

2009 Litigation Trends: Asbestos Litigation in the U.S.

*If you have any questions regarding the matters discussed in this memorandum, please call **Steven F. Napolitano** at 212.735.2187 or your regular Skadden contact.*

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Overview

Asbestos personal injury litigation, having now gone on for more than 40 years, is the longest running mass tort litigation in U.S. history. Forecasters expect claims to continue until approximately 2050, albeit in decreasing numbers over time. A significant number of serious claims are still being filed every year.

This high-level summary is intended to provide an overview of the current state of asbestos personal injury litigation in the United States. The information provided is general in nature and subject to change. Significant changes often take place in the world of asbestos litigation very quickly, and the litigation has evolved many times over the years in response to legal and economic developments. We expect such evolution to continue in the coming years.

Filing Trends

- Asbestos claim filings peaked in 2002 at approximately 80,000 new claims. Since then, asbestos filing rates are down dramatically. However, as discussed below, this decline can be attributed almost entirely to a marked drop in unimpaired, less serious claims. Mesothelioma and other cancer claims have remained relatively steady.
- In 2008 approximately 5,000 new claims were filed. Approximately 2,000 of those claims involved mesothelioma, and we expect a similar number of such claims in 2009. In most of these cases dozens (sometimes more than 100) companies are named as defendants.
- Since 2002-03, the rate of unimpaired asbestos claims has fallen off precipitously. These claims typically allege pleural disease. Plaintiffs' lawyers presently express little interest in filing such claims. The falling numbers of unimpaired claims can be attributed in large part to the effects of tort reform measures enacted in various states. These reforms include inactive dockets where unimpaired claims must be "parked" unless a serious injury manifests, requirements that claimants file medical proofs at the onset of litigation as to the cause of their alleged injury, and the decline of mass screenings around the country.
- The leading jurisdictions for asbestos litigation continue to be California, Delaware, Florida, Maryland, New Jersey, Illinois, Mississippi, New York, Ohio and Texas.

- Although there has been much written about a “gold rush” of plaintiffs’ firms moving to California from Texas and elsewhere to file asbestos claims, the data does not seem to bear this out. There has however been a well-documented significant drop in asbestos cases filed in Texas because of tort reform. Prominent Texas plaintiffs’ firms have shifted their attention to other states, including Delaware.
- In Illinois, most of the filings continue to be in Cook and Madison counties. The SimmonsCooper firm continues to file the lion’s share of asbestos claims in Madison County.
- Plaintiffs’ counsel report seeing more female and child claimants alleging serious asbestos injuries. Some of these are “take home” (clothing) claims. Defense counsel believe that many of these claims involve suspect exposures. Nevertheless, there have been significant settlements and jury verdicts in such cases where mesothelioma was alleged and product identification was established.

Defendants

- At the end of 2008, there were approximately 4,500 unique defendants appearing as parties in the asbestos litigation. Since the litigation began, more than 12,000 companies have been named as defendants.
- The plaintiffs’ bar continues to search for new defendants and to push legal theories extending liability to parent corporations and alleged corporate successors. Many of the defendants in the litigation today had no direct involvement in the manufacture or sale of asbestos-containing products.

Verdicts and Settlements

- With respect to verdict data, there were approximately 40 asbestos trials in 2008. The vast majority of asbestos claims still settle before trial.
- Jury verdicts in cancer cases continue to be very high. In 2007 the Weitz & Luxenberg firm obtained a verdict of \$37 million in two asbestos cases involving claims of lung cancer. Both plaintiffs also smoked cigarettes. In 2008 the same firm obtained a jury verdict in a mesothelioma case for \$16.25 million. There have been some very significant jury verdicts in Los Angeles County in mesothelioma cases in the past few years.
- The average mesothelioma jury verdict in 2008 was approximately \$7 million. Over 90 percent of the cases that went to verdict in 2008 involved a mesothelioma injury. Only a few cases that went to verdict in 2008 involved non-malignant claims.
- Settlement costs for mesothelioma and other cancer cases continue to increase steadily. It is not unusual for a claimant in a mesothelioma case to receive more than \$2 million in settlement from the various defendants. Formerly peripheral defendants are seeing an increase in the amounts they are paying in settlement.

Legislative Developments

- The much-debated federal asbestos legislation appears dead at this time. It does not appear to be a priority of President Obama or Congress. We have seen nothing suggesting that a federal legislative solution to the asbestos quagmire will be resuscitated in the near future.
- Although state tort reform has stemmed the tide of unimpaired asbestos claims in some jurisdictions, the plaintiffs' bar is mounting serious challenges to roll back these reforms. We expect this effort will continue to gain momentum in the next few years.

In summary, although fewer overall asbestos personal injury claims are being filed in the U.S., the number of high-risk mesothelioma and other cancer cases has remained fairly stable. More of these cases are being concentrated in unfavorable jurisdictions and are being handled by a smaller group of skilled plaintiffs' counsel.

Defendants in asbestos litigation will need to remain vigilant in not raising their profile unnecessarily while continuing to challenge dubious claims of exposure and injury. Finally, companies considering entering into a corporate transaction with a company involved in the U.S. asbestos litigation will need to exercise a high level of diligence to fully understand the nature of the asbestos liability at issue, the degree of financial risk posed, and how that risk can be managed. Although asbestos may not be grabbing the headlines it did a few years ago, the litigation still poses very real risks to an increasing group of companies.