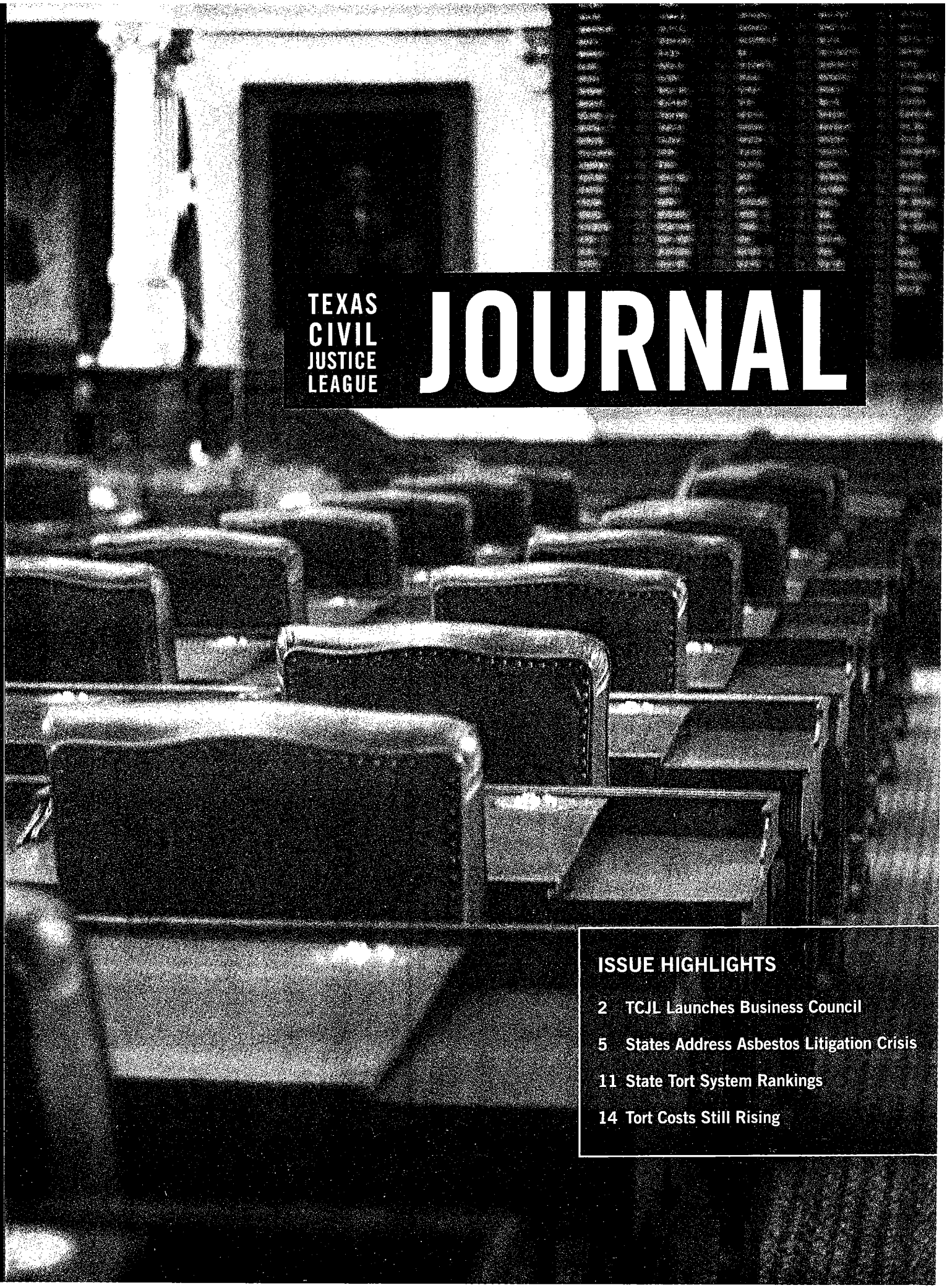

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ISSUE HIGHLIGHTS

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STATES ADDRESS ASBESTOS LITIGATION CRISIS AND CURB SILICA LITIGATION FRAUD

by Mark A. Behrens

Recent studies have shown that up to ninety percent of the claimants who file asbestos claims today are not sick. Those who are sick face a depleted pool of assets as asbestos lawsuits have bankrupted at least seventy-eight companies.

As a consequence of these bankruptcies, the litigation has spread to thousands of small and medium size companies. Some companies have been drawn into the litigation solely because they merged with another corporation and therefore became liable for the torts of the predecessor. Recently, some personal injury lawyers have begun to use mass screenings to recruit plaintiffs to file claims alleging exposure to silica. In many instances, plaintiffs' lawyers have filed claims against both asbestos and silica defendants.

To address these problems, Texas and other states have enacted procedures requiring claimants to submit credible and objective evidence of physical impairment to proceed with an asbestos or silica claim. Often, these laws also contain provisions to curb forum-shopping and joinder abuse. In addition, many states, including Texas, have lessened the injustice from outdated successor liability laws by placing a principled and reasonable limit upon the wholly vicarious asbestos-related liability of a successor corporation following a merger.

Texas and other states have enacted procedures requiring claimants to submit credible and objective evidence of physical impairment to proceed with an asbestos or silica claim.

These laws, coupled with general state tort reform legislation such as that enacted in Texas, are having a positive impact on the state tort litigation environment. As the CEO of Liberty Mutual Group, a large insurer, recently testified:

"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 state laws that specifically address asbestos and silica litigation issues with the hope that the impressive success achieved to date can be replicated in more states.

Mass Asbestos Filings Exhaust Resources

The vast majority of new asbestos claimants are not impaired by an asbestos-related disease and likely never will be. 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 unimpaired claimants.

Mass screenings conducted by plaintiffs' lawyers are driving the filing of these claims. *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!'"

These filings have created judicial backlogs and are exhausting scarce resources that should go to the sick and dying, and their families. Now that scores of defendants have been forced into bankruptcy, cancer victims have a well-founded fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed. For example the trust set up to pay claims after Johns-Manville declared bankruptcy has cut its settlement payments to just five cents on the dollar after being swamped by claims filed by persons with no discernable impairment. The trusts created through the Celotex and Eagle-Picher bankruptcies have similarly reduced payments to claimants. Dallas plaintiffs' lawyer Peter Kraus has said that plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."

The plaintiffs' bar has responded to the large number of asbestos-related bankruptcies by casting the litigation net wider. More than 8,500 defendants have been named in asbestos cases. According to plaintiffs' attorney Richard Scruggs, the litigation has become an "endless search for a solvent bystander." The Congressional Budget Office has observed that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities." According to the RAND Institute for Civil Justice, nontraditional defendants now account for more than half of asbestos expenditures.

State legislatures are responding to these problems. In 2004, Ohio became the first state to require plaintiffs to demonstrate physical impairment in order to bring or maintain an asbestos-related action. In 2005, Georgia, Texas, and Florida enacted similar asbestos medical criteria laws. In 2006, medical criteria legislation in Kansas enjoyed massive bipartisan support and received the signature of Democratic Governor Kathleen Sebelius, a former executive of the Kansas Trial Lawyers Association. South Carolina also joined the list of asbestos medical criteria states in 2006.

Early indications are that these laws are working as intended. For example, Bryan Blevins of Provost & Umphrey, a national plaintiffs' practice based in Beaumont, Texas, told the *National Law Journal* in 2006 that since Texas enacted its 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. I think we are going to see dramatic, dramatic changes when the numbers come in from [2005]." An Ohio lawyer who chairs his firm'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."

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The Growth of 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. Recently, 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 are bringing many of the new silica suits. Some have speculated that asbestos personal injury lawyers have filed silica cases as a way to "diversify" beyond asbestos and circumvent legislation on that issue. Some lawyers are even filing "re-tread" cases—bringing silica lawsuits on behalf of

people who have already received an asbestos-related recovery. *The National Law Journal* reported in February 2005 that at least half of the approximately 10,000 plaintiffs in the federal multi-district silica litigation had previously filed asbestos claims.

In June 2005, the manager of the federal silica litigation, U.S. District Court Judge Janis Graham Jack of the Southern District of Texas, issued a scathing opinion in which she recommended that all but one of the 10,000 claims on the docket should be dismissed on remand because the diagnoses were fraudulently prepared. "[T]hese diagnoses were driven by neither health nor justice," Judge Jack said in her opinion. "[T]hey were manufactured for money." Both the U.S. Attorney's Office in Manhattan and the Texas Attorney General have convened grand juries to consider criminal charges arising out of Judge Jack's findings. A congressional investigation has been launched as well.

In 2004, when the Ohio legislature enacted its asbestos medical criteria law, the legislature also enacted medical criteria 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 silica medical criteria reform law in 2006.

Ending Forum Shopping

Forum shopping is a problem in both asbestos and silica cases because different states, and different jurisdictions within states, treat claims differently. Rather than file cases where there is a logical connection to a claimant or claim, plaintiff lawyers often strategically file cases in certain areas referred to as "magic jurisdictions" by Mississippi trial lawyer Richard Scruggs, or "Judicial Hellholes" by the American Tort Reform Foundation. These are places that have developed a reputation for producing large settlements and verdicts because court procedures and laws are routinely applied in an unfair manner against civil defendants.

State legislatures are starting to take their courts back from out-of-state litigation tourists. Over the past three years, Florida, Mississippi, South Carolina and West Virginia enacted meaningful venue reform legislation, and Texas closed a loophole that previously facilitated forum shopping abuse. In 2006, Tennessee enacted a venue reform applicable to silica cases. These laws generally require claimants to file where they reside or where the exposure giving rise to the alleged injury occurred.

Shutting Down Trial Consolidations

Some courts that have been inundated with asbestos and silica claims have tried judicial shortcuts to move the dockets at a faster pace. One technique that is particularly unfair to the litigants is to join disparate claims for trial, either in mass consolidations or in clusters. People with serious illnesses are often lumped together with claimants having little or no illness. Defendants have no real ability to defend the cases and are forced to settle, regardless of the merits of the individual claims.

Instead of clearing dockets, consolidations actually invite more claims. RAND recently concluded "it is highly likely that steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved." As mass tort expert Francis McGovern of Duke Law School has explained, "[i]f you build a superhighway, there will be a traffic jam."

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

Successor Asbestos-Related Liability Fairness

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 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 in their dragnet search 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. over forty 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 ninety-three 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

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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. 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 more than a half billion dollars 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 U.S. Senator 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."

Laws providing litigation fairness to successor companies like Crown have been enacted in Texas, Pennsylvania, Mississippi, Ohio, Florida, and South Carolina. 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 May 2006, a Texas appellate court upheld Texas's successor asbestos-related liability law as a legitimate exercise of the legislature's police power.

Conclusion

States, such as Texas, where a majority of asbestos and silica claims have been filed have taken significant measures to stop litigation abuse.

Asbestos and silica litigation appears to have reached a turning point. States, such as Texas, where a majority of asbestos and silica claims have been filed have taken significant measures to stop litigation abuse. If these trends continue, the litigation will once again be focused on those who are truly sick, it will occur more often in jurisdictions that have a logical connection to the claimant or claim, plaintiffs and defendants will be more likely to receive individualized justice, and fairness will be applied to successor corporations.

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