to defeat federal diversity-of-citizenship jurisdiction in multistate class actions.

The Class Action Fairness Act passed out of the House of Representatives in June 2003. Last October, Senate action on the bill was effectively blocked when a floor vote to limit debate on a motion to take up the bill fell one vote short of the sixty votes needed for the motion to pass. Subsequent to that vote, however, three Democrats who voted "no" – Senators Chris Dodd, Charles Schumer, and Mary Landrieu – reached an agreement with Majority Leader Frist on compromise changes to the bill's language. Senator Frist has indicated that he would like to bring the compromise bill to the floor this year. There

is some speculation that the bill could be brought to the floor soon after the Memorial Day recess. The November 2003 compromise appears to provide the votes needed for the bill to clear the Senate, but opponents have been lobbying hard to block the bill. If the legislation clears the Senate, the House most likely would act quickly to send the bill to the President. President Bush supports class action reform.

### III. State Action

#### A. Key State Legislative Action

##### 1. Ohio

In Ohio, asbestos litigation reform has advanced in both chambers of the General Assembly. The Senate passed an "asbestos plus general tort reform" bill (S.B. 80) in June 2003. Claimants who are unable to demonstrate actual asbestos-related impairment would have their cases dismissed, but would be permitted to re-file should an impairing condition later develop. The general tort reform measures in S.B. 80 include a ten-year statute of repose applicable to many product liability actions, a cap on noneconomic damages in tort actions, and limits on punitive damages awards. The legislation also would provide for comparative fault in product liability actions, allow parties to introduce evidence of the plaintiff's right to receive collateral source benefits, and limit contingency fees, among other reforms.

When S.B. 80 reached the House of Representatives, the Speaker broke the bill into two smaller bills. H.B. 292, which contains the asbestos-related provisions of S.B. 80, passed out of the House in December 2003. As of press time, H.B. 292 has been sent back to the Senate and referred to the Senate Judiciary Committee, which is holding hearings on the legislation. The general tort reform bill, S.B. 80, remains in the House Judiciary Committee. The House also is considering a silica and mixed dust medical criteria bill, H.B. 342. Indications

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are that the Governor would sign these proposals into law if they reach his desk.

Ohio asbestos personal injury lawyer Tom Bevan has said that if asbestos reform legislation is enacted, he may initiate a petition drive to force a referendum on the November 2004 ballot. Under Ohio law, asbestos reform supporters would need to win the ballot referendum for the law to take effect.

#### 2. Mississippi

Governor Haley Barbour (R) has put tort reform atop his legislative agenda. Civil justice reform legislation would have a substantial impact on asbestos and other litigation. The RAND Institute for Civil Justice has reported that Mississippi is among five states that handled sixty-six percent of all asbestos filings between 1998 and 2000. In Jefferson County, Mississippi, 21,000 plaintiffs filed asbestos claims from between 1995 and 2000, despite the fact that the County only has less than 10,000 residents.

In late February 2004, the Mississippi Senate passed S.B. 2736, a comprehensive tort reform package that included: venue and joinder reform; a \$250,000 cap on noneconomic damages; abolishes joint liability; innocent seller reform to address the fraudulent joinder of local defendants for the purpose of defeating federal diversity-of-citizenship jurisdiction; would cut the state's existing caps on punitive damages in half; and reform premises owner liability. In addition, the bill would help bring about more balanced and representative juries in Mississippi courts, among other provisions.

In early April 2004, the House Judiciary "A" Committee, chaired by Edward Blackmon, Jr. (D), reported out a strike-through version of the Senate tort reform. Chairman Blackmon's bill did not include key reforms sought by proponents of the Senate-passed bill. On April 14, the House voted 61-57

to adjourn for the evening instead of voting on the bill, missing a deadline for moving it to the Senate for consideration. That procedural move ended S.B. 2736 as a vehicle for tort reform.

The Senate Judiciary "A" Committee responded by amending a House Banking Committee bill, H.B. 1323, to include the core tort reform measures contained in the Senate-passed version of S.B. 2763. H.B. 1323 passed the Senate on April 13 with the tort reform measures intact. When that bill came back to the House, Speaker William McCoy referred the amended bill to the House Judiciary "A" Committee under Chairman Blackmon. As of this writing, H.B. 1323 remains in the Judiciary "A" Committee.

On April 21, the Mississippi House passed a concurrent resolution to permit consideration of new civil justice reform legislation. This will permit the introduction of a new tort reform bill, which the legislature would need to act upon before members adjourn on May 9. If legislation is not enacted, Governor Barbour has pledged to call many special sessions as necessary until the legislature reaches agreement on a tort reform bill.

#### B. Looking Ahead to 2005

Next year is likely to be a busy year for state asbestos and civil justice reform. We often see a lot of activity following an election year. Furthermore, the apparent lack of consensus around an approach at the federal level that can achieve bipartisan support of sixty or more senators – coupled with a serious need for reform – may energize state reform efforts.

##### 1. Texas

The Texas legislature was not in session this year. Next year, asbestos reform is likely to be the civil justice priority in the state. Last session, asbestos reform efforts focused on the creation of a statewide inactive docket. In 2005, policymakers may attempt to achieve the same public policy goals as the

inactive docket proposal, but avoid the administrative issues of a formal registry. Under such a proposal, claimants who do meet objective minimum medical criteria indicating impairment would have their claims dismissed, but the statute of limitations would be tolled so that claimants could re-file if they develop a impairing condition.

##### 2. Maryland

In Maryland, a bill was introduced in the General Assembly this year (H.B. 1346) to overturn opinions from Maryland's highest court exempting most asbestos cases from Maryland's statutory cap on noneconomic damages. In *John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002), the court held that the cap applies only to plaintiffs whose last exposure to asbestos occurred after the cap's effective date, July 1, 1986. H.B. 1346 would clarify that the cap shall apply to any latent disease or injury claim in which the plaintiff was diagnosed with or manifested symptoms of legally compensable injury or disease after July 1, 1986, even if the exposure occurred before that date.

#### C. State Judicial Action

##### 1. Inactive Dockets

In January 2004, the Circuit Court for Madison County, Illinois joined the growing list of courts that have adopted an inactive asbestos docket to give trial priority to claimants who can demonstrate actual asbestos-related impairment. Similar docket management plans were recently adopted in New York City and Seattle, Washington (December 2002) and Syracuse, New York (January 2003). Under these plans, the claims of individuals who cannot meet objective medical criteria specified by the court are suspended. Otherwise applicable statutes of limitations are tolled so that claimants may sue later should they develop an asbestos-related impairment. Claimants on the inactive docket can have their cases removed to the active docket and set for trial when they develop an impairing condition.

The Michigan Supreme Court is now considering a Petition filed by nearly seventy companies and numerous amici asking the court to adopt a statewide inactive asbestos docket. The court held an administrative hearing on the matter, *In re Pet. for an Admin. Order*, No. 124213, in January 2004.

## 2. Mississippi

In February 2004, the Mississippi Supreme Court amended the Mississippi Rules of Civil Procedure to narrow the criteria by which plaintiffs can choose to join their cases or be consolidated into joint trials. Specifically, the court changed its previous position that broad joinder was appropriate under Mississippi Rule of Civil Procedure 20. In the past, Mississippi courts have allowed plaintiffs to join numerous claims that few, if any, courts outside the state would permit to be joined together.

Now, plaintiffs seeking joinder under Rule 20 must have a "distinct litigable event linking the parties." If they do not, the Mississippi Supreme Court advises that trial courts should consider "whether different injuries, different damages, different defensive postures and other individual factors will be so dissimilar as to make management of cases consolidated under Rule 20 impractical." The court also has required plaintiffs to make the factual basis for joinder known "as early as practicable," and said that trial courts are to resolve joinder issues "sufficiently early to avoid delays in the proceedings."

In addition, the Mississippi Supreme Court has acknowledged that some consolidations under Mississippi Rule of Civil Procedure 42 "may be prejudicial" and that consolidation should be invoked only where "the issues of law or fact justifying consolidation predominate over individual issues which will be heard in the consolidated proceedings."

Finally, the court amended Rule 82 of the Mississippi Rules of Civil Procedure to recognize the doctrine of forum non conveniens. New Rule 82(d) permits a trial court to transfer any civil action to any court in

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which the action might have been properly brought if it would be convenient for the parties and witnesses or in the interest of justice to do so.

The new Rule changes were issued the day after the court, sitting en banc, determined in *Janssen Pharmaceutica, Inc. v. Armond* that it was improper for fifty-six plaintiffs to be joined in a single Propulsid trial.

## IV. State Judicial Elections That Matter

There are a number of key state judicial elections in November 2004. These are summarized below.

In Ohio, four of seven seats on the Ohio Supreme Court will be decided: Chief Justice Thomas Moyer (R); Justice Paul Pfeifer (R); Justice Terrence O'Donnell (R); and an open seat created because Justice Francis Sweeney has reached the mandatory retirement age of seventy. Ohio Court of Appeals Judge Judith Ann Lanzinger is running as the Republican candidate for the seat being vacated by Justice Sweeney. She will face Cuyahoga County Common Pleas Judge Nancy Fuerst (D).

The November 2004 elections also are likely to determine the composition of the Mississippi Supreme Court for the next several years. Four of nine seats on the court are up in 2004: Justices William Waller, Jr., George Carlson, Jr., Justice James Graves, Jr., and the seat vacated by retired Chief Justice Edwin Lloyd Pittman.

There will be a key race for a seat on the Illinois Supreme Court. The race will be between Republican Lloyd Karmeier and Democrat Gordon Maag, now an Illinois appellate court judge. The Illinois Civil Justice League supports Karmeier. Judge Maag is a former member of the Lakin law firm in Madison County.

In Michigan, Justice Stephen Markman (R) is up for reelection in November. He has been targeted by the trial bar. Justice Markman, a former appellate judge, was appointed to the Michigan Supreme Court by then-Gov. John Engler in 1999 to fill a vacant seat. He was elected to complete the term in 2000.

Finally, in West Virginia, incumbent Democratic Supreme Court of Appeals Justice Warren McGraw faces a primary challenge on May 11 from Circuit Judge Jim Rowe, a former majority leader and chairman of the Judiciary Committee in the West Virginia House of Delegates. According to West Virginia Justice Watch, a grassroots project of West Virginia Citizens Against Lawsuit Abuse, Justice McGraw has received over eighty-three percent of his campaign donations from personal injury lawyers.

## V. Conclusion

Congress and the states must act to solve the asbestos litigation problem. This year and next, there are several opportunities to help improve the asbestos litigation environment. These reforms will be difficult, but some are possible. State judicial races also will influence the asbestos litigation environment in some key jurisdictions.

