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AN ASBESTOS caution tape is wrapped around the site of the demolition of a home in the Lower Ninth Ward of New Orleans in 2006. Asbestos claims overall are down in number, but pockets of severity remain.

Asbestos Litigation: A Reckoning

The days of companies dealing with tens of thousands of new asbestos claims each year appear to be over thanks to changes in the laws in key states. Less certain is the extent to which asbestos defendants' costs will be reduced. **BY BRADLEY DREW AND MARY LYMAN**

In evaluating the risk that exposure to tort litigation poses for a company, some of the factors that must be considered include the number of claims that may be filed, the likelihood that the company will be found liable or will be forced to settle for payment, and the value that will be assigned to the claims. All of these factors are influenced by both the statutory and the common law of the states in which tort actions are filed.

The legal environment for those involved in such circumstances, particularly the thousands of companies drawn into asbestos litigation, has changed significantly over the past several years.

In 2001, companies across a spectrum of industries were drowning in asbestos claims, with the major asbestos defendants named in tens of thousands of new claims every year. Some states tended to attract large numbers of claims because of favorable tort law and plaintiff-friendly juries; Texas and Mississippi were particularly notorious in this regard.

A number of corporations filed for bankruptcy, using reorganization under Chapter 11 as a means of dealing with the asbestos litigation burden. Asbestos claims threatened to swamp syndicates at Lloyd's of London.

The relentless rise in claims led to pressure from the affected companies, their insurers, and legal scholars to address what had become an untenable situation. The most visible effort, a federal asbestos reform bill, did not succeed.

However, important changes in the laws in some key states combined with changes made in past years as part of general product liability and medical malpractice reform have made a difference in the number of asbestos claims.

A key factor in the asbestos litigation crisis was the increasing number of "unimpaired" claimants, those with little evidence of a discernible asbestos-related injury. By 2002, nine out of 10 claimed a nonmalignant disease, often based on a screening X-ray rather than any noticeable symptoms. They often showed little sign of impairment and perhaps only a tenuous connection to the products of the named defendants. Defendants paid these claims because they were filed in such large numbers that the cost of defending them was prohibitive. This practice in turn encouraged further claims and diverted resources away from those seriously ill with cancer or severe asbestosis.

Beginning with Ohio in 2004, five other states Florida, Texas, Georgia, South Carolina, and Kansas enacted statutes that required plaintiffs filing asbestos and silica personal injury actions alleging a nonmalignant disease to provide evidence meeting specific medical criteria that they were impaired by the disease in order to have an actionable claim, or in the case of South Carolina, to proceed to trial.

Some or all cancer claims, depending on the state, must also meet specific medical criteria. A seventh state, Tennessee, enacted a similar statute covering silica only. Some other jurisdictions have brought about a similar effect through judicial orders establishing inactive dockets to which claims filed by the unimpaired would be transferred, with the statute of limitations tolled, until an illness meeting impairment criteria developed.

Unimpaired claimants might simply have moved on to other states, except for a second, nonstatutory development. In June 2005, a scathing opinion by U.S. District Judge Janis Jack in the federal silica multidistrict litigation shed light on the mass screening network that had generated large numbers of unimpaired asbestos claimants as well as silica claimants.

The physicians and facilities involved were thoroughly discredited; their medical evidence no longer accepted by the courts and the active asbestos bankruptcy trusts. The combination of medical criteria laws and the Judge Jack decision together produced a major change in asbestos claim activity.

VENUE LAWS

Plaintiffs' attorneys prefer to file claims in favorable jurisdictions where they're more likely to win significant judgments or extract higher settlement values. Their ability to do so is limited by state laws governing venue—where a particular action may be brought. Most states' venue laws do not allow claims to be filed in their courts unless there is a strong connection to that court's location, such as the plaintiff's residence, the defendant's substantial business presence, or the location of the alleged misconduct.

Texas and Mississippi were notorious for having venue laws that, combined with generally plaintiff-friendly systems, made it easy and attractive to file claims there. They also made it easy, once jurisdiction had been established, for one party to bring others in through joinder and consolidation of numerous claims into one large case. As a result, by 2002, over half of all asbestos claims were filed in those two states alone.

Reacting to their growing reputations as "judicial

summary

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hellholes," Texas in 2003 and 2005 and Mississippi in 2002 and 2004 enacted and then strengthened tort reform laws that among other provisions made venue and joinder requirements much more restrictive. Other states have also enacted venue reform and limits on consolidation (typically barring the addition of new claimants without the consent of all parties), some as part of their medical criteria bills.

LIMITS ON DAMAGES

Another focus of tort reform has been limiting the amount of damages that may be assessed against defendants, particularly those going beyond what is needed to compensate for monetary loss. Efforts have focused on limiting punitive damages, whose size and unpredictability make managing risk particularly difficult, and in some states, noneconomic damages such as pain and suffering. The hope is that these limits will not only reduce the amounts awarded to plaintiffs at trial, but by reducing the threat of large trial verdicts, produce more reasonable settlement amounts.

A total of 22 states now have a statutory limit on punitive damages in some or all types of personal injury cases, and Florida has banned them altogether in asbestos and silica cases. In addition, five states have traditionally banned them as a matter of common law. The amounts, nature, and exceptions to the caps – typically for especially egregious conduct by the defendant – vary widely. As a means of providing predictability and an upper-bound to the amount a defendant could be required to pay, the caps are of limited utility not only because of their variability but because in all but a few states they do not impose an absolute dollar limit.

Four states provide a firm upper-bound for punitive damages in all cases; five other states provide a cap in some instances. In the other states, the upper-bound is expressed not as a dollar limit but in relation to another, variable measure. In 16 states, the limit on punitive damages is expressed either as a straight multiple of compensatory damages or as the greater of a fixed sum or a multiple of compensatory damages—for example, the greater of $250,000 or three times compensatory damages. Seven states base the cap wholly or partially on the defendant's finances, which should provide the defendant with a better measure of certainty.

Another way to provide greater certainty and reduce defendants' exposure to punitive damages is to ensure that the same conduct is not punished in this manner more than once. This is particularly appropriate in asbestos cases, when the undesirable behavior is often far in the past. Thus, some states have provided by statute that punitive damages may not be awarded more than once for the same conduct, and others allow or require this factor to be taken into account.

About a dozen states have capped noneconomic damages in some or all tort actions. These caps are more likely to be actual dollar limits than punitive caps; two states factor in the plaintiff's life expectancy and Ohio links them to economic damages. As with punitive damages, however, the caps may be waived or increased if the defendant's conduct is particularly egregious or the injury particularly severe.

LIABILITY

The evaluation of a company's risk from tort litigation involves not only the number and value of claims but what portion of the overall value the defendant will have to pay. Traditional tort law commonly applied joint and several liability, which allows the plaintiff to recover the full amount of damages from any or all of the defendants found responsible for his injury.

Thus, if other responsible defendants are in bankruptcy or otherwise unreachable, a defendant with only a portion of the responsibility for harm may end up shouldering all or most of the burden of payment.

This principle is particularly important in asbestos cases, in which numerous defendants are typically named and there have been many bankruptcies. This principle was the rationale under which plaintiffs could demand from companies only peripherally involved with asbestos products the larger share of damages attributable to actions of other major manufacturers.

More than two-thirds of the states have now modified or eliminated joint and several liability. About two-thirds of those apply purely proportional liability. The others apply joint and several only to defendants whose share of responsibility is greater than 50 percent (or 60 percent in New Jersey). It is still possible to pay more than one's share of liability, as some states reallocate liability among the remaining defendants if any are unavailable, but overall the situation is much improved.

Other provisions that have been seen in state tort reform laws include: limiting liability for nonmanufacturing sellers of products and for innocent owners, lessors, and

renters of premises where plaintiffs may have been exposed; limits on successor liability for asbestos products; and required disclosure by plaintiffs of payments from collateral sources. If the recoveries from the bankruptcy trusts begin to be accepted by judges and/or various courts, the expected recovery from the solvent defendant may be greatly reduced.

EFFECT ON CLAIMS

There is agreement that tort reform has had a major effect on the overall level of asbestos claim filings. The drop has been primarily in nonmalignant claims, which have decreased dramatically from 2002 levels while mesothelioma claims have remained fairly stable.

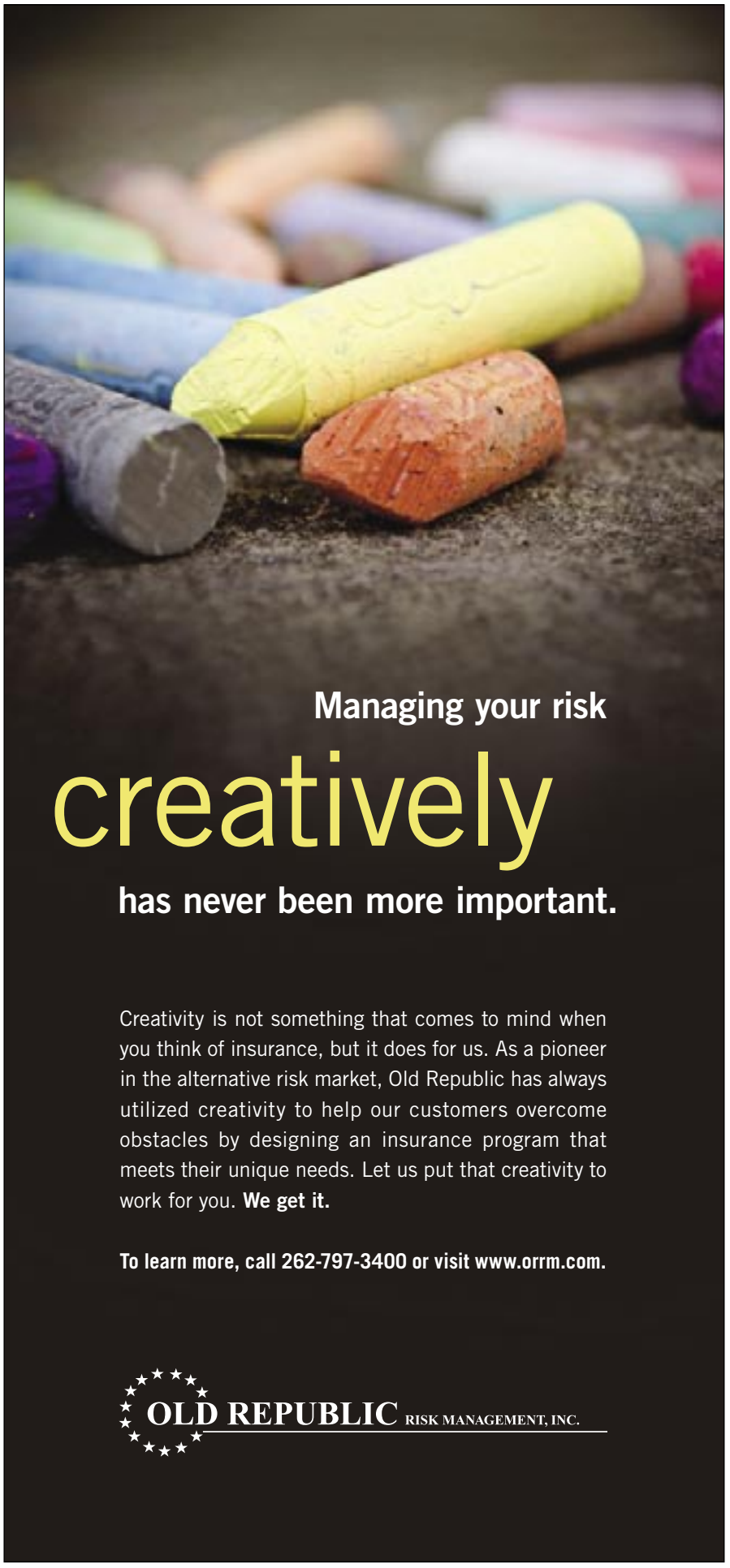
There is evidence of this in asbestos defendants' public reports – filings reported in defendants' 10-K filings showed that new claims dropped over 85 percent between 2001 and 2007.

The decline in claims has been particularly dramatic in the states that formerly had the highest numbers of claims: Mississippi, Texas, Ohio, and Florida. All four states enacted major tort reform legislation between 2002 and 2005. Mississippi did not include medical criteria, but its other reforms combined with the impact of the Judge Jack decision have had the same effect.

Filings nationwide began to diminish about the same time as the Mississippi tort reform, but the other states experienced drops in filings to near zero once they enacted their own legislation.

In earlier decades, asbestos litigation seemed somewhat like a water balloon, reshaping itself to fit the area of least resistance—if one state adopted reform measures, it simply moved to plaintiff-friendlier states with no diminution in the overall claiming rate. That is not the case this time around.

While there has definitely been a shift in claims away from those states that dominated in 2002, there has been no dramatic shift to any particular state(s). Maryland, which now leads the other states in claims filings, has always had substantial numbers of asbestos claims; its claim numbers have not grown in number but only relative to the states that dominated earlier.



A Change at the Top

The five states with the highest numbers of asbestos filings in 2003 has changed over the last several years, and their relation to overall filings.

	2003	2005	2007	2009
Miss.	38%	14%	4%	1%
Texas	22%	16%	7%	4%
NY	6%	5%	13%	10%
Fla.	5%	5%	1%	1%
Ohio	5%	3%	5%	4%
All others	22%	58%	71%	79%

Most importantly, while there are some year-to-year ups and downs within individual states, claims everywhere are far lower than they were at the peak of the litigation and continue to decline overall.

The states with the highest numbers of filings in 2003 has changed over the last several years and post tort-reform claims are no longer concentrated in a few friendly states.

We have moved from less than 25 percent of claims coming from states outside the top five in 2003 to more than 75 percent.

CLAIM VALUES

While state tort reform has lowered claim numbers, claims values aren't as easily gauged. After identifying the states that have enacted statutory limits on punitive damages, we compared settlement values in states with caps to values in states without caps.

Our analysis found no significant difference between the two. Moreover, in comparing the trend in values over a period of years we found no upward or downward trend in values that could be linked to punitive damage caps or their absence.

This may be because asbestos is a very mature tort, with well-developed procedures and claim values that are unlikely to be moved by changes in state law. It is worth following the pending economic damages legislation in various states because to the extent new legislation is enacted it could have an impact on claim values.

Recently, the legal environment for asbestos personal injury litigants has changed considerably. Medical criteria laws and other developments have targeted mass screening and claims by the unimpaired; venue and consolidation reforms have made it more difficult to forum shop and to consolidate numerous claims into one case in a favorable state; and changes in joint and several liability and caps on damages have placed some limits on the amounts that defendants may be assessed.

These changes have greatly reduced the number of asbestos claims faced by companies. In the country as a whole, the number of new claims filed each year has dropped dramatically. As we move further from the years of heaviest exposure, epidemiological trends should continue to reduce the numbers of claims. The days of companies dealing with tens of thousands of new asbestos claims each year appear to be over.

Less certain is the extent to which asbestos defendants' costs will be reduced. Certainly companies will no longer bear the expense of managing new claims by the tens of thousands. As we have seen, however, damages caps have not lowered asbestos claims values.

Also, the claims that have been eliminated are mostly the low-value nonmalignant claims, leaving the more expensive claims of those alleging more severe diseases still to be litigated and paid. These more valuable cases may be more likely to go to trial, with the resulting expense, clearly an issue that will bear continued watching.

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