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focus REPORT

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Asbestos Litigation: An Inactive Docket Proposal

A sharp resurgence in the number of asbestos-related claims filed over the past few years in Texas has prompted some legislators to propose the creation of an "inactive docket," a type of waiting list for plaintiffs who have been exposed to the potentially harmful effects of asbestos but are not yet considered impaired. Exposure to asbestos can lead to changes in the lining of the lungs or even death and has been the subject of legal claims since the 1970s. According to a study by the RAND Institute, a nonprofit research organization, over 600,000 people had filed personal injury asbestos claims through the end of 2000, and annual filings have risen sharply in the last few years. In the late 1990s, cases migrated to different states that seemed more likely to produce a favorable result, including Mississippi, New York, Ohio, and West Virginia. Texas accounted for fewer than 10 percent of cases filed before 1998 and for more than 60 percent of filings between 1998 and 2000. Nationally, the U.S. Congress has considered establishing a compensation trust fund financed by industry to pay asbestos-related claims in exchange for immunity from further asbestos liability.

Should asbestos-related injury claims be suspended for those claimants not medically impaired? This report examines a proposed inactive docket for unimpaired asbestos injury claims.

Supporters of an inactive docket for asbestos-related claims by those who are not impaired say that it is the best way to address the issues raised by what the U.S. Supreme Court in 1999 referred to as an "elephantine mass of asbestos cases," *(Ortiz v. Fibreboard Corp.* 527 U.S. 815, 821). They say that healthy claimants without significant impairment due to asbestos exposure constitute as much as 90 percent of these claims, that Texas is receiving a disproportionate share of these cases because plaintiffs and their attorneys consider its courts and juries to be more congenial to their claims, that a larger and more varied number of defendants are being subjected to potentially ruinous damage awards, and that the

potential exists for widespread bankruptcies even by companies that had only peripheral involvement with asbestos products. They say that courts in other states have successfully implemented such a docket, which has helped ease their case burden and reduced costs.

Opponents of the creation of an inactive docket in Texas say that it would limit Texans' access to the courts by unfairly delaying adjudication of the claims of those with demonstrable injuries by arbitrarily and unjustifiably segregating them into second-class status based on their medical condition. An inactive docket would not prevent companies from seeking bankruptcy protection. The responsible companies would not be shielded from liability from those most likely to recover the largest damage awards — the sickest — and still would be subject to large damage claims. They say courts already have the authority to manage their caseloads, including grouping the claims of similarly situated defendants and creating their own form of inactive docket, and that the legal system can handle these cases without legislative interference designed to assist one side in these disputes.

Supporters of an inactive docket say it is the best way to address a mass of claims, while opponents say it would limit Texans' access to courts.

Recent legislation. A number of bills relating to asbestos liability were filed in 2003 during the 78th regular and special sessions of the Texas Legislature. HB 1240 by Nixon and SB 496 by Janek, which focused on creation of an inactive docket, both were reported from committee during the regular session, but died when no further action was taken. Substantially similar bills, HB 47 by Nixon and SB 8 by Janek, also were reported from committee during the first called session. The committee substitute for SB 8 would have permitted the Texas Supreme Court to set the rules for an inactive docket. No further action was taken on either bill. Sen. Janek also filed a similar bill, SB 28, in the third called session, but no further action was taken. A similar bill, SB 41 by Carona, first called session, focused on the creation of an inactive docket, although Sen. Carona's proposal differed in the criteria for who could have filed a claim and when the inactive docket would have taken effect.

A provision specifically relating to successor liability — the extent of liability when a corporation with asbestos claims against it is acquired by another (successor) firm — was enacted as part of HB 4 by Nixon, the omnibus tort reform law. That legislation limits a successor corporation's asbestos related liabilities to the fair market value of the acquired company's total gross assets at the time of a merger or consolidation, if the acquisition took place before May 13, 1968. The cutoff date in the legislation apparently applies to only one company, Crown Cork & Seal, a consumer goods packaging company that had acquired a company with some insulation operations. According to company documents, about 90 days after the stock purchase in 1963, the company sold its insulation operations and was later merged into Crown Cork & Seal, which now is the defendant in a substantial number of asbestos lawsuits because of its successor liability. The limits placed on that liability in HB 4 do not apply to acquisitions completed after 1968 and will not affect Halliburton or other corporate defendants with similar successor liability claims against them.

Asbestos health effects. "Asbestos" is the common name for a group of six different, naturally occurring fibrous minerals: amosite, chrysotile, crocidolite, and the fibrous varieties of tremolite, actinolite, and anthophyllite. These minerals have separable, long, flexible fibers that can be woven into a heat resistant material. Because of these characteristics, it has been used as an insulator for a wide range of manufactured goods, including building materials, friction products (such as automobile brakes), heat resistant fabrics, and household consumer goods.

During the manufacturing and installation process, asbestos fibers can become airborne in a fine dust that settles in the lungs. This dust can irritate the lining of the lungs and lead to scarring or other serious lung conditions. Asbestos-related diseases can have a long latency period, taking as long as 40 years to develop, and generally are dependent on the length of exposure to the fibers. However, smoking and other lifestyle habits may have a significant effect on susceptibility to asbestos-related ailments as well.

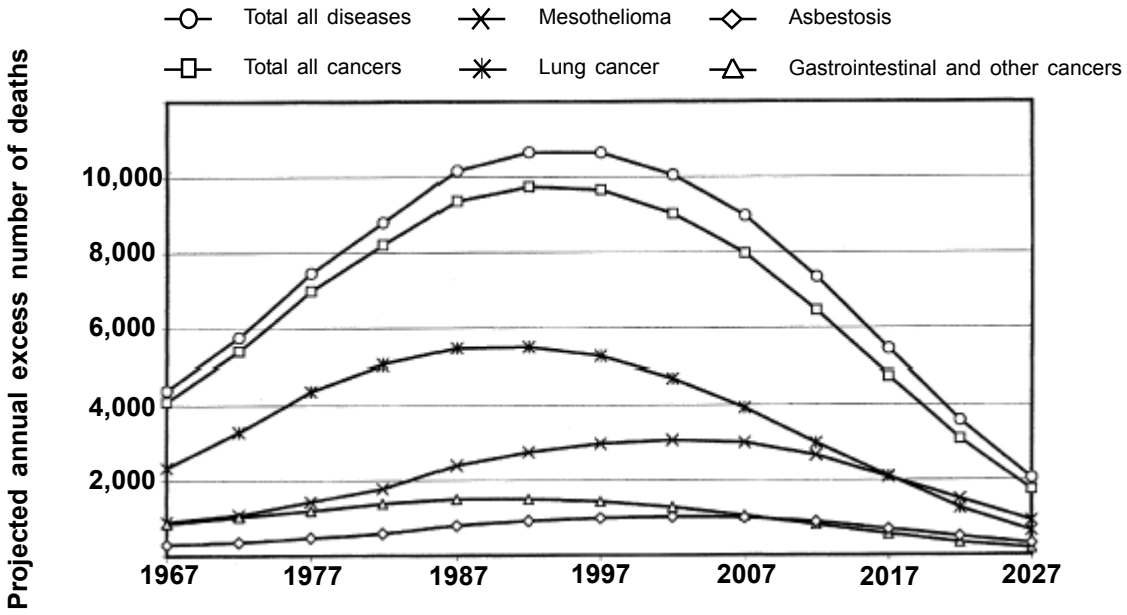
Scarring of the lining of the lungs is called pleural plaque and may be diagnosed with an X-ray. Asbestosis is a more severe form of scarring, which affects the

lungs' internal membranes. Asbestos exposure also may cause lung cancer, including mesothelioma, an aggressive form of cancer that affects the membranes lining the abdomen and chest.

Some asbestos manufacturers were aware of the dangers of prolonged exposure to the fibers well before a landmark study by Dr. Irving Selikoff published in 1962 that established a clear link between asbestos and lung diseases such as asbestosis and mesothelioma. A 1982 study by Nicholson, Perkel and Selikoff published in the American Journal of Medicine identified U.S. industries in which workers were at risk for exposure to asbestos, including manufacturing, shipbuilding, and construction. In all, the study estimated that 27.5 million workers in these industries had been exposed to asbestos from 1940 to 1979. The failure of manufacturers to protect workers and their resistance to greater regulation prior to that time set the stage for litigation.

Data. An analysis by Wyckoff and McBride of two projections of asbestos claims (see figures 1 and 2) found that the total number of excess asbestos disease-related deaths was projected to be greater then 4,000 per year until about 2020. It also found that the number of exposure-related deaths from mesothelioma was projected to peak at 3,000 deaths per year in 2002, then fall to 2,000 by 2017. The number of asbestosis claims were projected to peak at 24,000 per year in 1997 and fall to 4,000 in 2027. Claims for mesothelioma were projected to fall from 1,300 in 2002 to 250 in 2037. The projections of asbestos-related deaths and diseases were compiled in 1982 and based on estimates of the number of exposed workers, duration of employments, the relative risk of exposure, and the dormancy and duration of asbestos-related diseases. The projections of claims were made in 2001 and are based on claims data from the Manville Personal Injury Trust.

Figure 1: Projected annual deaths from asbestos-related diseases



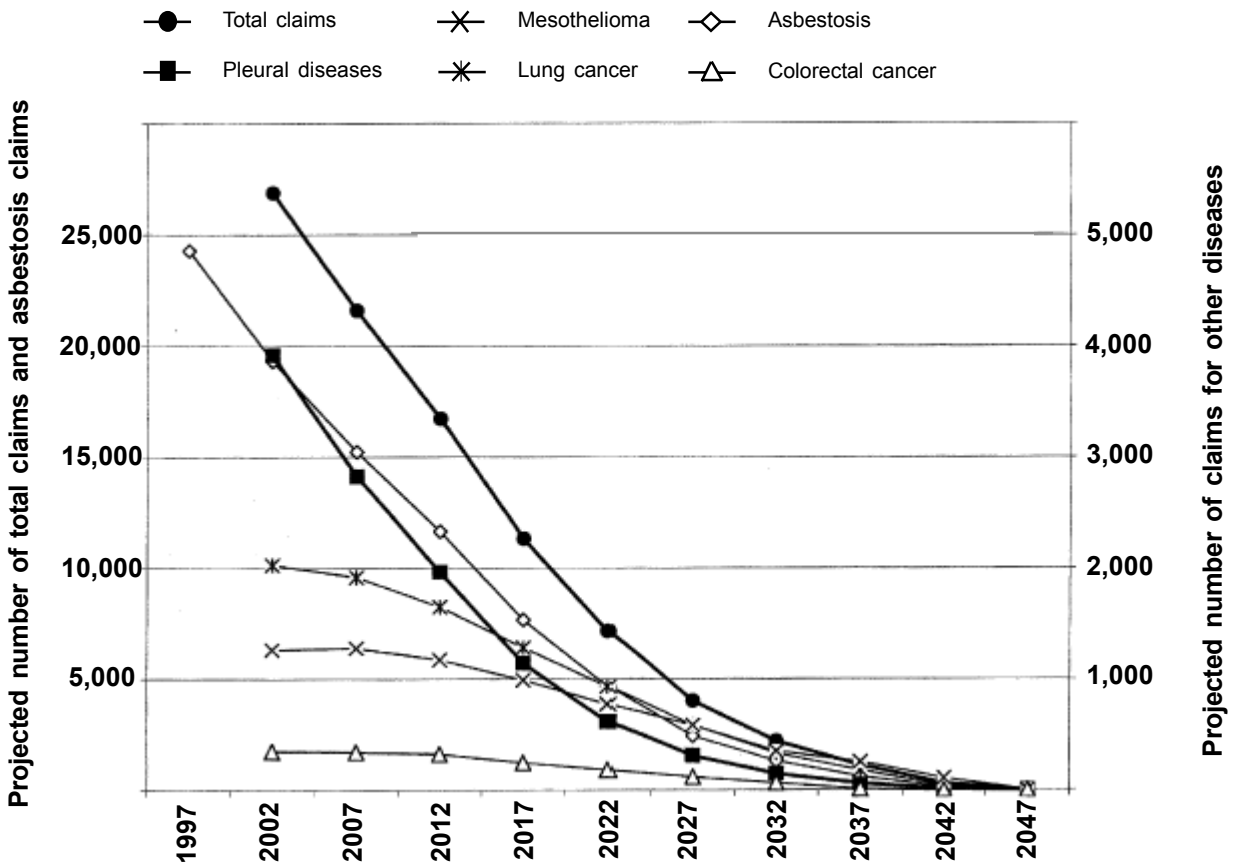
Source: © 2003 From *Primer for Prospective "Secondary and Premises" Asbestos Defendants*, Environmental Claims Journal, vol. 15, no. 1, Winter 2003, by Wyckoff and McBride. Original projections from Nicholson, et. al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality - 1980-2030*, American Journal of Industrial Medicine, vol. 3, pp. 259-311. Reproduced by permission of Taylor & Francis, Inc., http://www.routledge-ny.com

Asbestos as a toxic tort

In 1973, the *Borel* decision (*Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1073 (5th Cir. 1973)) established asbestos claims as products liability cases, not occupational claims to be handled by workers' compensation. According to the RAND Institute, by 1982 more than 20,000 claimants had initiated asbestos lawsuits against 300 defendants at an estimated future cost of $38 billion. At that same time, three major corporations had filed for bankruptcy under Chapter 11, identifying the cost of asbestos litigation as the principal reason for filing.

In 1989, the U.S. Environmental Protection Agency (EPA) proposed a ban of all products that contain asbestos. While that ban was overturned by the 5th U.S. Circuit Court of Appeals on procedural grounds in 1991, the EPA subsequently did ban all new uses of asbestos and established regulations for inspection and remediation in schools, factories, and other buildings. The federal Occupational Safety and Health Administration (OSHA) also set limits on exposure to workers. By the end of the 1980s, asbestos litigation was considered a relatively "mature" wave of litigation in that enough cases had been tried to establish standard key findings and settlement terms.

Figure 2: Projected number of claims for asbestos-related diseases



Source: © 2003 From *Primer for Prospective "Secondary and Premises" Asbestos Defendants*, Environmental Claims Journal, vol. 15, no. 1, Winter 2003, by Wyckoff and McBride. Original projections from Stallard, et. al., *Product Liability Forecasting for Asbestos-Related Personal Injury Claims: A Multidisciplinary Approach*, Annals of the New York Academy of Sciences, vol. 954, pp. 223-244. Reproduced by permission of Taylor & Francis, Inc., http://www.routledge-ny.com

A second wave. According to the RAND Institute, asbestos claims surged between 1982 and 2002. During that period, the number of claimants climbed from 21,000 to 600,000, and the number of defendants grew from 300 to 6,000. The number of bankruptcies attributed to asbestos liability was 60 by 2002, including most of the original manufacturers of asbestos. The RAND study estimated the total ultimate cost, including transaction costs, settlements, and awards, at between $145 billion and $210 billion, with other projections as high as $275 billion. A December 2003 report by the Insurance Information Institute projects the insurance industry's share of asbestos-related losses eventually could reach as high as $65 billion, "more than the combined total for the September 11 terrorist attacks and Hurricane Andrew."

One observation about the recent resurgence of asbestos litigation is that it differs from the earlier wave of litigation in the 1980s because a smaller percentage of claims are made by "impaired" claimants, although what exactly constitutes impairment is a point of contention. Exposure to asbestos ultimately can lead to changes in the lungs that generally are viewed as an injury in the legal sense. While some of these claimants may never develop cancer or another disease that causes functional impairment, under the statute of limitations they are required to file a claim within a specific period of time after discovering their injury or when they reasonably should have discovered their injury — two years in Texas — or forfeit their claim. Many claimants may have no immediate injury stemming from asbestos exposure, but want to preserve their right to seek a legal remedy should they subsequently become impaired.

Some suggest that many claims today are made by people who are not impaired. In 1995, the Manville Trust, a private asbestos trust created to pay claims against the Johns-Manville Corporation when that asbestos manufacturer declared bankruptcy, audited claims of asbestos injury submitted for compensation. When a random sampling of claims were reviewed by an independent B-reader, an impartial expert who can render a second opinion on the X-ray evidence, it found half the claims failed to show diagnostic proof of asbestos exposure. According to the RAND Institute, other studies have placed the percentage of unimpaired claimants as high as 90 percent, but since many of those studies were conducted by defendants, their findings may be contested.

The implication that healthy individuals are filing claims is incorrect, according to opponents of changing the system by which asbestos claims are handled. Asbestos cases are very difficult and costly to pursue, so lawyers have an economic interest only in taking cases

The 1991 Judicial Conference Ad Hoc Committee on Asbestos

The March 1991 report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by U.S. Supreme Court Chief Justice William Rehnquist to examine the issue, summarized the problem as follows:

> [This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related diseases is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
>
> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether. (Quoted in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598, (1997)).

in which an actual injury occurred. The evidence found during the Manville Trust audit should be viewed in context, as most auditors do not agree much of the time. B-reading is an art, not a science, and should not be given the weight of an independent reading. Also, a retrospective audit may not be valuable in evaluating the rate of injury among today's plaintiffs as the medical standards are more refined today than they were when the Manville settlement was reached, say the opponents.

An increasing number of defendants named in asbestos cases are nontraditional industries, so-called "peripheral defendants," unlike the asbestos-related manufacturing and installation industries sued in the initial wave of asbestos litigation in the 1980s. A study by the RAND Institute found that by 1998, peripheral defendants accounted for more than 60 percent of asbestos expenditures to resolve asbestos claims. Asbestos claimants sue peripheral defendants because these companies used products that contained asbestos in the manufacturing of other products, though they did not directly manufacture asbestos products. Also, since most of the asbestos manufacturers have sought protection against further litigation exposure by declaring bankruptcy, leaving claimants with the potential for significantly reduced recovery, the peripheral defendants often have greater resources to pay for asbestos-related claims. These defendants may include such areas as food and beverage, textiles, and durable goods, according to the Claims Resolution Management Corporation, a litigation analysis firm. An example would be auto parts manufacturers sued for using asbestos in brake pad linings.

While asbestos cases may be filed in either state or federal court, depending on the structure of the litigation, the percentage of cases filed in federal court has fallen to less than 20 percent since the early 1990s when the federal court system began transferring cases to a single judge for multi-district litigation (MDL). At that time, Texas saw a sharp increase in the number of asbestos cases filed in state court. Supporters of changing the system by which asbestos claims are handled say that the issue is relevant to the state because Texas has about half of all asbestos claims filed in the nation. They say that claimants "forum shop" and often wind up in Texas courts because the laws governing punitive damages and the juries in the state are favorable to plaintiffs.

Opponents of changing the system say that Texas may have a larger proportion of asbestos cases than other states because it has a significant industrial base, a large resident retiree population who were exposed to asbestos years before, a transitory industrial workforce that has temporary residency, and a history of product liability litigation with specialized legal practices. Changes in the venue laws in the mid-1990s required that plaintiffs plead and prove sufficient facts to show that a Texas venue was proper in filing such cases. The new venue rules authorize judges to remove cases that do not belong in the state. Because cases take years to resolve, there may be cases in the system that were filed under old venue rules and may inflate Texas' numbers.

Other changes in the laws governing venue selection were included in HB 4 by Nixon, the omnibus tort liability law enacted by the 78th Legislature in 2003. The new law requires a court to dismiss a case that has no connection to Texas and that should have been brought in another state or country, if the court determines that dismissal is in the best interest of justice and for the parties' convenience. The bill also established multi-district litigation modeled after the federal MDL. The chief justice of the Texas Supreme Court must appoint a five-member judicial panel that may transfer civil actions involving one or more common questions of fact pending in the same or different courts to any district court for consolidated or coordinated pretrial proceedings. These are not class action rules, but would permit a group of claims to go through pretrial matters together, saving on some costs. The effects of these changes, which became effective in September 2003, are not reflected in current tallies of the proportion of asbestos cases that are in Texas courts today.

Some opponents of changing the system by which asbestos cases are handled say that the resurgence in the number of cases was due to a one-time underlying factor: mass screening. During the late 1990s, some plaintiff law firms offered free X-ray screening for members of certain unions whose work may have exposed them to asbestos. That screening caught a number of cases that otherwise would have gone undetected for many more years. It created a false "bubble" in filings because workers who otherwise would not have filed until a disease was diagnosed proceeded with a claim while the statute of limitations still applied.

Inactive docket proposal

Most of the proposals relating to asbestos liability that were filed during the 78th Legislature focused on the creation of an "inactive docket." Generally, this proposal would have placed claims made by a plaintiff who did not have significant existing impairment or malignancy on an inactive docket until the claimant could show sufficient impairment. In practical terms, this would have meant that a claimant who showed evidence of exposure to asbestos, such as pleural plaque, would have filed a claim within the time allotted for the statute of limitations. Because pleural plaque likely would not meet the medical standard set for an active claim, such claims would have been placed on an inactive docket, suspending or "tolling" the statute of limitations and halting any pretrial activity, such as discovery. If the claimant subsequently developed mesothelioma, a severe medical condition that would meet the criteria for an active case, the claim would have been reviewed by an independent expert, who would have made a recommendation to the court. The court then would have decided if the claim should be placed on the active docket. Factors involved in establishing an inactive docket would have included medical standards by which a claim would have been evaluated, the medical conditions that would have warranted a claim becoming active, and the selection of independent experts.

SB 496 would have required the Texas Supreme Court to establish an inactive docket administered by the Office of Court Administration and funded by a filing fee paid by claimants. If a claim were removed to the inactive docket, the statute of limitations would have been suspended and all pretrial activity halted. In order for a claim to be removed from the inactive docket, the claimant would have had to file a motion for removal showing that the medical criteria were met.

The bill proposed medical standards by which a claim would have been evaluated and criteria that a court would have used to decide if the case should be

Proposed medical criteria for removal of cases from the inactive docket

The American Bar Association adopted a policy statement concerning asbestos litigation in February 2003 in which it proposed medical standards by which claims could be evaluated. These standards are based on the American Thoracic Society's official statement regarding lung function testing. For a claim to be removed from an inactive docket, the claimant's lung tests would have to show, at a minimum:

- a quality 1 chest X-ray that, in the opinion of a certified B-reader, shows bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse pleural thickening graded b2 or higher, including blunting of the costophrenic angle;
- pathological asbestosis graded 1(B) or higher under the criteria published in "Asbestos Associated Diseases," 106 Archive of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982); and
- pulmonary function testing that demonstrates either forced vital capacity (FVC) below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal or total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal.

If the claimant's lung function tests did not show these minimum values, the claimant could submit an additional report by a physician that showed:

- a quality 1 chest X-ray that has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher;
- restrictive impairment from asbestosis with supportive pulmonary function test findings;
- reports and readouts from all pulmonary function, lung volume, diffusing capacity, or other testing relied upon for the report's conclusions; and
- the conclusion that the medical findings and impairment were not more probably the result of other causes revealed by the claimant's employment and medical history.

placed on the active docket. That move would have been authorized if the plaintiff could have shown, by a preponderance of evidence, a diagnosis of "impaired asbestosis or other specific, nonmalignant asbestos-related condition accompanied by a verifiable physical impairment substantially caused by the asbestos-related condition." The diagnosis of impairment would have to have been based on a medical report certified by a licensed Texas physician board certified in internal, occupational, or pulmonary medicine based on generally accepted medical standards related to impairment. It would have included a physical examination, a detailed medical history including non-occupational causes of pleural changes, and the claimant's smoking history, as well as a reliable history of exposure that indicated whether each employment involved exposures to airborne contaminants. The bill also would have set forth a definition for generally accepted medical standards based on the American Thoracic Society's official statement regarding lung function testing (see *Proposed medical criteria* sidebar, page 7).

Once a claimant filed a motion to remove the case from the inactive docket, the court would have referred the medical tests and information to an independent expert. Under SB 496, the independent expert would have been randomly selected from a list of experts prepared by the Supreme Court. To be eligible for the list, the expert would have to have been a physician licensed in Texas, board certified, and actively and primarily practicing internal medicine, pulmonary medicine, or occupational medicine. Claims removed from the inactive docket would have received a priority court setting under Govt. Code, sec. 23.101, if the claimant were still living.

Supporters say an inactive docket would focus remedies and awards on those who have actual impairment stemming from asbestos exposure.

The proposal also would have limited the evidence pertaining to the inactive docket process that could have been admitted into any proceeding other than the motion to remove the claim to an active docket. The existence of an inactive docket, or the fact that a claim was or was not on an inactive docket, would not have been admissible. The medical criteria would have been established only for the purposes of the inactive docket, and the fact that a claimant satisfied the medical criteria could not have been construed as a determination that a person had a condition related to asbestos exposure and could not have been used in a proceeding to establish that fact. The expert report would have been inadmissible, and an independent expert could not have been compelled to testify.

Support for an inactive docket in Texas. Supporters of an inactive docket for asbestos-related claims say that it is the best way to address the issues raised by the recent wave of asbestos litigation; specifically, that healthy claimants without significant impairment due to asbestos exposure constitute the vast majority of these claims, that more peripheral defendants are being named, that Texas is receiving a disproportionate share of these cases, and that the potential exists for widespread bankruptcies with the potential loss of jobs and employee pensions and retirement accounts. Other states successfully have implemented such a docket that has helped ease the case burden on the courts and reduced costs.

An inactive docket proposal would focus remedies and awards on those who have actual impairment stemming from asbestos exposure. Because the current system relies on a jury to determine if a claimant is impaired and deserves compensation, people who are not sick can take their case all the way to a trial before that determination is made. It would be significantly more efficient and less costly to make that determination at the beginning of the legal process. Under the current system, the claims of those who are not sick may be grouped with those who are, and companies may settle for much larger overall awards rather than risk a trial with a jury reviewing evidence presented by the sickest claimants. By "piggy-backing" on the sick claimants, those who are not impaired, and may never be, can gain much more than they might otherwise.

An inactive docket would ensure that the determination of a "valid" case would be made by qualified professionals. The proposal would require an unbiased physician who practices in a relevant area of medicine to evaluate the X-rays, lung function tests, and other medical information. This would help ensure that impaired claimants actually got a fairer review of their case than when a jury of laypersons tries to sort through

highly technical and complicated information. Also, a review by a qualified professional would be fairer for all claimants because the same level of expertise would apply to all cases, rather than different juries with different strengths and weaknesses reviewing each case individually.

An inactive docket would help ensure that the sickest patients received compensation rather than pitting them against other healthy claimants. If a high number of asbestos claims forces a company into bankruptcy, then even the sickest claimants may receive little or no compensation. By moving their cases to the front of the line and preventing unimpaired claimants from proceeding, the people who are very ill would be more likely to receive compensation.

Opponents say an inactive docket unfairly would suspend the cases of many victims with legitimate claims, pitting the sickest against the sick.

In addition to helping the sickest patients receive compensation, an inactive docket also would expedite their cases. Instead of waiting in line with unimpaired people as all of their claims work their way through the system, the inactive docket would put the claims of the sickest first. Under the proposal in SB 496, the claims made by impaired asbestos victims who are still alive would be given priority over most other non-asbestos-related cases.

An inactive docket would help prevent a coming wave of bankruptcy filings by peripheral defendants by setting justifiable limitations on their potential liability and making their potential exposure more predictable. Not only do bankruptcies take money off the table for impaired clients, they are bad for the economy. Bankruptcy can produce transaction costs that eat up a portion of the assets upon reorganization, disrupt relationships with vendors and suppliers, result in a loss of jobs and employee pensions and retirement accounts, and generally result in a loss of shareholder value.

Another significant advantage of an inactive docket over the current system is that it would recognize contributory causes when evaluating a claimant's medical situation. A history of smoking or other non-work activities that may contribute to pleural plaque sometimes is not considered by a jury, but would be a required element of the expert review under an inactive docket system. Claimants whose impairment likely was not due to a workplace exposure would not proceed with their asbestos cases, freeing courts to concentrate on those with legitimate claims.

The creation of an inactive docket would not have a significant impact on claimants' ability to obtain health or life insurance. Texas has established an insurer of last resort, The Texas Health Risk Pool, for individuals who cannot obtain commercial health insurance or who have major conditions excluded from their policies. It *is* difficult for all people with a history of asbestos exposure to obtain life insurance, but that is based on their work history, not on medical information that would have been discovered in the course of filing a claim. With or without an inactive docket, these people must disclose their exposure to a potential insurer.

Inactive dockets have been successful in other states. Courts in local jurisdictions including Baltimore, Boston, Chicago, Cleveland, New York City, Seattle, and Syracuse have adopted types of inactive dockets in asbestos cases, as have federal courts in Pennsylvania and South Carolina, according to a January 2004 report in "Mealey's Tort Reform Update." In addition, the Michigan Supreme Court is considering rules that would establish the first statewide inactive asbestos docket. Legislation pending in committee in both houses of the U.S. Congress would establish a federal inactive docket, but since Congress cannot seem to resolve this crisis on the national level, the states must act, say the supporters.

Opposition to an inactive docket in Texas. Opponents of the creation of an inactive docket in Texas say that it unfairly would limit Texans' access to courts, rationing justice by limiting those who could pursue their claims. The Texas Constitution's Open Courts Doctrine protects an individual's right of access to the courts for a "remedy by due course of law," but this proposal would reduce one group of claimants to second-class status by denying them their right to have the courts evaluate their claims.

The claims of ill claimants unfairly would be held on an inactive docket. The claimants whose cases would be suspended are far from healthy, suffering from changes to the lining of their lungs caused by exposure

Federal trust fund proposal

In 2003, the U.S. Senate Judiciary Committee favorably reported S. 1125 by Sen. Orrin Hatch (R-Utah), the Fairness in Asbestos Injury Resolution Act (FAIR Act), which would create a court-run trust fund to pay victims of asbestos exposure. The fund would be financed by insurance companies and corporations that used asbestos in exchange for immunity from further liability through the courts. As proposed, the fund would hold about $108 billion, which would be paid out to victims based on their medical status. Claimants with more advanced diseases caused by exposure to asbestos would be paid more, and those without medical impairment would not be eligible for compensation. The bill also would ban almost all remaining manufacturing, processing, and distribution of asbestos in the United States.

Supporters of the Hatch plan say that it is a fair way to quickly compensate impaired victims. It would ensure that future victims receive some compensation by socking away money that could be lost if the companies were forced into bankruptcy. They also say that it would ensure that the sickest victims got compensation quickly, rather than waiting in line at the courthouse for cases of plaintiffs who were not as sick to be cleared ahead of theirs.

Critics of the Hatch plan say that the proposed $108 billion fund is too small to compensate all future victims and that companies should contribute more to ensure that the fund is solvent in the future. Other critics say that the trust fund is unfair because it would compensate victims far less than they would otherwise receive if their cases went to court. The Hatch plan proposes paying $750,000 to each victim suffering from mesothelioma, while plaintiffs in a similar situation who go to court often receive much higher awards.

to asbestos fibers. This issue has nothing to do with "frivolous" lawsuits because these are victims with legitimate claims that asbestos exposure damaged their lungs. To file a valid claim, the victim already must show physiological changes and a history of exposure to asbestos fibers, and this threshold is high enough.

An inactive docket also would not solve the problem of courts clogged with asbestos-related cases because no such problem exists in Texas. The argument than an inactive docket would help the sickest patients obtain justice more quickly is irrelevant given that the courts already have the authority to prioritize their dockets. Reports from areas of the state that have the highest number of asbestos cases suggest that those dockets are moving at a reasonable pace. However, if all the claimants on the inactive docket in Texas decided to file in another state with sufficient venue connections to one of the defendants, then dockets in that state could be overwhelmed, which just would create a problem elsewhere.

The state should not replace juries with physicians selected by the Texas Supreme Court. Under the current system, juries decide whether a claimant is impaired as part of their deliberation about liability. Requiring a review of each claim before it moved to an active docket would take that role away from juries. Texas relies on juries to make decisions in highly complex cases, including life and death decisions in capital murder cases, so they should be sufficiently qualified to evaluate asbestos cases.

An inactive docket would pit the sickest against the sick. Two individuals with the same history of exposure should not be treated differently when evidence shows that the exposure hurt each individual's lungs. The person who is sicker would have access to remedies, while the person who still is sick, but less so, no longer would be able to obtain commercial health insurance or life insurance nor access to a remedy to change that situation. The sicker person could have health insurance paid as part of a settlement, while the less sick person would have to pay twice the commercial rates to obtain insurance from the state's insurer of last resort while waiting until a court-appointed doctor deemed the person sufficiently impaired for the claim to be heard.

Bankruptcies would not be mitigated or prevented if an inactive docket were in place. Because an inactive docket would not prevent all asbestos cases from going to court, but ensure that only the most compelling were

put on an active docket, companies could expect to settle or lose a higher proportion of active cases. In addition, these cases would be the most severe, likely resulting in the largest damage awards. Because the majority of the cost in an asbestos case is in the settlement or judgment, companies and their insurers would not obtain relief from an inactive docket because they likely would lose or settle any claims that made it onto the active docket. Most asbestos claims are settled out-of-court, and trials are very infrequent. Focusing on the worst cases actually could mean that more cases would be brought to trial before sympathetic juries, which not only could boost the size of the damage award, but also increase the legal costs for defendants. Also, plaintiff attorneys might seek higher awards to make up for the losses in contingency fees from claimants on the inactive docket.

The reorganization of a company under bankruptcy protection is a normal part of the business environment. While jobs may be lost and investors may lose value in their investment, this is part of the free-market economic system and not a sign that the government needs to step in. Companies that have asbestos liability may go bankrupt, but restricting access to courts would not prevent all bankruptcies.

No other state has enacted legislation requiring an inactive docket with special medical criteria that must be met to activate asbestos-related claims. Some courts have established their own inactive dockets or have prioritized asbestos cases so that the claims of the most impaired are heard first, but no state has legislated one. Texas judges have the authority to establish an inactive docket, if justified, which should be the way it is handled, say the opponents.

Other opponents to the proposal for an inactive docket say that Texas should not take action until the effects of previously enacted legislation can be determined. In 1995, the 74th Legislature enacted several bills that substantially changed aspects of the Texas tort law, including restricting venue and increasing penalties for filing frivolous lawsuits. In 2003, the 78th Legislature enacted HB 4 by Nixon, the omnibus tort liability law, which among other changes raised the threshold for joint and several liability in toxic tort cases from 15 percent to 50 percent, and limited the liability of sellers of products that they did not manufacture. It also permitted the designation by defendants of "responsible third parties" to whom juries may assign partial responsibility even when these third parties, such as bankrupt entities and parties outside the court's jurisdiction, cannot be found liable, thereby reducing the potential percentage liability of other defendants. This legislation has changed the legal landscape for asbestos claims, but because these cases sometimes take years until they are resolved, the effects of earlier legislation cannot yet be measured, say the other opponents.

— by Kelli Soika

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Room 420

P.O. Box 2910
Austin, Texas 78768-2910

(512) 463-0752
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