

NEW OHIO ASBESTOS REFORM LAW PROTECTS VICTIMS AND STATE ECONOMY

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The asbestos litigation crisis has dragged on for decades and it will continue to drag on and burden sick individuals and their families until policy makers decide otherwise. While this asbestos litigation nightmare continues to erode the judicial systems across the country, Ohio legislators recently said enough is enough and approved public policy measures to protect Ohioans by ensuring that sick individuals are compensated for their asbestos-related injuries.

The Asbestos Nightmare. As the longest-running mass tort in U.S. history, asbestos litigation continues to saturate the judicial system. In the 1970s and 1980s, manufacturers of asbestos materials and products were held accountable in courtrooms across the country for asbestos-related injuries. As these defendant manufacturers became insolvent, trial lawyers targeted new solvent companies to supplement funding sources that were becoming scarce. Many refer to this new round as the second wave of asbestos litigation.

Unfortunately, for many victims of asbestos exposure and defendants this wave of litigation is far from over. Recent studies show more than 600,000 individuals have filed asbestos claims nationwide against numerous defendants for asbestos-related personal injuries. *See* Rand Institute for Civil Justice, *Asbestos Litigation Costs and Compensation, An Interim Report 40* (2002). Today, there are more than 300,000 asbestos cases clogging the nation's courts. More than 6,000 companies have been named as defendants and 70 companies have gone bankrupt as a result of asbestos litigation. *See id.* Many of the defendants named in the most recent lawsuits have tenuous connections to the products alleged to have caused the injury. However, trial lawyers routinely name numerous defendants in any one particular claim as a way of coercing defendant companies into abandoning defense strategies and settling outright. Regrettably, many companies are increasingly inclined to settle rather than defend in a mass trial in which evidence of the plaintiff's illness or the fault of a particular defendant plays very little, if any, role.

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The avalanche of new claims has many wondering whether any solvent companies with money will be left to pay future claims. Not only have the bankruptcies impacted corporate America, but the financial insolvencies have significantly impacted many employees across the country. Nobel award-winning economist Joseph Stiglitz calculated that bankruptcies caused by asbestos have already resulted in the loss of up to 60,000 jobs and that each displaced worker in the bankrupt companies will lose, on average, an estimated \$25,000 to \$50,000 in wages over his or her career, and at least a quarter of their accumulated pension benefits. *See* Joseph E. Stiglitz, *The Impact of Asbestos Liabilities On Workers In Bankrupt Firms* 26-39 (2002). While \$54 billion dollars has already been spent on asbestos litigation, experts are forecasting that the final price tag could be \$200 to \$265 billion. *See* Rand, *supra* at 54 and 77.

How did this happen? Why the dramatic increase in new asbestos litigation filings? Over the past decade, the asbestos crisis has risen to new levels due to the mass filings of claims on behalf of persons who have no actual physical impairment. *See* Rand, *supra* at 44. To date, 65 percent of the compensation has gone to claimants with nonmalignant injuries. *See id.* at 65. Up until 2002, claim filings for mesothelioma have slowly risen. Approximately three to four percent of the total claims filed are mesothelioma claims. *See id.* at 46. What does this mean? Today, hundreds of thousands of asbestos claims filed by individuals who are not sick are clogging the court systems and depleting scarce resources at the expense of individuals who are sick and living with asbestos-related injuries.

Ohio's Asbestos Nightmare. If the asbestos crisis impacts state courts across the country, why was reform essential to Ohio? Ohio lawmakers resolved to do something about the current system — a system that clogs Ohio's court dockets, encourages venue shopping and mass consolidations, financially burdens Ohio companies and employees, and deprives many Ohioans of compensation for asbestos-related injuries.

Clogged court dockets. Over the years, Ohio has become a haven for asbestos claims. Of the 300,000 cases pending nationwide, more than 40,000 of those are pending in Cuyahoga County, Ohio alone, which encompasses much of the greater Cleveland area. In Cuyahoga County, the number of asbestos claims rose from 4,000 to 27,000 in just four years. The states and venues where asbestos claims are filed have changed dramatically. Five states — Mississippi, New York, West Virginia, Texas, and Ohio — accounted for only nine percent of the cases filed before 1988. Between 1998 and 2000, however, those same five states handled 66 percent of all asbestos filings. *See* Rand, *supra* at 32-34.

Practitioners in Cuyahoga County, Ohio have illustrated the gravity of the problem by using the following example: If Ohio's 233 general jurisdiction judges started trying asbestos cases today, each would try over 150 cases before retiring the current docket. That figure conservatively computes to at least 150 trial weeks or more than three years per judge to retire the current docket. But the current docket continues to increase exponentially. *See* Testimony by Laura Hong before the Ohio House Civil Justice Committee, Oct. 15, 2003.

Venue and consolidation practices. Over the past few years, Ohio has been particularly appealing to the plaintiffs' bar as a jurisdiction offering liberal venue rules. The stacking up of cases in Ohio jurisdictions which have no meaningful connection to the claim or the claimant creates judicial inefficiencies and often results in procedures that are unfair and raise serious due process issues for Ohioans trying to resolve their claims.

To further complicate this mass-filing problem, courts have employed various judicial management strategies in an attempt to curb new filings and move the current asbestos dockets at a faster pace. One technique common in the system is to join disparate claims for trial, either in mass consolidation 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 illnesses at all. In these instances, defendants have no real ability to defend the case, and are forced to settle, regardless of the merits of the individual claims. The reality of such management strategies is that plaintiffs' attorneys are drawn to jurisdictions that utilize these types of approaches because cases are at least moving through the system. However, claims filed by non-sick claimants are moving through the process grouped together with sick claimants and compensation is being paid even where there is no injury. Sick claimants inevitably suffer in such a system.

Financially burdened Ohio companies. Many Ohio companies are experiencing the financial impact of massive asbestos filings. One Ohio company in particular, Owens Corning, has been sued more than 400,000 times and was forced into bankruptcy several years ago. *See* Testimony of Bob Bunda before the Senate Judiciary Committee on Civil Justice, June 4, 2004. Although there is hope that Owens Corning will emerge from bankruptcy as a strong company, it will likely be years before it is the premier Toledo employer it once was. Many Ohioans, living in Toledo and in neighboring counties, have experienced job and pension loss as a result of the Owens Corning bankruptcy. In 2000, Owens Corning laid off 275 workers from its Licking County plant in Granville, Ohio. The ripple effect of those job losses is predicted to result in a total loss of 500 jobs and a \$15 to \$20 million annual reduction in regional income. *See* U.S. Chamber of Commerce, *The Secondary Impact of Asbestos Liabilities* 9 (Jan. 23, 2003).

Compensation for asbestos-related injuries. The current asbestos system is depriving sick Ohioans of compensation for their asbestos-related injuries. Because most of the asbestos claims are filed by claimants with nonmalignant injuries, the reality is most of the compensation is going to individuals who are not sick and may never become ill in the future. What does that mean for sick Ohioans? If this system continues, there will be no compensation left for those Ohioans who are sick and suffering from asbestos-related injuries.

The Legislative Solution. A solution to this massive problem was introduced in Ohio in May 2003, which many likened to the triage approach used in hospital emergency departments. While discussions related to a federal solution were taking place in Washington, D.C., Ohio legislators were considering House Bill 292, legislation aimed at offering immediate help to those individuals who are sick from asbestos, while at the same time filtering out claims of individuals who are not sick.

House Bill 292, as introduced, included medical criteria that applied to nonmalignant claims and cancer claims. House Bill 292 has never applied to mesothelioma cases — either in the introduced version or in the final version. Mesothelioma victims do not have to meet any sort of medical criteria under this bill.

Throughout the legislative process, the asbestos trial bar repeatedly attempted to derail House Bill 292 by raising countless concerns and arguments identified by many as red herrings. In a number of roundtable negotiations where both proponents and the opponents of asbestos reform participated, the asbestos trial bar repeatedly raised concerns and then argued that it was impossible to resolve any of those concerns. Notwithstanding the fact that reform in Ohio was essential, the opponents' strategy throughout this entire process was to define issues as problems without solutions.

One particular red herring the opponents to House Bill 292 raised was with respect to the bill's application to bankruptcy claims brought pursuant to federal law. Their argument was that the medical criteria in House Bill 292 could not apply to those claimants who have filed a bankruptcy claim under federal law. While most of the proponents recognized federal preemption could result in this instance, those supporting asbestos reform also recognized that federal preemption would likely take place without a state statute having to articulate that very fact. The asbestos trial bar, however, did not concur and when the bill's proponents agreed to include language that explicitly articulated that the medical criteria do not apply to bankruptcy claims brought under federal law, the opponents declared that it was impossible to draft the type of language necessary to accomplish that task. According to the opponents, it just couldn't be done.

In Ohio, one additional tactic employed by asbestos reform opponents was re-filing asbestos claims as silica or mixed dust claims. Over the past year, the number of silica and mixed dust claim filings has been on the rise. A quick review of these filings in Ohio reveal that most of these silica and mixed dust claims were being filed in anticipation of medical criteria legislation passing the Ohio General Assembly. In Ohio, it became increasingly clear that a number of the silica and mixed dust claims were either once filed as an asbestos claim or were being filed in addition to an asbestos claim that had already been filed. In other words, plaintiffs' attorneys were filing both asbestos claims and silica and mixed dust claims on behalf of claimants for the same alleged injury in the event they could not meet the medical criteria for asbestos claims post-House Bill 292. Legislation providing medical criteria for silica and mixed dust claims was introduced and approved to address this very issue through House Bill 342.

Despite repeated attempts to prevent legislative action on House Bill 292, the bill survived and the fundamental principles integrated in the bill withstood the asbestos reform opponents. House Bill 292's medical criteria were revised, however, to apply only to nonmalignant claims. The medical criteria included in the introduced version were replaced with exposure requirements that apply to lung cancer where the claimant is a smoker and in wrongful death cases. All Ohioans will now experience the impact of House Bill 292's provisions, which will bring comprehensive reform to the state's asbestos litigation crisis.

The Provisions of House Bill 292. For asbestos claims based on nonmalignancy, House Bill 292 requires that a claimant submit medical criteria that include: (1) occupational and exposure history, (2) medical and smoking history, and (3) a diagnosis from competent medical authority of: (a) permanent respiratory impairment and (b) evidence of asbestosis substantiated by either a chest x-ray of 1/1 or a chest x-ray of 1/0 with additional testing.

For asbestos claims based on lung cancer where the claimant is a smoker, House Bill 292 requires that a claimant submit exposure criteria that include: (1) a diagnosis from competent medical authority of primary lung cancer for which exposure to asbestos is a substantial contributing factor to that cancer, (2) evidence of a 10-year latency period, and (3) evidence of exposure substantiated by proof of either exposure of at least five years or exposure at a level equal to 25 fiber per cc years.

For asbestos claims based on wrongful death, House Bill 292 requires that a claimant submit exposure criteria that include: (1) a diagnosis by competent medical authority that exposure to asbestos was a substantial contributing factor to the death, (2) evidence of a 10-year latency period, and (3) evidence of exposure substantiated by either exposure of at least five years or exposure at a level equal to 25 fiber per cc years.

When a claimant cannot show physical impairment due to asbestos exposure as defined in House Bill 292, the period of limitations does not begin to run until that exposed person is sick. The bill also provides a series of other reforms involving premises liability and piercing the corporate veil.

Venue and consolidation reform was also essential to accomplish complete asbestos reform in Ohio and was a provision in House Bill 292. Due to state constitutional constraints on the power of the Ohio General Assembly to enact rules pertaining to civil procedure, the Ohio General Assembly requested the Ohio Supreme Court to adopt venue and consolidation rules in an attempt to achieve comprehensive reform. Draft rules have already been filed with the Ohio Supreme Court for the Court's consideration.

House Bill 292 will significantly impact how asbestos claims are litigated in Ohio. The legislation will enable claimants with serious injuries to move through the system and will allow them to obtain essential compensation.

With the enactment of House Bill 292, Ohio became the first state to adopt comprehensive asbestos reform. As reforms to the asbestos litigation crisis are contemplated, perhaps other states and policy makers will consider Ohio's House Bill 292 as a basis for developing reform. House Bill 292 and House Bill 342 are scheduled to take effect in September of this year. Now that they have lost the battle to prevent reform in the state legislature, opponents of these bills are exploring other options to derail these reforms. These include a potential court challenge to the constitutionality of the legislation as well as a state-wide referendum to repeal House Bill 292 on the November 2004 ballot.