

## Asbestos Removal

Thanks to a combination of state tort reform, judicial rulings, and public scrutiny, the asbestos docket has dropped dramatically over the last three years.

**By Alison Frankel**

**I**N LATE MAY, SENATOR Arlen Specter (R-Pennsylvania) introduced a new version of the asbestos reform legislation that's been kicking around the Senate Judiciary Committee for the last few years—the latest attempt to create a nationwide trust fund that removes asbestos cases from the tort system. Specter reminded senators that it was their duty to take action “for the sake of thousands of [dying asbestos victims] who are unable to secure compensation in today's broken tort system.”

The response was a big yawn, not only from the media, but also from most of the interest groups that have fought fiercely over the proposed fund. That might be chalked up to summer ennui, but there's a more enlightened explanation: a growing consensus that the litigation hurricane has passed. “Asbestos litigation has taken a turn,” says name partner Paul Hanly of New York's Hanly Conroy Bierstein

Sheridan Fisher Hayes, a onetime asbestos defense lawyer who now works with plaintiffs firms. “We're not seeing junk cases anymore. . . . The litigation has become totally manageable by both the judiciary and the defendants.”

Asbestos defendants still vehemently dispute that notion. “Federal legislation is the only real and permanent solution,” asserts Barry Drenfeld, a Bingham McCutchen partner who is counsel to a coalition of asbestos defendants that includes General Electric Company and Pfizer Inc. “Unless the economic incentives for plaintiffs lawyers are changed . . . the problem will persist.” Adds Michael Baroody, executive vice president of the National Association of Manufacturers: “There's no consensus [that] the problem has gone away. . . . The problem is real and present.”

But asbestos case filings show a precipitous decline since 2003—for some defendants, a decline to half, a third, even a tenth of what they were a few

years ago. The drop has come in the so-called unimpaired claims that first led Congress to propose the national fund. In the late 1990s and early 2000s, plaintiffs lawyers, some of whom sponsored mass X-ray screenings to scare up clients, swamped defendants with hundreds of thousands of claims for victims who weren't experiencing serious lung impairment. Defendants, claiming they could not afford to litigate so many cases, filed for bankruptcy by the dozens. Insurers began warning about their asbestos reserves, and even plaintiffs lawyers who specialized in cancer cases testified in Congress that unimpaired claims had wrecked the system.

That is no longer the case. Consider the records of the Manville Personal Injury Settlement Trust, which operates outside the tort system but has long been regarded as a reliable indicator of court filings. (The trust was created almost 20 years ago, through the bankruptcy of asbestos defendant Johns Manville

Corporation, to streamline compensation to victims.) In 2004 the trust implemented new standards that slashed compensation for the unimpaired. New U.S. claims promptly dropped from 93,760 in 2003 to 16,600 in 2005.

The trend is the same in court filings. “A lot of companies that were seeing 40,000 cases in 2002 and 2003 have dropped to the 15,000 level,” says Jennifer Biggs, who chairs the mass

consolidation of thousands of cases under one filing fee. In other hotbed asbestos jurisdictions, judges have created special inactive dockets for unimpaired plaintiffs. And even the trust funds established through the bankruptcies of asbestos defendants are no longer a source of significant compensation for the unimpaired; many have followed Manville’s lead in redirecting money to the sickest victims.

The result of such reforms, say five

Defense lawyers and experts also say that a June 2005 ruling by Corpus Christi federal court judge Janis Jack in the silica multidistrict litigation has had a chilling effect on the asbestos bar. Judge Jack excoriated nine doctors who had diagnosed silicosis in masses of plaintiffs—many of whom, improbably, had also been diagnosed with asbestosis [see “Lighter Caseloads for All,” page 17]. Her ruling prompted two federal grand jury investigations. “Now other judges,” says Dunbar, “will have more courage [in scrutinizing claims].”

Bankruptcy filings offer additional evidence that asbestos litigation is no longer the dire threat that defendants claimed. As asbestos litigation ensnared more peripheral defendants, dozens filed for Chapter 11 bankruptcy protection between 2000 and 2004—but only five companies have filed in 2005 and 2006, according to statistics compiled by Washington, D.C.’s Crowell & Moring. “The reasons for asbestos bankruptcies in the past are no longer operative,” says Crowell & Moring bankruptcy partner Mark Plevin. “I don’t think companies are under as much pressure.”

It’s too early to declare asbestos just another tort. Even if all the unimpaired cases disappear, experts predict that about 10,000 asbestos-related cancer and fatality cases will annually arise for years to come. And there’s no guarantee that plaintiffs lawyers won’t try to revive volume filing where it is still permitted. As defense lawyer Direnfeld notes, every time asbestos litigation has been declared on the wane in the last 30 years, plaintiffs lawyers have found a way to keep it alive. Nevertheless, trust fund proponents had better act quickly—before their alarms sound increasingly like cries of wolf.

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torts subcommittee of the American Academy of Actuaries. Frederick Dunbar, a senior vice president of NERA Economic Consulting, studied Securities and Exchange Commission filings of 18 large asbestos defendants. In a 2006 paper, he concluded that for all of them, 2004 asbestos claims had dropped from peak levels of the previous three years. Ten companies saw claims fall by more than half between 2003 and 2004. Viacom Inc., for example, peaked in 2001 with 60,000 new claim filings; in 2004 new claims fell to 16,060.

And those 2004 declines, Dunbar has noted, did not reflect all of the recent reforms aimed at reducing unimpaired claims. Several states long known as asbestos havens—Mississippi, Texas, Ohio, West Virginia, and South Carolina—passed laws in 2005 and 2006 that tightened venue rules, set minimum standards for injury, and restricted the

asbestos plaintiffs lawyers, has been to refocus the asbestos practice on cancer cases. Searching out and filing thousands of unimpaired claims in the courts is no longer a lucrative business. “I haven’t heard of anyone settling unimpaired cases in a couple of years,” says former defense lawyer Hanly. “They’re pretty much languishing on inactive dockets, if not being voluntarily dismissed.” Adds name partner Jeffrey Cooper of East Alton, Illinois’s SimmonsCooper: “A lot of lawyers got into asbestos because they thought it was easy, quick money. The firms that relied on that model are suffering now, and they deserve to.” New York’s Weitz & Luxenberg and Charleston, South Carolina’s Motley Rice were once among the biggest volume filers in the asbestos business. Name partners at both firms say the volume era is over. “I wish I still had 50,000 cases,” says Perry Weitz. “But now this is a case-specific litigation.”