Legal Backgrounder

Washington Legal Foundation

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2009 Massachusetts Ave., NW
Washington, D.C. 20036
202.588.0302

Vol. 17 No. 13

February 22, 2002

ASBESTOS LITIGATION CRISIS REQUIRES POLICYMAKERS' ATTENTION

by

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Courts are experiencing an explosion of asbestos litigation. Between 1993 and 1999, the number of pending cases nationwide doubled. Analysts predict that up to 700,000 more cases will be filed by 2050. The number of future claimants could reach two million.

The crisis is fueled by filings by unimpaired claimants, aggressive personal injury lawyers, the tendency to promote efficiency over fairness, and the willingness to permit multiple punitive damages awards for conduct that ended decades ago. Resources are being depleted that that should go to "the sick and dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.,* 121 S. Ct. 2216 (2001) (quoting *In re Patenaude*, 210 F.3d 135, 139 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 565 (2000)).

To date, at least 43 companies have been driven into bankruptcy by asbestos. In 2001, Federal-Mogul Corp., USG Corp., W.R. Grace & Co. and G-I Holdings, Inc. (formerly known as GAF Corp.) sought Chapter 11 protection. In 2000, Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning, and Armstrong World Industries, Inc. all declared bankruptcy. More filings are likely. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, MEALEY'S LITIG. REP.: ASBESTOS, Vol. 16, No. 6., Apr. 20, 2001. These bankruptcies are squeezing so-called "peripheral defendants" — companies sued to make up for insolvent "traditional defendants."

These combined forces have resulted in a "domino effect." Payments to the unimpaired have encouraged more claims, depleting the assets of "traditional defendants." Each new bankruptcy puts "mounting and cumulative" pressure on the remaining solvent defendants and accelerates the bankruptcy process. Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993) [hereinafter Edley & Weiler]. New defendants are sued to make up for the shares of bankrupt defendants; new defendants themselves begin to collapse under the weight of new claims, and the process goes on.

This system is bad for almost everyone, particularly sick claimants. Without changes, claimants who become ill later may not receive adequate compensation. Changing the current asbestos compensation system would be pro-claimant and pro-defendant.

The Explosion of Asbestos Lawsuits. When asbestos lawsuits emerged in the 1970's, no one predicted

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that courts thirty years later would face a worsening crisis. Production and use of new asbestos products largely ceased in the United States in the early 1970's, and the large latency period between exposure and manifestation of asbestos-related diseases led many to believe that the litigation would be a declining problem. Unfortunately, this has not proven true.

Unimpaired Claimants Fuel The Explosion. Most new asbestos claimants — as much as 90 percent — are only mildly impaired or are not sick at all. *See Transcript of Dec. 10 Tel. Conf.* (Dec. 10, 2001), *available at* <http:\\www.halliburton.com> (stating that 90 percent of asbestos claims against Halliburton are by unimpaired claimants); Quenna Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12 (reporting that "as many as 80% of [GAF's] asbestos settlements are paid to unimpaired people."). They are "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease are likely never will be." *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School). Many of these claimants sue to avoid being time-barred if they do not file after the first markers of exposure are detected. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. On the Judiciary*, 106th Cong., at 4 (July 1, 1999) (statement of Dr. Louis Sullivan, former Secretary of the Department of Health and Human Services). But "their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now." Edley & Weiler, at 393.

Judge Weiner, who oversees the asbestos multidistrict proceedings, explains that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions," but they "are prone to be lost in the shuffle with pleural and other non-malignancy cases." *In re Asbestos Prods. Liab. Litig.* (No. VI), 1996 WL 539589, at *1 (E.D. Pa. Sept. 12, 1996). Today, given the volume of claims and the disappearance of any effective injury requirement, defendants are paying those who are not really injured.

A look at just one state confirms this view. In November, 2001, a Texas jury awarded $3 million to three plaintiffs exposed to asbestos at an aluminum plant. *See Texas Jury Awards $3 Million in Asbestos Exposure Case*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001). "Their attorney said the verdict was reached even though the plaintiffs who do not have cancer were forbidden from testifying on their fear of developing the disease from past asbestos exposure." *Id*. Only months earlier, another Texas jury awarded 22 plaintiffs $35 million for "future physical impairment" and "future medical costs" although it is likely that these claimants will never become seriously ill. *Two Asbestos Defendants Hit With $35 Million Verdict*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

Claims by the unimpaired clog the court system, causing delays for sick claimants and others in the justice system. Perhaps most troubling, "[t]he continued hemorrhaging of available funds deprives current and future victims of rightful compensation" for real injuries. *See Collins*, 233 F.3d at 812.

Courts Partly to Blame. Courts are partly to blame. Faced with an "elephantine mass of asbestos cases," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), many judges have focused on promoting efficiency and expediting resolutions. It was hoped that this process would put money in the hands of the sick promptly, reduce transaction costs, and ultimately clear the docket. Instead, the situation is worse. As one professor has written: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. The courts increase demand for new cases by high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997). *See also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995) ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more

  ISBN 1056 3059

and larger mass tort filings become.").

How Can States Respond? States should give serious consideration to how they can take action to preserve assets for impaired claimants. By doing so, they can reduce pressures on remaining defendants and slow the spread of the litigation. Helpful reforms include: (1) establishing inactive docket plans, also known as a pleural registries or deferral registries; (2) abolishing multiple punitive damages in asbestos cases; and (3) fair share liability reform.

1. Inactive Docket Plans. Inactive docket programs allow impaired claimants to be heard promptly by "deferring" claims of unimpaired claimants to an "inactive docket" until actual impairment develops. Under these plans, individuals without objective medical criteria are placed on a docket where statutes of limitations are tolled, and all discovery stayed. Claims are re-activated when claimants present credible medical evidence of impairment. Impaired claimants thus move "to the front of the line."

Removing long delays is important, particularly for older claimants and those with fatal diseases. The program also benefits unimpaired individuals by protecting claims from being time-barred. This reform defuses limitations concerns underlying claims by many unimpaired individuals. Transaction costs would be substantially reduced because no discovery is conducted of unimpaired claimants.

Inactive docket programs have existed for many years in Massachusetts, Illinois, and Maryland. They have proven to be fair and workable, and should be adopted elsewhere. *See* Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001).

2. End Punitive Damages Overkill. In the asbestos context, punitive damages no longer serve the purposes of punishment and deterrence. Indeed, future claimants may suffer the most. Punitive damages recoveries "threaten fair compensation to pending and future claimants and threaten the economic viability of defendants." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 32 (Mar. 1991). This is true even when cases are settled, because of the *in terrorem* effect punitive damages have at the settlement table.

Texas juries have returned punitive verdicts in asbestos cases frequently. Examples from 2001 include:

•Five plaintiffs were awarded $130 million, including $70 million in compensatory damages and $60 million in punitive damages.

•$55 million was awarded to a man with mesothelioma, including $12 million in compensatory damages to the plaintiff, $5.5 million for his wife, $14 million for the couple's children, plus an additional $15 million in punitives (later reduced to $2.75 million).

•A defendant was hit with an $18 million damage award, including $15 million in punitives, for a single asbestosis claim.

•A jury awarded $11.1 million, including $3 million in punitives, against two defendants.

With awards of this magnitude, it is no surprise that plaintiffs' lawyers seek punitive damages in every case.

Some courts are moving to protect assets to cover later claims. Recently, the U.S. Court of Appeals for the Third Circuit approved a decision to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages cases for trial. The court concluded: "It is responsible public policy

  ISBN 1056 3059

to give priority to compensatory claims over exemplary punitive damage windfalls." *In re Collins*, 233 F.3d , at 812. Courts in Maryland, and Pennsylvania have severed, deferred, or stayed indefinitely asbestos punitive damage claims. In New York, some judges have severed and indefinitely deferred punitive damage claims in asbestos cases. Other states should follow this lead.

3. Fair Share Liability Reform. The rule of "joint and several liability" provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. Joint liability is unfair, because it puts full responsibility on those who are only marginally at fault. Joint liability contributes to the spread of asbestos litigation.

Most states have abolished or modified the principle of joint liability, but the laws are riddled with exceptions. In 1995, for example, the Texas legislature abolished joint liability, except for defendants found to be "greater than 50 percent" at fault. In asbestos cases, however, joint liability continues to apply to any defendant whose fault is determined to be "equal to or greater" than 15%. For example, AC&S Inc. was recently ordered to pay a former Navy machinist and his wife $3.1 million in damages in an asbestos case, even though AC&S was found only 20% responsible.

At a minimum, states should consider abolishing joint and several liability for defendants who are less than 50% responsible. States may even consider moving to a pure "fair share" proportionate liability system in all tort cases, as some jurisdictions have already done.

Conclusion. It is time to take a fresh look at the asbestos litigation environment and address the serious problems of today, particularly those caused by huge numbers of filings by unimpaired claimants, the drain on resources caused by multiple punitive damages awards, and the need for additional fair share liability reform. As Senior United States Circuit Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals has stated:

> It is time – perhaps past due – to stop the hemorrhaging so as to protect future claimants. . . . [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.

Dunn, 1 F.3d at 1399 (Weis, J., dissenting).

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