Research Report

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A Review Of Asbestos Litigation

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ABOUT THE TEXAS PUBLIC POLICY FOUNDATION

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute guided by the core principles of limited government, free enterprise, private property rights and individual responsibility.

The Foundation's mission is to improve Texas government by generating academically sound research and data on state issues, and by recommending the findings to opinion leaders, policy makers, the media and general public. The work of the Foundation is conducted by academics across Texas and the nation, and is funded by hundreds of individuals, corporations and charitable institutions.

By refusing government funding, the Foundation maintains its independent voice on the issues important to Texas' future.

In 1989, a small group of civic-minded Texans created the Texas Public Policy Foundation to bring independent, market-based thinking to tackle problems facing state government. Through the years, the Foundation has championed solutions to the day's pressing issues, and won support for market-based policies that have made Texas a better place to live and work.

The Foundation's impact on public policy is substantial, and has been noted by lawmakers and opinion leaders alike. The *Dallas Morning News* has said the Foundation is "dubbed the 'official think tank of Texas' by friends and foes."

Introduction

Asbestos litigation is a nationwide phenomenon. Asbestos plaintiff litigants have been firmly in the driver's seat now for over three decades. The power of the plaintiffs to extend their reach to claim large sums of money from corporations barely touched by asbestos use is undisputed. The result has been a large redistribution of wealth from consumers and shareholders to plaintiffs and lawyers.

The court system exists partially to resolve disputes when one party allegedly damages another party. Ideally, tort dispute resolution through the courts achieves a form of justice. Damaged parties can receive compensation for damages. Also, punitive awards can produce an incentive for parties that can potentially harm others to not produce the harm in order to avoid court resolution. Economically speaking, the desirable result of this system is to avoid situations where the costs of an economic activity are greater than its benefits.

Unfortunately, asbestos litigation seems to have departed from the ideal of just compensation and producing desirable incentives. Where litigation is supposed to produce net benefits for society, the special case of asbestos litigation has very likely produced net costs. Asbestos litigation has likely caused this by producing an economic environment with unjustifiably increased risks for manufacturers, reducing what would otherwise be economically efficient investment and the jobs that go with it.

There exists a generous literature regarding asbestos tort phenomena, with efforts to determine the costs it has produced for the nation's economy. In order to understand how asbestos litigation has affected us all, it is helpful to review this literature and to determine how it applies to Texas, which has often led the nation in the number of asbestos lawsuits filed. Plaintiff lawyers are always looking for the next "asbestos" and there is a good deal of evidence that the legal system needs to be re-tooled to handle it.

A Brief History of Asbestos Use and Exposure

Asbestos has been used in products for centuries. It was woven into fabrics to be used as cloaks, curtains, tablecloths and other fire-resistant products (Alleman, Mossman 1997). More modern uses have included fireproofing for ships, home insulation, drinking water pipes, roofing and flooring, and children's toys. Asbestos fibers have long been prized for their ability to resist fire as well as their softness and flexibility. Their utility has been so great throughout history that at one time asbestos was known as the "miracle fiber" (White 2004).

Because of its abundance, low price and versatility, over 30 million tons of asbestos have been mined and used in production since the early part of the 20th Century (Kamp and Weitzman 1999). U.S. production peaked at 750,000 metric tons in 1974 (White 2004). The main industrial uses of asbestos through which workers were exposed are primary manufacturing (friction products, pipes, textiles, and construction materials), secondary

manufacturing (heating equipment, furnaces and house wares), shipbuilding, and repair and construction (Carroll, et al. 2002).

Asbestos is a general term that refers to six different fibrous, silicate minerals that contain silicon and oxygen. It is found in two-thirds of the rocks on earth and becomes airborne through earthquakes and landslides. Through this process, the average person inhales from 10,000 to 15,000 fibers per day (Ridenour 2003). There are two main types of asbestos, chrysotile (or serpentine) and amphibole. Amphibole is the truly dangerous type, having small, needlelike fibers that are likely to stay in the lungs longer (even permanently), thus having a high level of toxicity (Agency for Toxic Substances and Disease Registry 2003).

Of the varieties of asbestos fibers, three have been most often used in manufacturing: chrysotile, amosite and crocodolite. The last two are part of the amphibole family and are quite dangerous. Chrysotile is the type that occurs naturally in the U.S. and Canada, accounting for 95 percent of all asbestos used in the U.S. Because chrysotile fibers are long and twisted, they are more easily expelled from the lungs than the amphibole varieties. In fact, Canadian chrysotile miners and Americans living near a large outcropping of chrysotile near San Francisco show no increased risk of asbestosis or lung cancer. The amphibole varieties, however, were heavily imported from South America during World War II and used in naval ships and other vessels as insulation (Ray 1990).

Even though asbestos has long been known to have potentially harmful effects – Pliny the Elder wrote about it (White 2002) – the effects were not widely known nor well understood. Thus, widespread exposure to asbestos continued up to the 1970s. Nicholson, Perkel and Selikoff (1982) estimated that over 27 million industrial workers were exposed to asbestos.

Beginning in the 1920s, physicians and researchers began to notice a connection between asbestos exposure and disease. One of the earliest cases of asbestosis was discovered in 1924 in a person who had spent twenty years weaving asbestos textile products (Borel v. Fibreboard Paper Products Corp 493 F.2d 1076, 1973). The British government began to regulate workplace safety relating to asbestos in 1931 (White 2004).

The initial responses in the U.S. to the dangers of asbestos came largely through the regulatory system. Occupational safety and product safety regulations gradually developed from the 1930s to the 1960s, but were largely ineffective. Some of this was because the rules were voluntary or poorly enforced. But some producers, such as Johns-Manville, sought to hide information about the risks, refusing to notify its workers when they were diagnosed as having asbestosis by company physicians. Legislative failure also played a role, as elected officials responded positively to industry efforts to relax regulatory measures (White 2004).

Workers' compensation was one of the administrative measures used to address asbestos-related illnesses, but with limited success. The statute of limitations on filings for benefits caused many workers who became ill many years later (asbestos-related illnesses can

take forty years and longer to manifest themselves) to be ineligible to file for benefits. And other workers were unable to access courts to pursue their claims because workers' compensation was often their sole legal remedy.

It wasn't until the 1960s that information about the problems with asbestos began to be widely disseminated. The pioneering work on illnesses related to asbestos exposure was done by Dr. Irving Selikoff at the Mount Sinai School of Medicine in New York beginning in 1962 (House Research Organization 2004). His work is still the standard reference used by litigators, but much more research has been done in the last forty years.

These studies have identified various illnesses that can be associated with asbestos exposure, but the two main ones are asbestosis and mesothelioma. Research strongly supports a relationship between asbestos exposure and these two diseases – they are known as "signature diseases" that are uniquely associated with asbestos exposure (White 2002).

Asbestosis is scarring of the lungs that reduces breathing capacity; its effects range from nondisabling to (rarely) producing fatality. Pleural thickening or plaques is the mildest form of scarring that can occur. It is a scarring of the pleura, the membrane that lines the inside of the chest wall and covers the outside of the lung. Plaques may appear with no indications of diminished pulmonary function and may never develop into any functional impairment (Carroll, et al. 2002). Mesothelioma is cancer of the pleural lining around the chest and abdomen and is almost always fatal, usually within one to two years of diagnosis (White 2004, Carroll, et al. 2002).

The causal relationship of asbestos exposure to other illnesses attributed to it is less clear. Other cancers asserted by asbestos claimants include: lung cancer, leukemia, and cancers of the bladder, breast, colon, esophagus, kidney, larynx, lip, liver, lymphoid, mouth, pancreas, prostate, rectum, stomach, throat, thyroid, and tongue. However, smoking and other behavioral and environmental factors have long been known as causes of these illnesses.

The information produced by the epidemiological research studies of the 1960s led to the beginning of large scale litigation from workers exposed to asbestos. Three other factors were also involved in the initial growth of asbestos-related lawsuits. First, a number of states changed their statute of limitations for filing product liability claims to start the time limit within which claims had to be made from the time of exposure to the time of discovery of injury. Second, product liability law began shifting from a negligence standard to making producers "strictly liable" for damages (White 2004). Third, the courts judicially rewrote insurance policies and applied successor liability laws to create tens of billions of dollars in "new" insurance coverage that could be accessed by plaintiffs (Brickman, 2004).

This increase in litigation led to a dramatic shift in asbestos production. In contrast to the years of ineffective regulation, manufacturers reacted quickly to their increased liability. Asbestos was removed from most of the products in which it had been previously used,

and modern production techniques were introduced that provided for the safe use and handling of asbestos and asbestos-related products.

Only one type of asbestos, chrysotile, is used in manufacturing today. This is the least toxic fiber in the asbestos family. In addition, today only non-friable products are manufactured with the fibers encapsulated in a matrix of either cement or resin. Non-friable products, which are considered safe for use, include chrysotile-cement building materials, friction materials, gaskets and certain plastics (Ridenour 2003).

The Asbestos Litigation Explosion

As much as any other reason, the asbestos litigation explosion can be explained by the search for profits by certain members of the plaintiffs' bar and the courts' willingness to accommodate them. Having driven the companies in the asbestos industry most responsible for asbestos-related injury into bankruptcy, plaintiffs' attorneys appear to be mining for more deep pockets by suing new companies that have had, at most, a tangential relationship to asbestos. Additionally, the plaintiffs' attorneys are mining for new plaintiffs who are not suffering any medical impairment or illness, but who can make a legal claim for injuries. Meanwhile, the courts are having difficulty separating the responsible parties from the innocent bystanders and the meritorious claims from the frivolous. The courts, having allowed plaintiff lawyers' greed to go unchecked (asbestos claimants with no illness have been awarded as much as $5 million each (White 2004)), have allowed the reach of asbestos lawsuits to go further than it should in search of still more funds to compensate the truly harmed, since the rewards to unimpaired claimants left little with which to compensate those who would later become ill from asbestos.

The U.S. Supreme Court has referred to the state of asbestos litigation as the "elephantine mass of asbestos cases" (*Ortiz v. Fibreboard Corp.* 134 F.3d 668, 1999). By the end of 2002, more than 730,000 individuals had filed lawsuits against 8,400 defendants. The amount of money spent on resolving claims, including legal costs, by defendants and insurers was $54 billion. It is estimated that the total number of claims will eventually range from 1 million to 3 million. Estimates of the total eventual litigation costs range between $200 billion and $265 billion (White 2004).

The case that is as responsible as any for the changed landscape of asbestos litigation was *Borel v. Fibreboard Paper Products Corp.* (493 F.2d 1076, 1973). In this 1973 decision, the Fifth Circuit ruled that Fibreboard could be held liable for making a defective product, completing the transition of asbestos exposure from a workers' compensation issue to one of product liability.

After *Borel*, lawsuits were filed in larger numbers in selected jurisdictions across the country. By 1982, over 21,000 claims had been filed against 300 companies. Plaintiffs were generally able to clearly demonstrate impairment, and the claims they filed were mostly against manufacturers and distributors of asbestos products (Christian and Craymer 2002). Even so, asbestos litigation was very complex and contentious, taking

twice as long to resolve as other tort cases filed in the 1980s (Hensler 2001). Part of the problem was that it was very difficult for plaintiffs to show harm from a specific company's product. As a result, all asbestos manufacturers were essentially pooled as defendants and rules of evidence were considerably relaxed.

Despite the increases of the 1970s and 1980s, it was in the 1990s that the asbestos litigation explosion truly manifested itself, with asbestos claims rapidly escalating in recent years (Brickman 2004). In 1991, 81,000 asbestos claims were filed. This number would increase throughout the decade to 220,000 claims filed in 1998. As of the end of 2002, 730,000 individual claimants had filed lawsuits (White 2004).

Another characteristic of the asbestos litigation explosion was a shift away from federal courts to state courts, as trial lawyers used forum shopping to find states where the law and courts were particularly favorable to plaintiffs (White, Regulation 2003). According to the Rand Institute for Civil Justice, over 40 percent of the pre-1988 filings were in federal courts; by 2000, this proportion had dropped to less than 15 percent (Carroll, et al. 2002).

Texas became a favorite venue for plaintiffs, leading the nation in new filings from 1988 through the 1990s. Three counties, Harris, Galveston and Jefferson, led all other jurisdictions for new filings for much of the 1990s. While other states such as Mississippi and New York vied for second and third, Texas led the nation in asbestos filings for over a decade (Carroll, et al 2002).

In addition to the increase in the number of lawsuits, the number of defendants has also substantially increased, as the primary focus of the filings has shifted from manufacturers and distributors to just about any company that has had the most tangential relationship to asbestos products. The total number of defendants in asbestos lawsuits has increased from around 300 in 1982 to more than 8,400 defendants (White 2004).

A final characteristic of the asbestos litigation explosion is that the plaintiffs in the lawsuits have shifted from those with impairments and illnesses to those with none. According to the American Academy of Actuaries (2004), the percentage of claimants who have no demonstrable impairment has grown from four percent in 1982, to 50 percent in 1993 to at least 66 percent in 2001. Others have estimated that 89 percent of all asbestos claims come from people who do not have cancer and may not be impaired at all (Carroll, et al. 2002). These lawsuits crowd courtroom dockets and deplete the resources of responsible companies, threatening the ability of legitimately injured claimants to obtain adequate compensation.

The causes of the asbestos litigation explosion can be traced to several factors. First, a settlement was reached in 1993 between several of the leading asbestos plaintiff attorneys' firms and about 20 of the major defendants. One of the most controversial aspects of the settlement was that while existing functionally unimpaired claims would be compensated, future claims would be paid only for actual impairments (Christian and Craymer 2002). This created a strong incentive for unimpaired claimants to file suit

immediately, and the number of lawsuits began to climb, increasing by 38 percent from 1991 to 1993 (White 2003).

Second, the Supreme Court eventually overturned the proposed settlement. When this happened, many of the major defendants who had sought relief in the settlement from rising liabilities filed for bankruptcy. This led to a fear on the part of plaintiffs that funds to pay claims might run short, and thus many plaintiffs, rather than waiting for symptoms to develop that might lead to greater claims, filed lawsuits much sooner than they might have otherwise (Christian and Craymer 2002). Additionally, plaintiffs' attorneys began to broaden their search for potentially liable defendants to increase the funding for future settlements.

Finally, many companies began shifting to a settlement strategy. This was done in order to avoid the risk of high verdicts in a trial and the certainty of higher defense costs (Dunbar 2002). However, these companies failed to take into the account the tremendous surge in the volume of claims that occurred in the 1990s. Much of this came through the increased activities of trial lawyers in recruiting plaintiffs. Since most of their costs are incurred during trial, trial lawyers sought to take advantage of the settlement strategy in order to maximize their profits (White 2004).

In order to take full advantage of the settlement strategy, trial lawyers have hired screening firms to carry out massive recruitment programs across the country. These efforts are not medical screenings meant to identify patients with diseases who need treatment, but legal screenings to identify potential litigants who meet legal criteria that may qualify them for settlements (Brickman 2004). These legal criteria are in essence relaxed standards of diagnoses, that have developed over time in an attempt to streamline cases (Christian and Craymer 2002). However, the result is that most people who meet the legal criteria do not meet the medical standards necessary in order to produce a positive diagnosis of illness of impairment.

Brickman has done a comprehensive study of the recruitment efforts of trial lawyers. He estimates that companies have screened over 1,000,000 construction and plant workers over the past seventeen years. One company, Most Health Services, Inc., has screened approximately 400,000 workers. Several other companies have likely screened at least 100,000 each (Brickman 2004). Brickman notes that these screenings are conducted by administering x-rays on equipment set up in truck trailers in "union halls, hotel and motel sites, and shopping center parking lots."

The lack of a medical objective in the screening process is readily apparent in the hiring and techniques of the doctors who read the x-rays. Many of the doctors are not licensed to practice medicine in the states where the x-rays are being taken, and the doctors generally apply legal, not medical, criteria, in reading the x-rays (Brickman 2004). Additionally, at the end of the screening process, potential plaintiffs receive an x-ray reading, a pulmonary function test, and a signed agreement by an attorney rather than a doctor (Dunbar 2002).

The failure of the screening programs to produce legitimately impaired plaintiffs has been recently exposed by a study of 492 chest radiographs used by plaintiffs in asbestos litigation. Independent radiologists identified the presence of parenchymal abnormalities (areas of reduced lung function associated with asbestos exposure) in only 4.5 percent of the cases, in contrast to the doctors employed by trial lawyers who found that 96 percent of the cases showed parenchymal abnormalities (Gitlin, et al. 2004).

Further evidence that the dramatic increase in claims is not associated with an increase in sick or impaired people can be found by examining the statistics about asbestos-related disease. With asbestos exposures peaking in 1974, the latency periods associated with exposure led many experts to project that the filing of claims would peak in the late 1980s or early 1990s (Stiglitz 2002). As has been shown, filings have far exceeded these expectations (See Figure 1, on page 10).

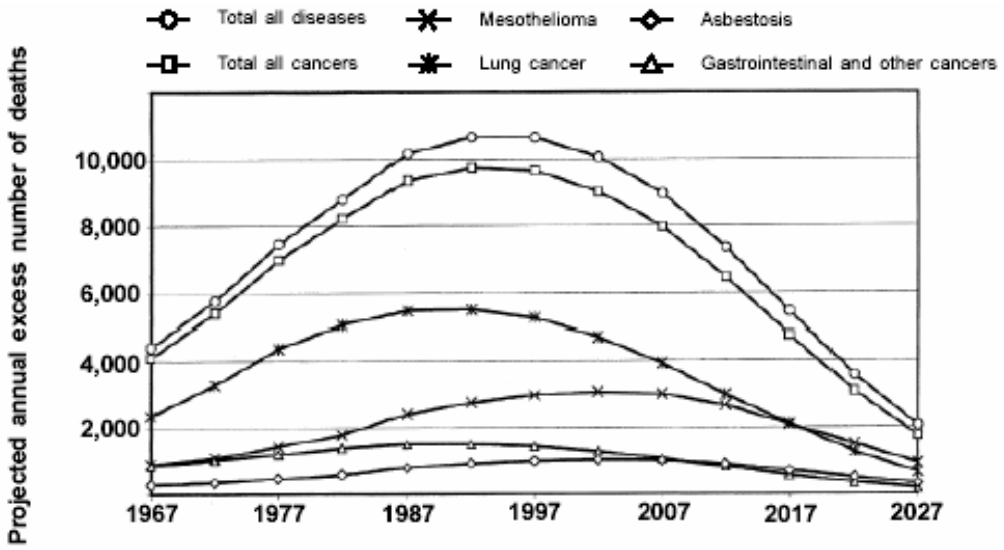
The number of deaths from all asbestos-related diseases could be another indicator of the number of lawsuits that could be expected to be filed. These deaths were estimated to have peaked in 1997 at about 10,000 per year (Wyckoff and McBride 2003). The 123,000 lawsuits filed that year far exceeded that level. Furthermore, the deaths from mesothelioma and asbestosis, the only diseases linked to asbestos as the primary cause, are even less – they are currently estimated to be approximately 4,000 per year (Wyckoff and McBride 2003).

After looking at the numbers, Stiglitz (2002) concludes,

> The dramatic acceleration in claims does not appear to be associated with an acceleration in the number of severely affected people. Indeed, the American Academy of Actuaries has concluded that about 2,000 new mesothelioma cases are filed each year, a flow which is largely unchanged over the past decade, and that the annual number of other cancer cases at least partly related to asbestos exposure amounts to between 2,000 and 3,000. Such cases cannot come close to explaining the increase in asbestos claims being filed, which increased by almost 60,000 between 1999 and 2001.

The inevitable conclusion drawn by reviewing the facts is that exposure to asbestos can lead to changes in the lungs that are viewed by many courts as an injury in the legal sense, but not by doctors in the medical sense (it is also the case, as has been previously noted, that in many instances even the legal injuries are no more than imagined by the radiologists hired by plaintiffs lawyers and screening firms). But even though many of those so affected may never develop any functional impairment, they nonetheless may be compelled to file lawsuits because of the perverse incentives contained in law. The statute

Figure 1. Projected Annual Deaths from Asbestos-Related Diseases



Source: © 2003 From *Primer for Prospective "Secondary and Premises" Asbestos Defendants*, Environmental Claims Journal, vol. 15, no. 1, Winter 2003, by Wyckoff and McBride. Original projections from Nicholson, et. al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality - 1980-2030*, American Journal of Industrial Medicine, vol. 3, pp. 259-311. Reproduced by permission of Taylor & Francis, Inc., http://www.routledge-ny.com

Source: Texas House Research Organization (2004)

of limitations in many states require claimants to file within a certain period of time (two years in Texas) after discovering their injury or when they reasonably should have discovered their injury (House Research Organization 2004). So to prevent the loss of the opportunity to receive damages should they become impaired later on, claimants must file within this two year period.

The Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by U.S. Supreme Court Chief Justice William Rehnquist, summarized the problem with asbestos litigation in its March 1991 report:

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Asbestos litigation "remains unique in the number of lawsuits filed individually and in the number of defendants involved in defending those cases" (Federal Judicial Center 1999).

The Economic Impact of Asbestos Litigation

By 1982, a decade after the Borel decision, asbestos litigation seemed to be a growing, but manageable problem. Approximately 20,000 claimants had filed lawsuits against 300 defendants (House Research Organization 2004). Three major corporations had filed for bankruptcy, the most notable of these being Johns-Manville. Johns-Manville's reorganization plan created the Manville trust with 80 percent of shareholder equity (Plevin and Kalish 2001).

Even after this bankruptcy, there was still no sense that the situation was getting out of control. Indeed, even a decade later, in the early nineties, most observers thought the situation to be manageable. Today, however, the situation has changed dramatically, and the economic impact of the litigation has become enormous.

The more than 8,400 companies named as defendants in asbestos lawsuits, along with other parties, have spent in excess of $54 billion on asbestos litigation, with transaction costs (attorneys' fees, court costs, etc.) accounting for more than half of the spending (Carroll, et al. 2002). At least 70 companies have filed for bankruptcy (Tolson 2004). The Bankruptcy Code has increasingly become the primary mechanism that defendant companies can turn to for relief in the face of a tort system that has failed to handle the asbestos litigation. But even it has problems.

For example, Asbestos Claims Management Corporation (ACMC) filed a prepackaged Chapter 11 bankruptcy plan in 1992. ACMC was the vehicle set up to compensate asbestos claimants against National Gypsum, which had filed for bankruptcy protection in 1990 (Plevin, Kalish and Epley 2002). The reason ACMC had to file for bankruptcy was that it had run out of money to pay the claims against it, and so the "new" National Gypsum was again having to face claims. National Gypsum agreed to pay ACMC an additional $347 million for future claims, and ACMC filed for the bankruptcy to implement the settlement and protect National Gypsum against future claims (Plevin, Kalish and Epley 2002).

In addition to asbestos producers and manufacturers, another industry that is particularly hard hit by asbestos litigation is the insurance industry. As of the beginning of 2001, "the U.S. insurance industry had paid $22 billion for asbestos claims and carried $10 billion in reserves" (Angelina and Biggs 2001). The earnings drag on insurance companies with asbestos exposure averages between 8 percent to 12 percent (Applegate, et al. 2002). But for some companies, the burden is much larger.

This can be seen in the significant increase in insurance company insolvencies in the five years prior to 2003. One of the main reasons cited for this increase is the "the increasing number of defendant companies seeking coverage for asbestos liabilities under both the products liability portions (which tend to have aggregate limits) and nonproduct liability portions (which tend not to have aggregate limits) of their general liability policies" (Wyckoff and McBride 2003).

Soika (2004) notes that, "A December 2003 report by the Insurance Information Institute projects the insurance industry's share of asbestos-related losses eventually could reach as high as $65 billion, 'more than the combined total for the September 11 terrorist attacks and Hurricane Andrew.'"

But the effects of asbestos litigation are not limited to asbestos manufacturers and the insurance industry. Today, there is virtually no sector of the American economy that is not impacted (Leonard 2003). No one knows what the ultimate impact asbestos litigation will have on the American economy. Much of the uncertainty stems from the fact that asbestos litigation is a "legal chess match" and no one is certain who is going to win. The filing of lawsuits continues and many expect the filings to continue past 2040 (Angelina and Biggs 2001).

The actuarial firm Tillinghast – Towers Perrin estimates the total U.S. asbestos liability to be $200 billion (Applegate, et al. 2002). Other estimates range from $200 to $265 billion (Carroll, et al.) Asbestos-related costs are a major factor in the explosive growth in the overall U.S. tort system. In the last 50 years, overall tort costs have increased more than a hundredfold, in comparison with the growth of the economy during that period by a factor of 37 (Tillinghast – Towers Perrin 2004).

Leonard (2003) explains the impacts of these costs on the U.S. economy and Americans: "These costs and inefficiencies are nominally shouldered by business (yet another obstacle to the raw competitive position of manufacturers) but are ultimately borne by consumers in the form of higher product prices, by workers in the form of lower wages, and by investors in the form of lower returns."

Workers have lost and will continue to lose jobs because of asbestos litigation. The United States has lost over 2.3 million manufacturing jobs over the past three years (Leonard 2003). The competitive drag on U.S. manufacturing caused by the cost of the tort system, including asbestos litigation, has not helped this situation. The U.S. Chamber of Commerce estimates that "between 52,000 and 60,000 jobs have been lost due to asbestos-related bankruptcies to date" (David 2003).

These job figures, however, apply only to the workers in the bankrupt firms. The overall numbers are much higher. Other studies estimate the total job loss from asbestos litigation to range from 543,000 to 702,000 (Kerr 2003). Research shows that these job losses will also affect local communities in other ways, such as a reduction in real estate values and tax revenues (David 2003).

However, money is not the only cost from asbestos litigation that the economy has to support. Companies that otherwise would be manufacturing consumer products or providing services are required to expend considerable resources on current and future liabilities. Examples include insurance, reinsurance, corporate restructurings, mergers and acquisitions, and capital markets tools such as catastrophe bonds, swaps or contingent capital that may be applied to asbestos risk (Applegate, et al. 2002). The end result of

these distractions is that product innovation is stifled, and consumers are denied access to higher quality and more effective, safer products.

The biggest problem with asbestos litigation may be less with asbestos litigation itself than the uncertainty it has produced with respect to the U.S. legal system. Perhaps the most important function of a legal system in a largely free enterprise, market system is to create certainty, especially certainty of property rights and liability. The asbestos fiasco has only served to create uncertainty and risk over and above what can be justified with objective evidence. Some corporations should have been held liable for asbestos illnesses, but many are now being held liable with little or no justification other than their checkbooks. This has tangibly but immeasurably negatively affected the U.S. economy.

Efforts at Reform

Efforts to reform asbestos litigation date back to the 1970s (Hensler 2002) but have met with limited success in the face of staunch opposition from the plaintiffs' bar and their allies. Congress passed the Bankruptcy Reform Act of 1994 that allows companies with asbestos liability to seek bankruptcy protection from future liability if they can show that future liability exceeds the assets of the company. While this has provided some protection for companies, it has done nothing to stem the flow of asbestos lawsuits and their impact on the economy. In fact, bankruptcies may have had the effect of increasing the filing of claims, reducing the value of those claims and making it more difficult to resolve them (Hensler 2002).

Recent efforts at reform in Congress, led by Senator Arlen Specter, R-Pennsylvania, have followed a similar pattern. Negotiations have focused on limiting the total amount of liability that companies will face, without addressing the problem of meritless lawsuits. This approach would result in a massive guaranteed payout for plaintiffs and their lawyers.

In February 2003, the American Bar Association passed a resolution that supported restricting nonmalignant claims to those meeting strict medical criteria and to prevent statutes of limitations from running out on those who might become sick later (Bouska 2003).

This approach has been implemented by a number of federal and state courts (though none in Texas) through what is known as an "inactive docket" (Christian and Craymer 2003). Claims that do not involve a malignancy are placed on the inactive docket until the claimant can show sufficient impairment based on the medical criteria. Ohio is one state which has recently adopted criteria establishing fair and objective medical criteria. Another suggested solution is to create a preference in law for litigation in cases where actual malignancies exist in order to keep non-impaired awards from depleting the resources available to compensate the most severe cases.

In 2003, the Texas Legislature considered asbestos litigation reform in SB 496 by Sen. Kyle Janek, R-Houston, and HB 1240 by Rep. Joe Nixon, R-Houston. These bills included the proposals included in the ABA resolution. They created an inactive docket for all pending and future asbestos-related claims that do not include a malignancy, a requirement that fair and objective medical criteria be used to move a lawsuit to the active docket, changes in the statutes of limitation to allow those who have been exposed to retain the ability to sue should they get ill in the future and a preference for trial for impaired claims involving asbestos-related malignancies. Efforts to include these reforms in HB 4, the major tort reform bill, were unsuccessful. As a result, HB 4 contained only minor reforms to asbestos litigation, and the major asbestos reforms failed to become law, due to a lack of votes in the Texas Senate.

Texas is shaping up to be the major battleground on asbestos litigation reform in 2005, not only due to the number of lawsuits filed here, but because of the excellent opportunity for meaningful reform. The only obstacles to reform are the votes of two to four Texas state senators. Senator Janek will once again be the lead Senate sponsor of reform legislation. Though it has not yet been filed, the legislation will likely look very similar to SB 496/HB 1240, with one significant exception: it will no longer call for the creation of an inactive docket, and instead set fair and objective medical criteria as the standard by which lawsuits may be dismissed. In other words, people will have to be impaired, rather than just exposed, to make a valid claim for damages. Eliminating the statue of limitations will allow these claims to be refilled when impairment is able to be shown.

Asbestos litigation reform in Texas will have a significant impact not only in Texas but across the nation. Both advocates and opponents of reform are aware of this, which is why it may become one of the major issues of the 79th Texas Legislature. Despite heavy opposition, the growing evidence and public awareness of the failure of the current system provide hope that meaningful reform could come to Texas in 2005.

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