Home of the Asbestos Litigation 'Gold Rush'?

What is happening in California stands in stark contrast with national trends.

Asbestos litigation has been described as the longest-running mass tort in U.S. history. Since asbestos litigation emerged more than three decades ago, lawyers who bring asbestos cases have kept the litigation going by adapting to changing conditions. Over the past several years, many states have enacted reforms to stem some of the most notable litigation abuses. California has not. As *Los Angeles Business Journal* reporter Emily Bryson York warned, "California is positioned to become a front in the ongoing asbestos litigation war."

A number of plaintiffs' firms that manage high-dollar asbestos claims are opening up offices in California. For example, Dallas-based Baron & Budd set up shop in Beverly Hills in 2007, and the SimmonsCooper from Southern Illinois has placed its only out-of-state office in El Segundo. Another huge player, Dallas' Waters & Kraus, which opened a small Los Angeles office in 2001, has been described by a *Daily Journal* reporter as having a "prominent presence" since its 2006 merger with the plaintiffs' firm Paul & Janofsky. Also opening up offices in California are Texas-based Brent Coon & Associates, The Lanier Law Firm, and Simon Eddins & Greenstone. According to Professors Alan Calnan and Byron Stier of Southwestern Law School in Los Angeles, "there is a sense locally among the bar that Southern California may be in the midst of a surge."

MARK BEHRENS is an attorney in the Washington, D.C.-based Public Policy Group of Shook Hardy & Bacon.

Former defense lawyer Patrick Hanlon, now a lecturer at the University of California, Berkeley's Boalt Hall School of Law, has said that "plaintiffs' firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases." Indeed, many of the plaintiffs' firms have clustered their offices in the Los Angeles and San Francisco-Oakland areas.

These firms are not setting up shop in California because they like the weather. Historically, lawyers who represent plaintiffs in asbestos-related lawsuits have strategically flocked to places they believe will give them a tactical advantage, rather than file where there is a logical and factual connection to a claim or claimant. Such claimants have been called "litigation tourists" - and they are many in California. A 2006 sample of 1,047 asbestos plaintiffs in California for whom address information was available showed that an astonishing *30 percent* had home addresses outside of California.

PHIL GOLDBERG is an attorney in the Washington, D.C.-based Public Policy Group of Shook Hardy & Bacon.

Judges in California have acknowledged the burden placed on the judicial system by the state's asbestos docket. For example, San Francisco Superior Court Judge James McBride recently said that the length of asbestos trials causes hardship for jurors, leaving many citizens unable to serve and forcing the courts to "use jurors at an absolutely abominable rate." In 2004, participants in a "Judges Roundtable" noted that asbestos cases were taking up 25 percent of the San Francisco Superior Court's docket and were a "growing percentage" of the court's ever-increasing caseload. A former San Francisco Superior Court judge said, "Lately, we have seen a lot more mesothelioma and other cancer cases than in the past."

California courts are also dealing with a worsening financial crisis - a $410 million budget gap, so far, and the closure of all state courts once a month. As the enabling statute for these extreme actions explains: "The Legislature finds and declares that the current fiscal crisis, one of the most serious and dire ever to affect the state, threatens the continued operations of the judicial branch." With insufficient money to keep the courts open to its own residents, California judges might question whether they have been too welcoming of "tourist plaintiffs" who can have their cases heard elsewhere.

In addition, Californians' tax dollars pay the costs of administering these out-of-state claims. For residents, being called to jury duty on these cases takes a toll. They are off work or away from home. Normally, accepting this burden would be part of one's duty as a citizen, but not when the case should be heard elsewhere or one's service is being manipulated as part of litigation gamesmanship.

In fact, "litigation gamesmanship" is a charitable way to describe tactics being employed in some of the new California cases. For instance, Los Angeles Superior Court Judge Aurelio Munoz has sharply criticized the Texas-based Waters & Kraus firm for repeatedly filing cases in Texas, dismissing them, and then re-filing them in Los Angeles - all in an apparent effort to play what he termed the "grisly game of asbestos litigation." As Judge Munoz wrote, "the filing of the Texas action was deliberately done to prevent the defendants from having adequate discovery and to prevent" defendants from seeking dismissal even when the plaintiff did not identify any of that defendant's products as being a possible source of his or her asbestos exposure.

Judge Munoz also highlighted other mischievous practices plaintiffs' lawyers use to facilitate large recoveries against multiple defendants and waste California judicial resources.

"The object appears to be to keep [non-culpable] defendants in as long as possible in order to force settlement out of those defendants in lieu of dismissals. It is not unusual to have trials with trial estimates of 15 to 20 days, commencing with 10 or more defendants. As a result many jurors have to be called, a longer jury selection occurs and the settlements begin to occur during jury selection and even as the opening statements are made. The main theme seems to be settle or we'll run up the attorney's fees so high that it is cheaper to settle. Rarely do the cases go to verdict. Instead what is accomplished is a waste of the court's time, the burning of numerous jurors because of the one day one trial rules and what seems to be a type of judicially sanctioned extortion."

What is happening in California stands in stark contrast with national trends. Other states have enacted a series of reforms, from assuring that claimants are truly sick, to facilitating the dismissal of non-culpable defendants, to sending out-of-state claimants to more appropriate jurisdictions. California judges and state legislators should take similar steps to make sure that California is not hit by a litigation tsunami as other states close their shores to abusive asbestos claims.