

APF

Civil Justice

# ALEC Model Legislation: Leading the Way to Help Address the Asbestos Litigation Crisis and Discourage Silica Litigation Fraud

*By Mark A. Behrens & Cary Silverman*

**A**sbestos litigation has reached crisis proportions. At least 322,000 asbestos claims are pending. Recent studies have shown that up to ninety percent of the claimants who file asbestos claims today are not sick. Those who are sick face a depleted pool of assets as asbestos lawsuits have bankrupted at least seventy-eight companies. As a consequence of these bankruptcies, the litigation has spread to thousands of small and medium size companies. Some companies have been drawn into the litigation solely because they merged with another corporation and therefore became liable for the torts of the predecessor. Plaintiff lawyers also are using mass screening techniques used to generate asbestos claims to recruit plaintiffs to file claims alleging exposure to silica from the use of industrial sand.

*Mark Behrens is a partner in Shook, Hardy & Bacon L.L.P.'s Public Policy Group, based in Washington, D.C. He serves as Advisor to ALEC's Civil Justice Task Force and has written extensively on asbestos and silica litigation issues. Cary Silverman is an associate in Shook, Hardy & Bacon L.L.P.'s Washington, D.C. office.*

ALEC has developed model legislation to address some of these problems by giving priority to claimants who can demonstrate physical impairment under objective medical criteria. Other ALEC model legislation would lessen the injustice from outdated successor liability laws. Reforms similar to the ALEC model bills are now law in several states.

## I. The Asbestos Litigation Crisis in a Nutshell

The vast majority of new asbestos claimants - up to ninety-percent - are "not impaired by an asbestos-related disease and likely never will be," according to Christopher Edley, Jr., a former Harvard Law School Professor and current Dean of the University of California-Berkeley's Boalt Hall School of Law. Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by unimpaired claimants.

Mass screenings conducted by plaintiffs' lawyers are driving the filing

of these claims. *U.S. News & World Report* has described the claimant recruitment process: "To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'"

These filings have created judicial backlogs and are exhausting scarce resources that should go to the sick and dying and their families. Now that scores of defendants have been forced into bankruptcy, 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 the trust set up to pay claims after Johns-Manville declared bankruptcy has cut its settlement payments to just five cents on the dollar after being swamped by claims filed by persons with no discernable impairment.

The plaintiffs' bar has responded to the accelerating number of asbestos-related bankruptcies by casting the litigation net wider. More than 8,500 defendants have been named in asbestos cases. According to plaintiffs' attorney Richard Scruggs, the litigation has become an "endless search for a solvent bystander." The Congressional Budget Office has observed that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities." These defendants are named in asbestos cases because they provide fresh "deep pockets" for plaintiffs' lawyers.

State legislatures are responding to these problems by enacting laws to prioritize asbestos claims using objective criteria developed by the medical community. In 2004, Ohio became the first state to require plaintiffs to demonstrate physical impairment in order to bring or maintain an asbestos-related action. In 2005 and 2006, Florida, Georgia, Kansas, South Carolina, and Texas enacted similar reforms. Early indications show these laws are working as intended to prioritize asbestos claims and suspend the claims of the non-sick.

## II. The Growth of Silica Litigation

For years, litigation against industrial sand manufacturers and other aggregates and industrial minerals companies, respirator (dust mask) makers, and related safety equipment manufacturers by workers alleging health conditions from workplace exposures to silica was stable, with only a low number of people pursuing claims each year. In recent years, however, the number of silica lawsuits has risen dramatically. Some have speculated that asbestos personal injury lawyers are using mass screenings to generate silica cases as a way to "diversify" beyond asbestos and circumvent legislation on that issue. Some lawyers are even filing asbestos "re-tread" cases – bringing silica lawsuits on behalf of people who have already received an asbestos-related recovery. The *National Law Journal* reported in February 2005 that at least half of the approximately 10,000 plaintiffs in the federal multi-district silica litigation had previously filed asbestos claims. In June 2005, the manager of the federal silica litigation,

U.S. District Court Judge Janis Graham Jack of the Southern District of Texas, issued a scathing opinion in which she recommended that all but one of the 10,000 claims on the docket should be dismissed on remand because the diagnoses were fraudulently prepared. “[T]hese diagnoses were driven by neither health nor justice,” Judge Jack said in her opinion. “[T]hey were manufactured for money.” The U.S. Attorney’s Office in the Southern District of New York has since convened a federal grand jury to investigate the screenings. A congressional investigation also has been launched.

In 2004, when the Ohio legislature adopted its asbestos medical criteria law, it also enacted legislation to help ensure that silica filings would not be exacerbated by plaintiffs’ lawyers who might be discouraged from bringing weak or meritless asbestos suits as a result of the new asbestos law. Georgia, Texas, Florida, Kansas, and South Carolina addressed asbestos and silica claims simultaneously. In 2006, Tennessee also enacted a silica medical criteria reform law.

### **III. Ending Forum Shopping**

Forum shopping is a problem in both asbestos and silica litigation because different states and different jurisdictions within states treat claims differently. Rather than file cases where there is a logical connection to an injury, plaintiff lawyers often strategically file cases in certain areas referred to as “magic jurisdictions” by Mississippi trial lawyer Richard Scruggs, or “Judicial Hellholes” by the American Tort Reform Foundation. These are places that have developed a reputation for producing large settlements and verdicts because court procedures and

laws are routinely applied in an unfair manner against civil defendants.

The filing of asbestos and silica cases in jurisdictions that have no meaningful connection to the claim or the claimant creates judicial inefficiencies, clogs the courts for local people trying to resolve local issues, burdens local jurors who must take time away from work or home to decide disputes that should be heard elsewhere, raises expenses for local taxpayers, and often results in unfair procedures that raise serious due process issues for defendants.

State legislatures are starting to take their courts back from out-of-state litigation tourists. Over the past three years, Florida, Mississippi, South Carolina and West Virginia enacted meaningful venue reform legislation, and Texas closed a loophole that previously facilitated forum shopping abuse. These laws generally require claimants to file where they reside or where the exposure giving rise to the alleged injury occurred.

### **IV. Shutting Down the Consolidation Cuisinart**

Some courts that have been inundated with asbestos and silica claims have tried judicial shortcuts to move the dockets at a faster pace. One technique that is particularly unfair to the litigants is to join disparate claims for trial, either in mass consolidations or in clusters. People with serious illnesses, such as mesothelioma or lung cancer, are often lumped together with claimants having different alleged harms, or no illness at all – “apples are joined with oranges.” Defendants have no real ability to defend the cases, and are forced to settle, regardless of the merits of the individual claims.

Instead of clearing dockets, consolidations actually invite more claims. Indeed, RAND recently concluded “it is highly likely that steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved.” As mass tort expert Francis McGovern of Duke Law School has explained, “[i]f you build a superhighway, there will be a traffic jam.”

### V. Successor Asbestos-Related Liability

By statute or case law, it is the general rule that when a predecessor merges with another corporation, the successor can be held liable for the torts of the dissolved predecessor. The successor can be liable even if it did nothing wrong — and even if the activity of the predecessor that created the liability was terminated before the merger. In such circumstances, even if the predecessor is a small company and the successor a large company, an overwhelming injustice can strike employees, shareholders, lenders, and other stakeholders of the larger successor, as even the largest of successor corporations can be threatened with bankruptcy.

One of the companies swept up in the dragnet search by plaintiffs’ lawyers for new asbestos defendants is Crown Cork & Seal, a leading manufacturer of packaging products for consumer goods. Crown never manufactured, sold, or installed a single asbestos-containing product in the company’s 100-year history. Yet, in recent years,

the company has been named in more than 300,000 asbestos-related claims because of its brief association forty years ago with a dormant division of Mundet Cork Co., a company that made bottle caps, just as Crown did.

Before Crown acquired a majority interest in Mundet for \$7 million in 1963, Mundet had a small side business making, selling, and installing asbestos insulation. By the time of Crown’s stock purchase, however, Mundet had shut down its insulation operations. Crown never operated the insulation manufacturing operation. Within ninety-three days after Crown obtained its stock ownership interest in Mundet, what was left of the Mundet insulation division — idle machinery, leftover inventory, and customer lists — was sold off by Mundet. Thereafter, Crown acquired all of Mundet’s stock and Mundet, now having only bottle-cap operations, was merged into Crown in January 1966. As a

result of its brief passive ownership, Crown has been sued in asbestos-related cases solely as a successor to Mundet Cork. Crown’s initial investment in Mundet four decades ago has cost Crown more than a half a billion dollars in asbestos-related payments.

Crown’s story illustrates the unfairness of asbestos litigation. As U.S. Senator Orrin Hatch said on the Senate floor in April of 2004: “The trial lawyers have made Crown Cork & Seal pay dearly for the 90 days it owned the insulation division of Mundet.... They should never have had to pay a dime to begin with.”

**The successor  
can be liable  
even if it did  
nothing wrong.**

## VI. ALEC Model Legislation Restores Fairness

### A. The *Asbestos and Silica Claims Priorities Act*

ALEC developed the *Asbestos and Silica Claims Priorities Act* to provide legislators with a sound and fair model to improve the way asbestos and silica cases are handled by state courts. In particular, the ALEC model bill seeks to address in a surgical and narrowly tailored manner the key problems outlined above by: (1) adopting fair and reasonable objective medical criteria recognized by the medical community to define when someone is impaired as a result of asbestos or silica exposure and to give priority to those claimants while tolling statutes of limitations for claimant who have been exposed to asbestos or silica, but who do not have a present physical impairment; (2) addressing the problem of forum shopping abuse by requiring claims to be filed in the state and county with a logical connection to the claim; (3) stopping the unfair and improper joinder of dissimilar asbestos and silica claims; and (4) providing a mechanism to police unethical medical expert testimony.

### B. The *Successor Asbestos-Related Liability Fairness Act*

ALEC's model *Successor Asbestos-Related Liability Fairness Act* restores fairness to successor liability by providing that plaintiffs allegedly harmed by the predecessor would be able to collect from the successor no less than the same amount they could have collected if no merger had occurred: the total gross asset value of that predecessor at the time of the merger. The successor would get credit for all the settlements or judgments it has paid

or committed to pay since the merger. The successor's liability would cease when it had paid or committed to pay as much as the predecessor's gross assets would now be worth (adjusted upward for the passage of time). Any successor that independently commits a tort — whether before or after a merger — could still be held liable to the full extent of its own assets for any harm it causes.

Laws similar to the ALEC model have been enacted in Florida, Mississippi, Ohio, Pennsylvania, South Carolina, and Texas. Recently, a Texas appellate court in *Robinson v. Crown Cork & Seal Co., Inc.*, 2006 WL 1168782 (Tex. App. May 4, 2006), upheld Texas's successor asbestos-related liability law as a legitimate exercise of the legislature's police power.

### Conclusion

ALEC's *Asbestos and Silica Claims Priorities Act* and *Successor Asbestos-Related Liability Fairness Act* offer a balanced approach to managing some of the most unfair aspects of asbestos and silica litigation. Through enactment of these model bills, states are leading the way in reform. As more legislators look for ways to improve the asbestos and silica litigation environment in their own states, they should enact laws based on the ALEC models.