



STATE-BASED REFORMS: MAKING A DIFFERENCE IN ASBESTOS AND SILICA CASES

by

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Recent studies have shown that up to ninety percent of asbestos claimants today are not sick. Those who are sick face a depleted pool of assets as asbestos lawsuits have bankrupted at least seventy-eight companies. Plaintiffs' lawyers have responded by dragging many small and medium size companies into the litigation. Over 8,500 defendants have been named. Plaintiffs' attorney Richard Scruggs has said that the litigation has become an "endless search for a solvent bystander."

In many instances, plaintiffs' lawyers have filed claims against both asbestos and silica defendants, although leading medical experts agree that it is a medical rarity for someone to have both asbestos-related and silica-related impairment. In 2005, the manager of the federal silica multi-district litigation, U.S. District Judge Janis Graham Jack of the Southern District of Texas, recommended that all but one of the 10,000 claims on the silica docket should be dismissed on remand because the plaintiffs' diagnoses were fraudulently prepared.

In response to these problems, courts and state legislatures have adopted reforms that are making a difference in the overall asbestos and silica litigation environment.

Medical Criteria. In 2004, Ohio became the first state to require plaintiffs to present credible and objective evidence of impairment in order to bring or maintain an asbestos or silica action. In 2005 and 2006, Florida, Georgia, Kansas, South Carolina, and Texas enacted similar asbestos and silica medical criteria laws. Tennessee enacted a silica medical criteria law this year.

Early indications are that these laws are working to focus resources on the truly sick by filtering out and preserving the claims of the unimpaired, and by discouraging frivolous litigation. For example, Bryan Blevins of Provost & Umphrey, a national plaintiffs' practice based in Beaumont, Texas, told the *National Law Journal* that since Texas enacted its 2005 medical criteria law, "[t]he only cases getting filed now are cancer cases, which are 12% to 15% of the cases being filed nationwide. I think we are going to see dramatic, dramatic changes. . . ." An Ohio lawyer who chairs his firm's national toxic tort defense litigation practice has said that Ohio's medical criteria law "dramatically cut the number of new case filings by 90%."

"A lot of companies that were seeing 40,000 cases in 2002 and 2003 have dropped to the 15,000 level," according to Jennifer Biggs of the American Academy of Actuaries. Frederick Dunbar of NERA Economic Consulting recently studied the SEC filings of eighteen large asbestos defendants

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and found that, “for all of them, 2004 asbestos claims had dropped from peak levels of the previous three years. Ten companies saw claims fall by more than half between 2003 and 2004.”

State courts also deserve credit for helping to re-focus the litigation on the truly sick. For example, a growing number of state courts now require asbestos claimants to demonstrate impairment in order to proceed to trial. The claims of the unimpaired are put on an inactive docket, where they are exempt from discovery and do not age. Since 2002, inactive asbestos dockets have been adopted in New York City and Syracuse, New York; Cleveland, Ohio; Minnesota (coordinated litigation); Madison and St. Clair Counties in Illinois; Portsmouth, Virginia; and Seattle, Washington—joining Massachusetts (coordinated litigation), Chicago, and Baltimore City, which adopted similar plans in the late 1980s and early 1990s. In 2005, RAND called the “reemergence” of inactive dockets “one of the “most significant developments” in asbestos litigation. For years, the same principles have applied to cases on the federal asbestos multi-district litigation docket.

In addition, courts in Arizona, Delaware, Maine, and Pennsylvania have held that the unimpaired do not have a legal claim.

Stopping Improper Joinder. Some courts that have been inundated with asbestos filings have forced defendants to settle by joining disparate claims for trial, either in mass consolidations or in clusters. This judicial shortcut actually invites more claims. As mass tort expert Francis McGovern of Duke Law School has explained, “If you build a superhighway, there will be a traffic jam.” Georgia, Texas, and Kansas addressed this problem in 2005 and 2006 by enacting laws that generally prevent the joinder of asbestos and silica cases at trial unless all parties consent. Tennessee’s 2006 silica medical criteria law contained a similar reform.

Ending Forum Shopping. Forum shopping is a problem in both asbestos and silica litigation. Rather than file cases where there is a logical connection to a claimant or claim, plaintiff lawyers often sue in places the American Tort Reform Foundation has called “Judicial Hellholes[®].” Over the past three years, several key states have enacted venue reform laws to take their courts back from out-of-state litigation tourists. These states include Arkansas, Mississippi, and South Carolina. Texas closed a loophole that previously facilitated forum shopping abuse. Georgia and Florida enacted venue reforms applicable to asbestos and silica cases in 2005. Tennessee enacted a venue reform for silica cases in 2006. These laws generally require claimants to file where they reside or where the exposure giving rise to the claim allegedly occurred.

Conclusion. Recently, courts and legislatures in states with large numbers of asbestos and silica cases have acted to restore fundamental fairness and promote sound public policy in the litigation. These reforms are making a difference. As the CEO of Liberty Mutual Group recently testified:

The beneficial impact of these efforts cannot be overstated. Historically Texas, Ohio and Mississippi have been the leading states to generate claims filed against Liberty Mutual’s policyholders, collectively accounting for approximately 80% of the asbestos claims filed against Liberty Mutual’s insureds. Since the statutory and judicial reforms in those three key states, the decrease in the volume of claims has been truly remarkable. In Mississippi, the decrease has been 90%, in Texas nearly 65% and, in Ohio, approximately 35%. Across all states, from 2004 to 2005 we have seen over a 50% decrease in the number of new claims filed, a trend that continued in 2006. These numbers are the best evidence that state-driven initiatives are working

The Fairness in Asbestos Injury Resolution Act of 2006: Legislative Hearing on S. 3274 Before the Sen. Comm. on the Judiciary, 109th Cong. at 5 (June 7, 2006) (testimony of Edmund F. Kelly, Chairman, President & CEO, Liberty Mutual Group), available at 2006 WLNR 9748946.