

Maybe This Time

Though asbestos litigation has been on the scene since the 1970s, recent legislative initiatives and the ripple effects of a landmark federal court opinion may lead to a permanent answer to the liability litigation question.

by Eleanor Barrett

With new state laws, a query by two ranking U.S. Representatives and a recent landmark federal court case decision added to the scene, it appears the well-worn road of asbestos and silica litigation is beginning to narrow.

For insurers, the news is welcome. According to a soon-to-be released A.M. Best Co. special report on asbestos and environmental liability, insurers sustained \$26 billion in asbestos-related claim costs between 1999 and 2004 alone. As losses continue to mount over time, the cost is expected to climb as high as \$65 billion, the company reports.

"Because of the current tort system, insurers face unlimited exposure to asbestos claims. Our point is, the money available from insurers is limited and it should go to those claimants who are truly sick from asbestos, which has not been the case in recent years," said

American Insurance Association spokesman Dennis Kelly.

This has been the goal of state reforms that have cropped up since 2004 in Georgia, Ohio, Texas and Florida. With varying degrees of severity, the laws seek to rein in nonmalignant claims by boosting medical criteria and venue rules and were pushed by defendant corporations and insurers as Congressional efforts at reform have been slow in coming.

With 15 bills tried and failed since the inception of asbestos litigation in the 1970s, the latest federal initiative is the Fairness in Asbestos Injury Resolution Act, which would establish a \$140 billion asbestos compensation trust fund and was approved by the Senate Judiciary Committee in May.

The Ruling With Legs

State and federal campaigns aside,

Key Points

- Since 2000, the U.S. property/casualty insurance industry has incurred ever-increasing asbestos losses.
- The tort tide appears to be turning in the face of state reforms and pending federal initiatives.
- A federal district court judge's denouncement of 10,000 silica cases has emboldened the defense of asbestos cases and spurred on investigations by key members of Congress and the U.S. Attorney's Office.

leading the interference has been the June landmark opinion issued by United States District Judge Janis Graham Jack of the Southern District of Texas in Corpus Christi, Texas. In denouncing 10,000 cases purporting diagnoses of silicosis—a suffocating lung disease caused by prolonged inhalation of fine sand particles—Jack exposed the

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Photo courtesy of United States District Court, Southern District of Texas



SETTING THE STANDARD: United States District Judge Janis Graham Jack of the Southern District of Texas in Corpus Christi, Texas, issued a landmark opinion regarding silicosis in June.

underbelly of a mass screening process that makes bedfellows of doctors and lawyers.

Jack's 249-page opinion outlined more than a year of pretrial hearings during which she accused plaintiffs' lawyers of filing legal claims for people who had not actually been diagnosed with silicosis. "On a number of different levels, the claims defy all medical knowledge and logic," Jack wrote. "These diagnoses were driven by neither health nor justice. They were manufactured for money."

According to a RAND Corp. study, of the \$70 billion in asbestos injury claims paid since the 1970s, 42% has gone to claimants, 31% toward defense costs from insurers and other sources and 27% to plaintiffs' lawyers.

"The one finding that stuck out more than anything else is all the money, more than half of which is going to legal fees and related expenses," said Stephen Carroll, a senior economist at the RAND Institute for Civil Justice and lead author of the 200-page study on asbestos litigation released this summer. "We have a whole lot of people who are sick and a whole lot of money being spent trying to get compensation to those people. In the course of doing that, we are

driving a whole lot of businesses out of business."

Seeking to use Jack's declaration to place fire at the feet of existing asbestos claims, U.S. House Energy and Commerce Committee ranking members Reps. Joe Barton, R-Texas, and Ed Whitfield, R-Ky., in August cast a net out to three screening companies and a dozen doctors, seeking information on the practices they engaged in related to 9,000 incorrect silicosis diagnoses uncovered by Jack.

"The most salient and troubling picture to emerge from the silica opinion is that individuals entrusted with the health care of patients may have corrupted basic principles of medical standards and practice in the service of litigation," the congressmen wrote. "Here there were two main actors involved in developing the medical information and diagnoses necessary to support the lawsuits: medical screening companies and physicians."

Also based on the case, the U.S. attorney's office in Manhattan has opened a criminal investigation, according to *The New York Times* and *Fortune*.

Refusing to Pay Claims

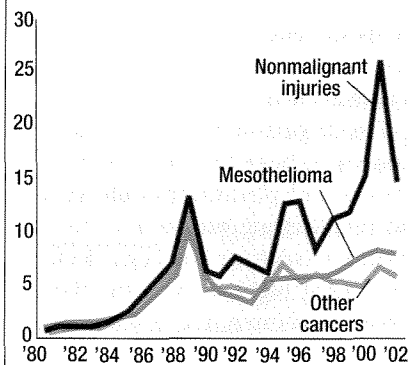
Another ripple-effect action came in September, when the Claims Resolution Management Corp. of the Manville Personal Injury Settlement Trust nixed payment of new claims based on the diagnoses of nine physicians and four screening companies whose names were attached to the case before Judge Jack, in which six doctors recanted their original diagnoses.

This is significant as the Manville Personal Injury Settlement Trust is one of the oldest and largest trusts established to compensate asbestos claimants. The Trust was formed following the 1986 bankruptcy reorganization of Johns-Manville, which used the cancer-causing, fibrous mineral compound to produce roofing and insulation products. Since 1988, the trust has paid out \$3.3 billion to settle 655,096 claims.

The Manville Trust is no longer alone. Since the Johns-Manville bankruptcy, more than 70 other companies

Trends in Asbestos Claims By Injury Type

Beginning in the 1990s, the number of people asserting nonmalignant injury grew much faster than the annual number of new claimants asserting some form of cancer.



Source: RAND Corp.

have filed for Chapter 11 reorganization, many within the past five years and many of which are in the midst of establishing personal injury trusts to compensate claimants.

From Johns-Manville to Halliburton subsidiaries, one thing most cases have in common is the names of the doctors and screening companies attached to each claim.

"There's no doubt that a very small number of doctors result in an extremely large percentage of the total asbestos litigation diagnoses. The silica litigation before Judge Jack certainly has highlighted the fact that many mass tort claims are litigation driven rather than illness driven," said C. Michael Evert Jr., a partner in the Atlanta law firm of Evert & Weathersby, who has spent the past 20 years defending companies being sued for asbestos exposure.

He noted that, over the years, there has been a change in the nature of asbestos cases. "The vast bulk of exposure to asbestos that occurred in the workplace in the 1980s was from the use of thermal insulation materials and early asbestos claims focused exposure on those materials," Evert said. "There's been a significant evolution over the years. Defendants now involved are only tangentially involved with asbestos products, so the claims of the

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Photo courtesy of United States District Court, Southern District of Texas

Regulatory/Law

plaintiffs are much farther removed from a traditional exposure claim.”

According to RAND, beginning in the 1990s, the number of people asserting nonmalignant injury, including those with little or no current functional impairment, grew much faster than the annual number of new claimants asserting some form of cancer. By the late 1990s and early 2000s, such claims rose to more than 90% of all annual claims.

The culprit behind the bulk-up of claims has been the mass screening process and plaintiff-friendly venues, said Lisa Rickard, president of the U.S. Chamber Institute for Legal Reform. One recent highlight was the filing of 139 asbestos cases and 35 silicosis cases



“[Trial lawyers] use a small group of doctors and screening companies and take the show on the road.”

—Lisa Rickard,
U.S. Chamber Institute for Legal Reform

over two days in September. The venue, Madison County, Ill., has been cited by the Chamber as being among the “worst jackpot jurisdictions in the country.”

“It’s a business model [trial lawyers] are using. They shop for plaintiffs and pull them in. They use similar screening techniques; set up a trailer in the Sizzler parking lot. They use a small group of doctors and screening com-

panies and take the show on the road,” Rickard said. “We’re talking about mass tort litigation that is not founded on actual harm and that results in massive settlements that are paid by businesses. This country needs a system of litigation that compensates the truly ill and keeps the unimpaired claims out.”

Meanwhile, defendants are cautiously optimistic that progress appears to be pending.

Mark Lederer, chief financial officer of the Manville Personal Injury Settlement Trust, said that since 2003, all claims to the Manville trust have dropped dramatically, including nonmalignant claims, from a high of more than 90,000 in 2003 to just over 10,000 last year. While he credits the 2003 spike to a revamping of the trust’s compensation system, it makes sense that recent action on the asbestos and silica fronts is also having some impact.

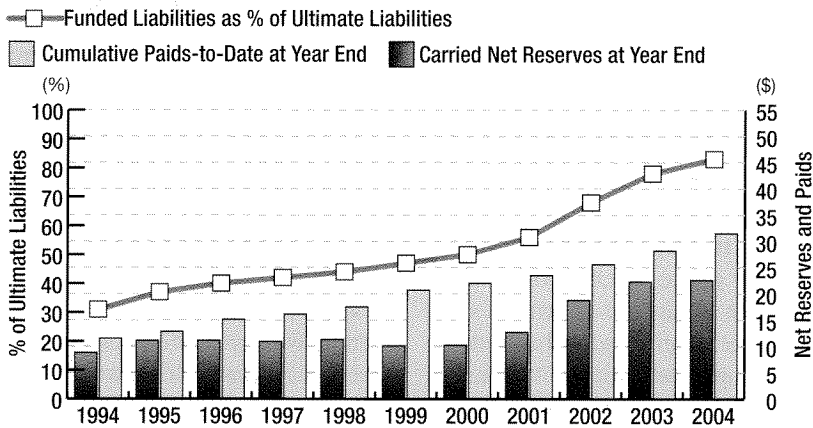
“The issue always, when you confront change, is to find out what drove the change,” Lederer said. In addition to changes in the trust that strengthen the medical and exposure criteria, external factors such as state reforms and the federal FAIR Act may also be playing a part in fueling the decline of claims, he said.

“Judge Jack’s opinion was probably one of the most important developments that have come to the Trust of late. We were aware of these doctors before and we were aware of mass screening before, but I think Judge Jack’s decision and everything that came out in that litigation signified a turning point,” Lederer said.

The American Trial Lawyers Association did not respond to a query seeking comment for this story. Mississippi trial lawyer Richard Scruggs, well-known for representing plaintiffs in tobacco and asbestos cases, did not return several queries seeking comment. **BR**

Estimated Industry Asbestos Funded Liabilities — 1994-2004

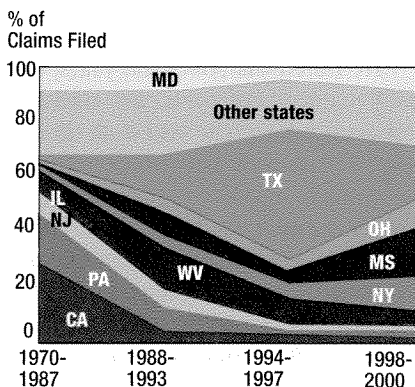
As a % of ultimate liabilities.



Source: A.M. Best Co.

Where Asbestos Claims Are Filed

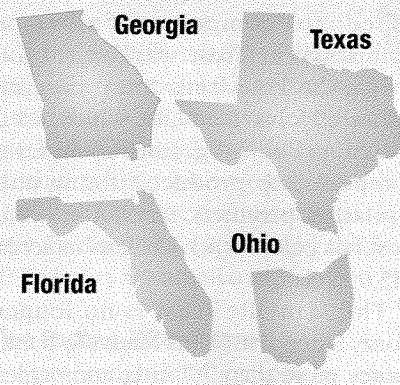
Some states attract more filings than others.



Source: RAND Corp., January 2003

Making a Change

These states enacted asbestos litigation reforms in 2004 and 2005.



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