American Legislative Exchange Council

The State Factor

Jeffersonian Principles in Action

ASBESTOS AND SILICA LITIGATION REFORM: HELPING THE SICK, CURBING FRAUD, AND PROVIDING LIABILITY FAIRNESS

By Mark A. Behrens

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Introduction

Studies have shown that up to 90 percent of recent asbestos claimants are not sick. Those who are sick face a depleted pool of assets as asbestos lawsuits have bankrupted an estimated 85 companies. Plaintiffs' lawyers have responded by dragging many small and medium size companies into the litigation; more than 8,500 defendants have been named. Before it ends, the litigation may cost up to $195 billion–on top of the $70 billion spent through 2002–with approximately 58 percent of the total amount going to transaction costs, such as attorneys' fees.

In recent years, some asbestos personal-injury lawyers have diversified their practices, filing claims alleging exposure to silica. Silica is present in sand, gravel, soil, and rocks. In its natural form, silica is not harmful, but when fragmented into tiny particles (such as through abrasive blasting, foundry operations, or road construction and repair, and other construction activities), silica can be dangerous if repeatedly inhaled.

In many instances, plaintiffs' lawyers have filed claims against both asbestos and silica defendants, although leading medical experts agree that it is a medical rarity for someone to have both asbestos-related and silica-related impairment.

In 2005, the manager of the federal silica multi-district litigation, U.S. District Judge Janis Graham Jack of the Southern District of Texas, recommended that all but one of 10,000 federal court silica claims be dismissed on remand because the plaintiffs' diagnoses were fraudulently prepared.

The American Legislative Exchange Council (ALEC) has developed model legislation called the Asbestos and Silica Claims Priorities Act to address some of these problems. The core of the model Act is the adoption of procedures requiring claimants to submit credible and objective evidence of physical impairment to proceed with an asbestos or silica claim. The presently unimpaired would be protected from having their claims time-barred should they develop an impairing condition in the future. Thus, the truly sick are given priority so they can receive more timely and adequate recoveries, defendants are relieved from having to spend critical resources on premature or meritless claims, and the non-sick have their claims preserved. The model Act also contains provisions to curb forum-shopping abuse and stop the improper joinder of dissimilar claims.

Reforms similar to the ALEC model have been enacted in Ohio, Georgia, Texas, Florida, Kansas, South Carolina, and Tennessee. These reforms also have received the support of the Council of State Governments, National Association of Insurance Commissioners, and National Conference of Insurance Legislators. In addition, the ALEC model finds support in an American Bar Association resolution calling for the enactment of federal asbestos medical criteria legislation and reforms adopted by many courts.

ALEC also has developed a separate model bill called the Successor Asbestos-Related Liability Fairness Act to lessen the injustice from the application of outdated successor liability laws to asbestos cases.

These laws generally provide that when a predecessor merges with another corporation, the successor can be held liable for the torts of the dissolved predecessor. ALEC's model Act would place a principled and reasonable limit upon the wholly vicarious asbestos liability of a successor corporation following a merger. Reforms based on the ALEC model are now law in Pennsylvania, Ohio, Texas, Mississippi, Florida, and South Carolina.

Laws based on the ALEC models, coupled with general tort reform enactments, are having a positive impact on the overall asbestos and silica litigation environment. As the CEO of Liberty Mutual Group testified in 2006:

> *The beneficial impact of these efforts cannot be overstated. Historically, Texas, Ohio and Mississippi have been the leading states to generate claims filed against Liberty Mutual's policyholders, collectively accounting for approximately 80 percent of the asbestos claims filed against Liberty Mutual's insureds. Since the statutory and judicial reforms in those three key states, the decrease in the volume of claims has been truly remarkable. In Mississippi, the decrease has been 90 percent, in Texas nearly 65 percent and, in Ohio, approximately 35 percent. Across all states, from 2004 to 2005 we have seen over a 50 percent decrease in the number of new claims filed, a trend that has continued in 2006. These numbers are the best evidence that state-driven initiatives are working. . .*

This article provides background and support for the two ALEC model bills that specifically address asbestos and silica litigation issues.

ASBESTOS AND SILICA CLAIMS PRIORITIES ACT

I. THE ASBESTOS LITIGATION CRISIS IN A NUTSHELL

The United States Supreme Court has described the asbestos litigation as a "crisis." Claims have poured in at an extraordinary rate, scores of employers have been forced into bankruptcy, and payments to the sick are threatened.

A. Mass Filings by the Non-Sick and the Role of Screenings

The vast majority of recent asbestos claimants are "not impaired by an asbestos-related disease and likely never will be," according to Christopher Edley, Jr., a former Harvard Law School Professor and current Dean of the University of California-Berkeley's Boalt Hall School of Law. Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said, "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by the unimpaired.

According to former U.S. Attorney General Griffin Bell, mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. As Senior U.S. District Court Judge Jack Weinstein and Bankruptcy Court Judge Burton Lifland have explained: "Claimants today are diagnosed largely through plaintiff-lawyer arranged mass-screening programs targeting possible exposed asbestos workers and attraction of potential claimants through the mass media." *U.S. News & World Report* has described the claimant recruitment process:

> *To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: "Find out if YOU have MILLION DOLLAR LUNGS!"*

Professor Brickman has estimated that more than one million workers have undergone attorney-sponsored screenings.

Litigation screenings have come under significant scrutiny. As General Bell has pointed out, these "screenings often do not comply with federal or state health or safety law. There often is no medical purpose for these screenings and claimants receive no medical follow-up." Senior U.S. District Judge John Fullam has said that many X-ray interpreters (called B readers) hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable."

The American Bar Association Commission on Asbestos Litigation studied this problem with the assistance of the American Medical Association. The commission confirmed that claims filed by the non-sick generally arise from for-profit screening companies whose sole purpose is to identify large numbers of people with minimal X-ray changes "consistent with" asbestos exposure. "Some X-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars—in some cases, millions—in the aggregate by the litigation screening companies due to

the volume of films read." The commission also reported that litigation screening companies find X-ray evidence that is "consistent with" asbestos exposure at a "startlingly high" rate, often exceeding 50 percent and sometimes reaching 90 percent. In February 2003, the commission's findings led the ABA's House of Delegates to recommend the adoption of federal legislation requiring claimants to demonstrate impairment before proceeding with an asbestos claim.

More recently, researchers at Johns Hopkins University compared the X-ray interpretations of B Readers employed by plaintiffs' counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-rays' origins. The study found that, while B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9 percent of the X-rays, the independent B Readers found abnormalities in only 4.5 percent of the same X-rays—a difference the researchers said was "too great to be attributed to inter-observer variability."

One physician, Dr. Lawrence Martin, explained the reason plaintiffs' B readers seem to see asbestos-related lung abnormalities on chest X-rays in numbers not seen by neutral experts: "the chest X-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." Some attorneys reportedly pass X-rays around to numerous radiologists until they find one who is willing to say that the films reflect evidence of asbestos-related disease.

B. Impact of Unimpaired Claimant Filings

Lawyer-generated asbestos claims have had serious adverse consequences for sick plaintiffs, the judicial system, businesses swept into the litigation, and the economy as a whole. For example, mass filings by unimpaired claimants have created judicial backlogs and are exhausting scarce resources that should go to the sick and their families. The Manville trustees have reported that a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever." The Trust is now paying out five cents on the dollar to asbestos claimants.

Cancer victims now have a well-founded fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed. In fact, plaintiffs' lawyers who primarily represent cancer victims have been highly critical of lawyers who file claims on behalf of the non-sick.

- Matthew Bergman of Seattle: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. . . . [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."
- Peter Kraus of Dallas: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."
- Randy Bono of Madison County, Illinois: "Getting people who aren't sick out of the system, that's a good idea."
- Steve Kazan of Oakland: "The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs' attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them."
- Terrence Lavin of Chicago (and former Illinois State Bar President): "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an X-ray."

The large number of employers that have been forced into bankruptcy reinforces the concern that, unless something is done, sick claimants may face a depleted pool of assets in the future. According to a 2006 American Bar Association publication, asbestos lawsuits have forced an estimated 85 companies into bankruptcy. The process has accelerated in recent years. RAND found that between 2000 and mid-2004, there were more asbestos-related bankruptcy filings than in either of the prior two decades.

These bankruptcies can cost employees their jobs and ordinary citizens their retirement savings, as well as have a deep impact on affected communities. A 2003 study by Nobel laureate Joseph Stiglitz of Columbia University found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. Those workers and their families lost up to $200 million in wages; employee retirement assets declined roughly 25 percent. Another 2003 study found that for every 10 jobs lost directly, the affected community may lose eight additional jobs, leading to lower real estate values and tax receipts. Former Goldman Sachs Managing Director Scott Kapnick testified, "the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their shareholders and employees, and the economy as a whole."

Furthermore, experience shows that when "traditional" asbestos defendants seek bankruptcy court protection, the plaintiffs' bar will cast its litigation net wider and sue more defendants. Plaintiffs' attorney Richard Scruggs has said that the litigation has become an "endless search for a solvent bystander." According to RAND, nontraditional defendants now account for more than half of asbestos expenditures.

C. State Legislatures And Courts Respond

State legislatures are responding to these problems by enacting laws to set aside and preserve the claims of the non-sick so that scarce and diminishing resources can be focused on the truly sick. In 2004, Ohio became the first state to require plaintiffs to demonstrate impairment in order to bring or maintain an asbestos claim. In 2005 and 2006, Georgia, Texas, Florida, Kansas, and South Carolina enacted similar asbestos medical criteria laws.

Early indications are that these laws are working to focus resources on the truly sick and discourage unripe or frivolous litigation. For example, Bryan Blevins of Provost & Umphrey, a national plaintiffs' practice based in Beaumont, Texas, told the National Law Journal that since Texas enacted its 2005 medical criteria law, "[t]he only cases getting filed now are cancer cases, which are 12 percent to 15 percent of the cases being filed nationwide." Richard Schuster, chairman of the Columbus-based Vorys, Sater, Seymour and Pease's national toxic tort defense litigation practice, has said that Ohio's medical criteria law "dramatically cut the number of new case filings by 90 percent." John Cooney, an asbestos plaintiffs' lawyer based in Chicago, told the *Financial Times,* "I know whole firms that just don't do asbestos anymore."

"A lot of companies that were seeing 40,000 cases in 2002 and 2003 have dropped to the 15,000 level," according to Jennifer Biggs of the American Academy of Actuaries. Frederick Dunbar of NERA Economic Consulting recently studied the SEC filings of 18 large asbestos defendants and found 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."

State medical criteria laws find support in court orders that require claimants to demonstrate impairment in order to proceed to trial. The claims of the unimpaired are put on an inactive docket, where they are exempt from discovery and do not age. Since 2002, inactive asbestos dockets have been adopted in New York City and Syracuse, New York; Cleveland, Ohio; Minnesota (coordinated litigation); Madison and St. Clair Counties in Illinois; Portsmouth, Virginia; and Seattle, Washington—joining Massachusetts (coordinated litigation), Chicago, and Baltimore City, which adopted similar plans in the late 1980s and early 1990s. In 2005, RAND called the "reemergence" of inactive dockets "one of the 'most significant developments'" in asbestos litigation.

For years, these same principles also have been applied to cases on the federal asbestos multi-district litigation docket. Since 1992, all federal court asbestos cases have been subject to an order dismissing the claims of persons who cannot produce evidence of impairment caused by asbestos. In 2002, the manager of the federal asbestos docket also dismissed all cases initiated through mass screenings. The judge explained, "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."

Additional support for state medical criteria laws comes from decisions by state courts in Arizona, Delaware, Maine, and Pennsylvania, which have held that unimpaired claimants do not have a claim as a matter of law.

II. SILICA LITIGATION

For years, litigation against industrial sand manufacturers and other aggregates and industrial minerals companies, respirator (dust mask) makers, and related safety equipment manufacturers by workers alleging health conditions from workplace exposures to silica was stable, with only a low number of people pursuing claims each year.

In recent years, however, there has been an increase in the number of lawsuits arising out of the use of industrial sand. Tellingly, the same lawyers and law firms who for years specialized in asbestos cases have filed many of the

newer silica suits. The tactics these lawyers have used to generate asbestos claims have been applied to the industrial sand context, such as plaintiff recruitment through Internet Web sites, mobile X-ray vans, and mass screenings.

Some lawyers have even filed asbestos "re-tread" cases, bringing silica lawsuits on behalf of people who have already received an asbestos-related recovery. As the *National Law Journal* reported, "[o]ne of the most explosive revelations that . . . emerged from the [federal court silica litigation] is that at least half of the approximately 10,000 plaintiffs . . . had previously filed asbestos claims."

In 2005, the manager of the federal silica multi-district litigation recommended that all but one of 10,000 federal court silica claims should be dismissed on remand because the plaintiffs' diagnoses were fraudulently prepared. "[T]hese diagnoses were driven by neither health nor justice," U.S. District Court Judge Janis Graham Jack said in her opinion, "they were manufactured for money." Judge Jack also noted the impact of for-profit screenings: "Defendant companies pay significant costs litigating meritless claims. And what harms these companies also harms the companies' shareholders, current employees, and ability to create jobs in the future. And potentially, every meritless claim that is settled takes money away from Plaintiffs whose claims have merit. And not only are those with meritorious claims denied just compensation, they are potentially denied full and meaningful access to the courts."

The U.S. Attorney's Office in Manhattan and the Texas Attorney General have convened grand juries to consider criminal charges arising out of the federal court silica litigation. In addition, the U.S. House Energy & Commerce Subcommittee on Oversight & Investigations held a series of hearings in 2006 to probe fraud in silica suits. According to *The Wall Street Journal*, several doctors and the owners of two screening companies refused to answer Congressional questions, invoking their Fifth Amendment rights. The co-owner of a third screening company could not be found by federal marshals attempting to serve him a subpoena.

In 2004, when the Ohio Legislature enacted its asbestos medical criteria law, the legislature also enacted legislation to help ensure that silica filings would not be exacerbated by plaintiffs' lawyers who might be discouraged from bringing weak or meritless asbestos suits as a result of the new asbestos law. Georgia, Texas, Florida, Kansas, and South Carolina addressed asbestos and silica claims simultaneously in their 2005 and 2006 medical criteria laws. Tennessee also enacted a medical criteria law for silica claims in 2006.

III. ENDING FORUM SHOPPING

Forum shopping is a problem in asbestos and silica litigation because different states, and different jurisdictions within states, treat claims differently. Rather than file cases where there is a logical connection to an injury, plaintiffs' lawyers often strategically file cases in certain "magic jurisdictions" with a reputation for producing large settlements and verdicts. Plaintiffs' lawyer Richard Scruggs has explained:

> *What I call the "magic jurisdiction,". . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. . . .These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is.*

The American Tort Reform Foundation calls these places "Judicial Hellholes" because court procedures and laws are routinely applied in an unfair manner against civil defendants.

From 1998 to 2000, according to RAND, 11 states saw the brunt of asbestos filings: Texas (19 percent), Mississippi (18 percent), New York (12 percent), Ohio (12 percent), Maryland (7 percent), West Virginia (5 percent), Florida (4 percent), Pennsylvania (3 percent), California (2 percent), Illinois (1 percent), and New Jersey (1 percent). Many of these jurisdictions became magnet courts for asbestos claims because of their reputation for high verdicts and settlement values. The story is the same with respect to silica litigation, where most cases are clustered in counties and states that plaintiffs hope will produce a favorable recovery.

The filing of asbestos and silica cases in jurisdictions that have no meaningful connection to the claim or the claimant creates judicial inefficiencies, clogs the courts for local people trying to resolve local issues, burdens local jurors who must take time away from work or home to decide disputes that should be heard elsewhere, raises expenses for local taxpayers, and often results in unfair procedures that raise due process issues for defendants.

State legislatures are starting to take their courts back from out-of-state litigation tourists. For example, Arkansas enacted venue reform legislation in 2003; Mississippi followed in 2004. In 2005, Georgia and Florida enacted venue reforms applicable to asbestos and silica cases, the South Carolina legislature took action to stem forum shopping, and Texas closed a loophole that previously facilitated forum shopping abuse. Also in 2005, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to limit venue in asbestos actions. In 2006, Tennessee enacted a venue reform applicable to silica cases. These reforms generally require claimants to file where they reside or where the exposure giving rise to the alleged injury occurred.

IV. SHUTTING DOWN TRIAL CONSOLIDATIONS

Some courts that have been inundated with asbestos claims have tried procedural shortcuts to move the dockets at a faster pace. One technique that is particularly unfair to litigants is the joinder of dissimilar claims for trial, either in mass consolidations 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 illness at all. Defendants are not given a meaningful opportunity to defend the aggregated cases and are forced to settle, regardless of the merits of the individual claims.

As its turns out, bending procedural rules to put pressure on defendants to settle does not make cases go away, it invites new ones. As Duke Law School Professor Francis McGovern explained, "[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam." One West Virginia trial judge involved in that state's asbestos litigation acknowledged, "we thought [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. . . . [I]t drew more cases." Consolidations also raise serious due process issues.

Georgia, Texas, and Kansas addressed this problem in their 2005 and 2006 medical criteria laws by including provisions to stop the joinder of asbestos and silica cases at trial. Tennessee's 2006 silica medical criteria law contained a similar reform.

Courts also are taking a fresh look at this practice. For example, the Mississippi Supreme Court has severed several multi-plaintiff asbestos-related cases, such as Harold's Auto Parts, Inc. v. Mangialardi, where the court called a 2004 mass action a "perversion of the judicial system." In July 2005, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions. Most recently, in August 2006, the Michigan Supreme Court adopted an administrative order that precludes the "bundling" of asbestos-related cases for trial. The order states: "It is the opinion of this Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery."

V. ALEC's MODEL ASBESTOS AND SILICA CLAIMS PRIORITIES ACT

ALEC developed its model Asbestos and Silica Claims Priorities Act to provide legislators with a sound and fair model to improve the handling of asbestos and silica cases in state courts. The ALEC model bill seeks to address the problems outlined above in a surgical and narrowly tailored manner.

Medical criteria: The core of the model Act provides for the adoption of procedures that require claimants to submit credible and objective evidence of physical impairment in order to bring or maintain an asbestos or silica claim. Discovery generally would be stayed until a claimant has presented prima facie evidence of impairment; this is to allow defendants to focus their resources on compensating the truly sick. Statutes of limitations would be tolled for presently unimpaired claimants so that these individuals may pursue a claim in the future should an impairing condition develop. To help ensure the reliability of claims, evidence relating to impairment would have to comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment established by the medical community. Evidence relating to impairment

also must comply with applicable laws, regulations, licensing requirements, and medical codes of practice, and shall not be obtained under the condition that the claimant hire the attorney or law firm sponsoring the examination, test, or screening.

Venue reform: To address forum shopping-abuse, the ALEC model requires asbestos and silica claims to be filed in the state and county where the plaintiff lives or had the most substantial cumulative exposure to asbestos or silica.

Joinder reform: To stop the unfair and improper joinder of dissimilar claims, the ALEC model generally provides that asbestos or silica claims may only be consolidated for trial if all parties consent.

SUCCESSOR ASBESTOS-RELATED LIABILITY FAIRNESS ACT

I. SUCCESSOR LIABILITY

By statute or case law, it has become the general rule that when a predecessor merges with another corporation, the successor can be held liable for the torts of the dissolved predecessor — even if the successor did nothing wrong and the activity of the predecessor that created the liability was terminated before the merger. In such circumstances, even if the predecessor is a small company and the successor a large company, an overwhelming injustice can strike employees, shareholders, lenders and other stakeholders of the larger successor.

For example, consider a corporation that has engaged in some kind of business activity that may give rise to liability. If the total gross asset value of that corporation were $10 million, the maximum amount plaintiffs could collect from that company (even if the plaintiffs could take priority over all the creditors of the company) would be the total asset value of the company. But assume the same corporation merges into a successor corporation worth $1 billion. Even though that successor itself did nothing wrong, it could be liable for up to its entire value of $1 billion solely because the predecessor was merged into it. In mass torts situations like asbestos, when there are many claimants, and many defendants are already bankrupt, joint and several liability can allow an innocent successor corporation to be unjustly singled out and bankrupted for wrongs it did not do.

In some circumstances, the rule of successor liability can cause a tremendous injustice, as in the case of Crown Cork & Seal, the inventor of the bottle cap and one of the companies that has been swept into asbestos litigation by plaintiffs' lawyers searching for new defendants. Crown never manufactured, sold, or installed a single asbestos-containing product in the company's 100-year history. Yet, the company has been named in a number of asbestos-related lawsuits because of its brief association with a dormant division of Mundet Cork Co. more than 40 years ago.

In November 1963, Crown purchased a majority of the stock of Mundet Cork, a company that made bottle caps, just as Crown did. Before the acquisition, Mundet also had a small side business making, selling, and installing asbestos insulation. By the time of Crown's stock purchase, however, Mundet had shut down its insulation operations. Crown never operated the insulation manufacturing operation.

Within 93 days after Crown obtained its stock ownership interest for $7 million in Mundet, what was left of the Mundet insulation division—as a matter of fact, the entire line of that insulation business, including idle machinery, leftover inventory, and customer lists – was sold off by Mundet. Mundet also signed a negative covenant not to get into that business again after the sale. Thereafter, Crown acquired all of Mundet's stock and Mundet, now having only bottle-cap operations, was merged into Crown in January 1966.

As a result of this brief passive ownership, the merger of Mundet into Crown has spawned more than 300,000 asbestos-related claims against Crown, even though its merger with Mundet occurred before any federal OSHA regulations on asbestos were established. Crown has been sued in asbestos-related cases solely as a successor to Mundet Cork. Crown's initial investment in Mundet over four decades ago has cost Crown almost $600 million in asbestos-related payments. Crown's credit rating has been reduced and the company has been forced to pay higher than prevailing interest rates on its borrowing.

Crown's story illustrates the unfairness of asbestos litigation, particularly with regard to the application of outdated successor liability laws. As Sen. Orrin Hatch said on the Senate floor in April 2004, "The trial lawyers have made Crown Cork & Seal pay dearly for the 90 days it owned the insulation division of Mundet. . . . They should never have had to pay a dime to begin with."

Scholars such as the highly regarded University of Chicago Dean and torts Professor Richard Epstein have argued that a failure to limit liability to the value of the predecessor makes no sense either as legal or economic policy. As Professor Epstein has explained in

his torts textbook about successor liability arising from a merger or consolidation:

> The black letter rule holds the surviving entity responsible for the torts of all of its predecessor entities. To see the business pitfalls that this rule holds for the unwary, assume that corporation A with assets of $10 million is merged into corporation B with assets of $1 billion. Let corporation A make some dangerous product that poses risk of future harms, and all assets of corporation B may be seized to pay for any wrongs that A committed before the merger. Yet by operating A as a separate subsidiary, B could continue to insulate its assets from pre-merger liabilities, and perhaps its post-merger liabilities as well. Keeping an acquired corporation alive as a separate subsidiary instead of liquidating it into the acquiring firm typically turns on tax or corporate law considerations unrelated to issues of products liability law. Yet the current regime of successor liability exacts a high price for corporate consolidations that may well make sense for other business or tax reasons. *A better rule would hold B liable as a successor only for the assets descended from the acquired firm (augmented by a suitable rate of return over time), without exposing its separate assets to A's pre-merger liabilities.* (The consolidation should be treated as an assumption of the post-merger liabilities.) (Emphasis added).

II. ALEC MODEL SUCCESSOR ASBESTOS-RELATED LIABILITY FAIRNESS ACT

ALEC's model Successor Asbestos-Related Liability Fairness Act would restore fairness to successor liability by providing that plaintiffs allegedly harmed by the predecessor would be able to collect from the successor no less than the same amount they could have collected if no merger had occurred: the total gross asset value of that predecessor at the time of the merger. The successor would get credit for all the settlements or judgments it has paid or committed to pay since the merger. The successor's liability would cease when it has paid or committed to pay as much as the predecessor's gross assets would now be worth (adjusted upward for the passage of time). Any successor that independently commits a tort—whether before or after a merger—could still be held liable to the full extent of its own assets for any harm it causes.

Laws providing litigation fairness to successor companies like Crown have been enacted in Pennsylvania (2001 and amended 2004), Texas (2003), Mississippi (2004), Ohio (2004), Florida (2005), and South Carolina (2006). These laws specifically cap payments that a company as a successor by merger must pay as a result of asbestos claims, reducing the jeopardy of innocent corporations by fairly altering (but not extinguishing) remedies available to asbestos plaintiffs. In December 2006, the Council of State Governments voted to approve the Florida and South Carolina laws as Suggested State Legislation.

CONCLUSION

ALEC's model Asbestos and Silica Claims Priorities Act and model Successor Asbestos-Related Liability Fairness Act offer a balanced and fair approach to managing some of the most unfair aspects of asbestos and silica litigation. The Asbestos and Silica Claims Priorities Act allows the resources of courts and defendants to be focused on sick claimants who need timely and adequate compensation. The Act also will help ensure that those cases are heard in jurisdictions that have a logical connection to the claimant or claim. In addition, plaintiffs and defendants will be more likely to receive individualized justice. The Successor Asbestos-Related Liability Fairness Act would place a principled and reasonable limit upon the wholly vicarious asbestos liability of a successor corporation following a merger.

Both of these model bills have been enacted in a growing number of states and have achieved strong momentum in a short period of time. It is encouraging to see that fairness and sound public policy are being applied more often in asbestos and silica cases. As more legislators look for ways to improve the asbestos and silica litigation environment, they would be wise to consider and enact ALEC's proposed reforms.

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