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Asbestos Litigation Reform: Where Is It Headed?

By Mark A. Behrens & Phil S. Goldberg

When future lawyers look back on asbestos litigation reform efforts, they may point to June 2004 as a key moment. This is demonstrated by groundbreaking asbestos and silica/mixed dust reforms enacted in Ohio and broad, sweeping tort reform legislation enacted in Mississippi. Other states may become energized to build on these reforms. Courts also may look for solutions to the asbestos problem. This article provides an update of federal and state asbestos litigation developments in 2004 and discusses where reform efforts may be headed in the next year.

I. Introduction

When future lawyers look back on asbestos litigation reform efforts, they may point to June 2004 as a key moment. Ohio became the first state to enact legislation requiring a person to demonstrate actual impairment under objective medical criteria in order to support an asbestos or silica/mixed dust exposure claim. Days later, Mississippi

enacted sweeping tort reform measures. Mississippi is the site of several counties that some plaintiffs' lawyers call "magic jurisdictions"—the same places that the American Tort Reform Association has called "judicial hellholes."

The success of the Ohio and Mississippi reform efforts is likely to energize state legislative reform efforts, particularly given the apparent lack of consensus around a federal bill that can achieve the bipartisan support of 60 or more U.S. senators. Looking ahead, we believe that other state legislatures will become active in trying to solve the asbestos litigation crisis within their borders. State courts also are likely to work on solutions to the litigation. Efforts to find a national solution are certain to continue at the federal level.

II. The Status of Asbestos Litigation

Asbestos litigation has mushroomed in recent years, clogging the courts with over 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.

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Asbestos Litigation Reform

(Continued from page 1)

Recent reports indicate that as much as 90 percent of new asbestos-related claims are filed by the nonsick, leading to a well-documented litigation crisis. 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.

Payments to individuals who are not impaired have had the effect of encouraging more lawsuits, setting off a chain reaction of liability in the business community. These filings already have forced dozens of so-called "traditional" asbestos defendants into bankruptcy. With more than 70 defendants in bankruptcy, experience shows that the asbestos personal injury bar will cast its litigation net wider to sue more defendants. Now, more than 8,500 defendants have been named in asbestos cases—up from 300 in 1982. Many are either household names or small businesses. These defendants have only attenuated connections to asbestos, but they provide fresh "deep pockets," and that is why they have become targets of litigation.

Because of this snowballing effect, the litigation has spread like a renewed wild fire, taking on even greater proportions. These dynamics have led lawmakers and jurists on both the federal and state levels to explore with even greater urgency ways to enhance the asbestos litigation environment.

III. Federal Reform Efforts

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.

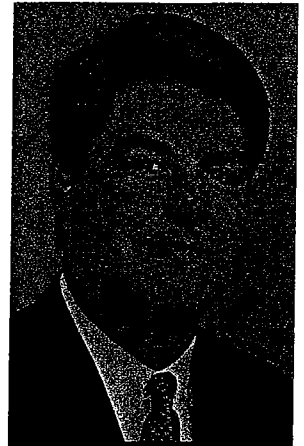
In July 2003, after a series of markup sessions, the Senate Judiciary Committee favorably reported the FAIR Act, largely along party lines. Although the bill moved out of the Committee, there were many unresolved issues, such as the fund's impact on pending claims, compensation levels, how the fund would 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, who was acting at the Senate's request to mediate discussions regarding the legislation.

On April 7, 2004, Chairman Hatch, in close coordination with Majority Leader Frist, introduced a substitute bill, S. 2290, to establish a \$124 billion

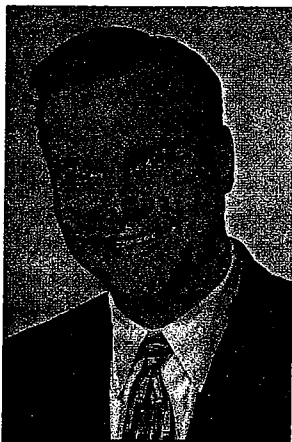
asbestos claimants compensation fund to be administered by the Department of Labor. The new bill reflected agreement on some difficult issues and attempted to address a number of concerns that had been raised but not resolved in negotiations. During the week of April 19, Majority Leader Frist fulfilled 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

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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 this year, we expect federal legislative reform efforts to resume next year. Congress may be open to pursuing less complex and comprehensive approaches, such as 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 also might address forum-shopping abuse, so that asbestos cases are no longer channeled into jurisdictions that have no logical connection to the claims.

IV. State Legislative Successes

A. Ohio

The first week of June 2004, Governor Taft signed H.B. 292 and H.B., 342, legislation setting minimum medical requirements for asbestos and silica/mixed dust claims. Both bills also set rules for premises liability actions and prescribe requirements for shareholder liability for asbestos claims under the doctrine of piercing the corporate veil.

H.B. 292, asbestos medical criteria, and H.B. 342, silica/mixed dust medical criteria, are groundbreaking in a number of respects. First, as mentioned, the asbestos bill marks the first time that medical criteria requirements have been adopted in legislation. The approach is modeled after judicially created asbestos docket management plans that exist in a number of courts. Second, Ohio is the first state to adopt either a legislative or judicial plan for curbing silica suits. The legislation took a "holistic approach" in adopting the silica bill, acting to avoid having silica filings exacerbated by

lawyers who might be discouraged from bringing weak or meritless asbestos suits as a result of H.B. 292.

There have been reports that some personal injury lawyers may initiate a petition drive to try to overturn the new laws through a referendum on the November 2004 ballot. Under Ohio law, supporters of the legislation would need to win at the ballot box for the laws to take effect.

After the November election, the Ohio legislature may take up additional tort reform legislation. In June 2003, the Senate passed S.B. 80 that includes 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. The House held hearings on the bill this spring.

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B. Mississippi

Mississippi adopted an asbestos litigation reform law and far-reaching tort reform legislation this year. In April 2003, the legislature passed H.B. 1517 to limit the asbestos-related liabilities of successors in subsequent mergers or consolidations to the current, fair-market value of the acquired company's assets at the time of the transaction. This law is important to companies like Crown Cork & Seal, whose only connection with asbestos is having bought a company long ago that once was involved with asbestos. By limiting liability in this fashion, the bill protects business

assets that were not part of the original company allegedly connected to asbestos.

In early June 2004, the legislature responded to Governor Haley Barbour's call for comprehensive tort reform by passing H.B. 13 during a special legislative session. The new law is certain to have an impact on asbestos, silica, and other litigation. The RAND Institute for Civil Justice has reported that Mississippi is among five states that handled 66 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. Mississippi is the site of roughly 60 percent of all silica filings in the United States.

H.B. includes a number of significant reforms:

- **Venue and joinder reform:** In Mississippi, parties have been joined in lawsuits purely for the purpose of getting jurisdiction in state court and venue in certain counties. To curtail forum shopping, H.B. 13 states that a civil suit may be filed in the county where the defendant resides (in the case of a corporation, the county of its principal place of business) or in the county where a "substantial alleged act or omission occurred or where a substantial event that caused the injury occurred." If venue cannot be asserted against a nonresident defendant under the above criteria, the plaintiff may file in the county where he or she lives. Venue must be proper for each plaintiff. If a claim would be more properly decided in another state, the trial court shall dismiss the claim or action. If the claim would be more properly decided in another county within Mississippi,

the case shall be transferred to the appropriate county. A case may not be dismissed until all defendants agree to waive the right to raise a statute of limitations defense in all other states in which the claim would not have been time-barred at the time the claim was filed in Mississippi.

- **\$1 million cap on noneconomic damages:** Noneconomic damages are capped at \$1 million for any civil defendant, keeping intact the state's existing \$500,000 noneconomic damages cap in medical malpractice cases.
- **Innocent product seller liability:** H.B. 13 insulates innocent sellers who are not actively negligent but instead are mere conduits of a product.
- **Punitive damages caps:** H.B. lowers several existing "sliding caps" on punitive damages. Now in Mississippi, punitive damages awards cannot exceed:
 - \$20 million for a defendant with a net worth of \$1 billion;
 - \$15 million for a defendant with a net worth between \$750 million and \$1 billion;
 - \$5 million for a defendant with a net worth of more than \$500 million but not more than \$750 million;
 - \$3.75 million for defendants between \$100 million and \$500 million;
 - \$2.5 million for defendants worth \$50 million but not more than \$100 million; or
 - Two percent of the defendant's net worth for a defendant with a net worth of \$50 million or less.
- **Protection for premises owners:** Civil liability is abolished for premises owners for death or injury to independent contractors or their employees if the contractor knew or reasonably should

have known of the danger that caused the harm.

- **Joint liability reform:** Joint and several liability is abolished. Defendants are not responsible for any fault allocated to an immune tortfeasor or a tortfeasor whose liability is limited by law.
- **Jury patriotism:** H.B. 13 seeks to make jury service more "user friendly" and less of a financial burden by more clearly defining hardship exemptions and by establishing a fund to supplement or replace lost wages for jurors in civil cases who serve for more than ten days.

C. Looking Ahead to 2005

As asbestos litigation continues to worsen, calls for reform will intensify. The apparent lack of consensus around a federal bill that can achieve strong bipartisan support may lead people to seek solutions to the litigation in state capitals and courts. More attention will be spent on state asbestos and tort reform efforts next year.

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, which may be modeled after the successful effort in Ohio, 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 refile if they develop an impairing condition.

Historically, Texas has been a key state for asbestos litigation. Texas led the nation in asbestos filings, according to the most recent RAND Institute for Civil Justice data, covering asbestos litigation between 1988 and 2000. By the mid-1990s, Harris, Galveston, and Jefferson Counties in Texas accounted for 42 percent of all new filings in the nation. Part of the reason why Texas has become an attractive location for plaintiffs is that awards have been high.

2. Maryland

In Maryland, H.B. 1346 was introduced in the General Assembly this year 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

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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. While the General Assembly adjourned before action could be taken this year, the legislative hearing on the bill illustrated that the ruling was against the original intent of the 1986 cap. The legislature is expected to consider a similar bill next year.

V. State Judicial Action

A. Inactive Dockets

Increasingly, courts are looking to inactive dockets and similar docket management plans to help preserve resources for the truly sick. Under these plans, the claims of individuals who cannot meet objective minimum 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.

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).

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.

In Texas, the trial judge with jurisdiction over pretrial proceedings of asbestos litigation filed after September 2003 has acknowledged the benefit of an inactive docket and has encouraged the parties to seek the input of the Texas Supreme Court as to whether he has the authority to adopt such a plan for cases under his jurisdiction.

In the late 1980s and early 1990s, three major jurisdictions pioneered inactive docket plans for unimpaired claimants—Boston, Chicago and Baltimore. Judges from all three courts have stated that they believe the plans are working well for all parties.

B. 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. 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. In these and other jurisdictions, courts have used mass consolidations as judicial shortcuts to clear their dockets. In practice, mass consolidations force defendants into settlement because they want to avoid the huge, disproportional verdicts generally associated with mass trials.

Specifically, the Mississippi court changed its previous position that broad joinder was appropriate under Mississippi Rule of Civil Procedure

20. Now, plaintiffs seeking joinder under Rule 20 must have a "distinct litigable event linking the parties" and, according to Rule of Civil Procedure 42, "the issues of law or fact justifying consolidation [must] predominate over individual issues." 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."

The new rule changes were issued the day after the court, sitting en banc, determined in *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004), that it was improper for fifty-six plaintiffs to be joined in a single Propulsid trial.

VI. State Judicial Elections That Matter

Of the judicial elections in November 2004 that could have an impact on asbestos litigation, the most important, given the legislative victory in Ohio, are for four of the seven seats on the Ohio Supreme Court: 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. Cuyahoga County Common Pleas Judge Nancy Fuerst is the Democrat.

In addition, 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., James Graves, Jr., and Michael Randolph (recently appointed to fill the seat vacated by retired Chief Justice Edwin Lloyd Pittman).

There also will be a key race for a seat on the Illinois Supreme Court between Republican Lloyd Karmeier and Democrat Gordon Maag, now an Illinois appellate court judge. Finally, in Michigan, Justice

Stephen Markman (R), appointed to the Michigan Supreme Court by then-Gov. John Engler in 1999 to fill a vacant seat, is up for reelection in November. He was elected to complete the term in 2000.

VII. Conclusion

State courts and legislatures are not likely to wait for a federal solution to the asbestos litigation crisis. This is demonstrated by the recent legislative reforms in Ohio and Mississippi and other reforms adopted by courts earlier this year. Future reforms in state legislatures and state courts are likely to give priority to the truly sick while preserving the ability of the nonsick to sue later should they develop an impairing condition related to asbestos or silica exposure.

"Increasingly, courts are looking to inactive dockets and similar docket management plans to help preserve resources for the truly sick."

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Our committee will be presenting the following programs that you won't want to miss:

Friday, August 6, 2004—Breakfast Meeting

- "Recent Developments in Drug and Medical Device Preemption Law"

Panelists:

Amy Padden, Wheeler, Trigg & Kennedy, P.C.
David Gossett, Myer, Brown, Rowe & Maw, LLP, WDC

Friday, August 6, 2004—3:45-5:15 PM

- "Successful Strategies for Minority and Women Rainmakers"

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