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Asbestos Tort Reform: Where Are We?

Law360, New York (July 21, 2010) -- Several decades ago, in response to the growing number of lawsuits filed and rising damage awards, several states enacted legislation to alter common law rules applicable in certain tort-based lawsuits. Among the various examples of tort reform, some states placed caps on non-economic and punitive damages, modified the application of joint and several liability, and abandoned the collateral source rule, allowing evidence of payment or compensation from sources other than the defendant to be introduced at trial.

That initial wave of tort reform, which gained acceptance in the mid-1980s, was driven primarily by a concern that state courts were overburdened with frivolous lawsuits and that the awards issued by juries in certain types of lawsuits — medical malpractice cases, for example — were excessive, if not alarming.

Within the last decade, a handful of states have breathed new life into the tort reform movement, now focusing their attention on product liability and toxic tort personal injury cases, particularly those alleging exposure to asbestos. Texas, Ohio and Florida, among others, have taken the lead in the current asbestos litigation reform front, each having passed legislation attempting to control the litigation that continues to thrive more than 30 years after it first began in the late 1970s.

To date, however, the asbestos tort reform movement has not gained wide acceptance among state legislatures. In addition, an attempt to pass federal legislation to address the problems presented by asbestos litigation — the Fairness in Asbestos Injury Resolution Act of 2006 — failed to gain enough support to withstand fierce opposition in Congress.

Nonetheless, as the 10-year anniversary of the beginning of the asbestos litigation reform efforts nears, it is apparent that the asbestos-related tort reform of the mid-2000s has had an immediate and dramatic impact on the direction of asbestos litigation that dominates many court dockets around the country.

Asbestos Litigation Reform Efforts

There is no dispute that asbestos litigation continues to be problematic for overburdened and overwhelmed state courts. The effects of asbestos litigation, however, can be equally devastating for a defendant faced with the need to defend itself in hundreds, if not thousands, of lawsuits each year, many of which do not remotely implicate the defendant or allege exposure to the defendant’s products.

Similar to the tort reform movement of the 1980s, the legislative reform efforts of the 2000s were intended, among other things, to relieve the burden on courts and to protect defendants from the harsh economic effects of asbestos litigation.

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In an effort to reduce the number of asbestos claims filed each year, several jurisdictions, including Texas, Florida and Ohio, have enacted legislation that requires some basic threshold demonstration of an illness or injury as a prerequisite to filing suit. For much of the 1990s and into the early 2000s, a large number of plaintiffs filing suit alleging exposure to asbestos claimed only speculative injuries. That is, the plaintiffs did not allege that they suffered from an actual injury relating to their alleged asbestos exposure; rather, these claims were based on the plaintiffs' fear that potential exposure would lead to some future injury or illness.

A small number of states have sought to distinguish between asbestos claimants who have a demonstrable injury and those whose actual physical injuries are non-existent at the time the suit is filed. By requiring plaintiffs to establish their physical impairment at the outset of the litigation, these jurisdictions seek to reduce the number of frivolous asbestos-related cases filed each year, as well as give their courts the opportunity to clear its dockets of stagnant and inactive claims that are not being pursued by the plaintiffs' attorneys that filed them. See, e.g., Ackinson v. Anchor Packing Co. 120 Ohio St.3d 228 (2008) (providing that Ohio's medical criteria statute applied retroactively, allowing the Cuyahoga County Court of Common Pleas to administratively dismiss more than 31,000 pending cases).

To further reduce the number of unsubstantiated claims filed each year, some states also have enacted legislation requiring asbestos cases to be tried individually, as opposed to the system of consolidation that once was thought to increase the efficiency and organization of asbestos dockets in jurisdictions with a large number of pending claims. The thought behind the consolidation of cases for trial was that it would increase the efficiency of the courts, thereby easing the burden on the overworked dockets.

The unintended effect of the trial consolidation system, however, was that it allowed plaintiffs lawyers to bundle for purposes of settlement and trial several weak or even frivolous cases together with a strong case involving a more serious injury with the effect of artificially enhancing the value of the weaker claims and creating an incentive to file an increasing number of weak cases. Courts in several states, including Ohio and Mississippi, have enacted rules or procedures moving away from trial consolidation, thereby eliminating this economic incentive to plaintiffs counsel.

Other states have made it more difficult for out-of-state plaintiffs to file asbestos-related suits in their state courts. For many years, a number of jurisdictions with relaxed pro-plaintiff legal standards and obscenely large jury verdicts in asbestos-related cases, such as Texas and Mississippi, attracted masses of claimants, including out-of-state claimants with little or no connection to the forum, thereby clogging up the state's court dockets.

In 2002, however, Mississippi, once thought to be one of the nation's "judicial hellholes," passed legislation requiring that the county in which the lawsuit was filed bear some relationship to the plaintiff or the facts of the underlying case. This type of legislation was intended to curb the forum shopping that led to overburdened courts in some plaintiff-friendly jurisdictions.

Finally, several states have placed caps or restrictions on potential non-economic and punitive damage awards handed out by juries. In many cases, non-economic and punitive damages form the bulk of a plaintiff's total recovery. As a result, a handful of states, including Ohio and Florida, have established a statutory maximum amount of allowable non-economic or punitive damages in certain tort cases or, in the case of Florida, have eliminated the availability of punitive damages in asbestos cases altogether. By limiting the total potential damages available in a tort action, and thus reducing the total potential recovery for plaintiffs' attorneys, these states have created a disincentive for plaintiffs' counsel to file lawsuits in those jurisdictions.

It is worthwhile to note, however, that some states, such as Maryland, have held the statutory cap on non-economic damages is not retroactive and, therefore, does not apply in lawsuits alleging exposure to asbestos prior to the enactment of the cap on damages. See, e.g., John Crane, Inc. v. Scribner, 369 Md. 369 (2002). In addition, statutes placing caps on potential non-economic damages have been challenged on constitutional grounds with

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some success, most recently in Georgia earlier this year. See Atlanta Oculoplastic Surgery PC v. Nestlehutt, 286 Ga. 731 (2010).

Effects of Tort Reform

Even though this legislation is in its infancy, there are some noticeable outcomes of the asbestos litigation reform efforts of the 2000s. Generally, these statutes have already had the effect of reducing the total number of asbestos-related claims and have changed the types of cases that plaintiffs lawyers choose to pursue, as well as the jurisdiction in which plaintiffs choose to commence their claims.

As an initial matter, the number of asbestos-related claims filed has drastically reduced in recent years and forced plaintiffs attorneys to focus their attention on the smaller number of more serious claims. To some extent, this result should be expected from litigation that is based on events dating more than 30 years ago and that has lasted almost as long. Legislation similar to that in Florida and Ohio that requires some threshold demonstration of medical impairment, however, has further reduced the potential number of lawsuits filed in those jurisdictions and allowed states to remove dormant lawsuits involving claimants with non-existent or speculative physical injuries from their already crowded dockets.

The other effect of these medical criteria statutes is that plaintiffs lawyers are limited to pursuing cases in which the claimant has an established injury, shifting the trend in the litigation away from claimants alleging asbestosis or pleural impairment to those who have been diagnosed with mesothelioma and other types of cancer. Some states, such as Maryland, have established an inactive docket essentially to place cases on hold that do not meet the medical criteria.

Strict legislative reform in the asbestos arena has also forced plaintiffs to find new venues to file their claims. Specifically, it appears that asbestos-related filings are migrating away from jurisdictions where reform has been enacted. Several of the states that were previously considered “judicial hellholes” (e.g., Texas, Mississippi and Florida) have enacted tort reform in recent years, thus making them a less attractive forum for out-of-state claimants. Although plaintiffs lawyers still file a large number of cases in Texas, Florida and Mississippi each year, filings in those jurisdictions have decreased since the enactment of reform legislation several years ago.

Rather than face the strict pre-trial requirements of these jurisdictions, plaintiffs lawyers instead have begun to flock to unrestricted plaintiff-friendly jurisdictions such as California and Illinois. In stark contrast to the states that been proactive in restricting or limiting asbestos litigation, California’s state court dockets, already overwhelmed and overburdened, face an ever-increasing number of asbestos claims filed by both in-state and out-of-state claimants each year. In addition, well-established plaintiffs law firms have opened new offices in these states, perhaps foreshadowing a further increase in the number of lawsuits filed in those jurisdictions.

One outstanding question is whether the asbestos litigation reform efforts have had any recognizable effect on damages awarded to plaintiffs or demands made by plaintiffs during settlement negotiations in cases pending in those jurisdictions. Certainly, in jurisdictions that have created a cap on non-economic or punitive damages applicable in asbestos-related lawsuits (which are almost always the bulk of an asbestos plaintiff’s recovery), there is an immediate impact on the amount that liable defendants will be required to pay in damages.

Where there has been no legislative restriction on damages, however, there appears to be little to no difference between pre-legislation and post-legislation jury verdicts. A review of reported jury verdicts over the past 10 years in Florida and Texas, for example, show no discernible difference between jury verdicts before and after the enactment of their respective legislation. Texas, for instance, has not seen any jury verdicts similar to those in 2001 (prior to its asbestos reform legislation), when plaintiffs were awarded verdicts of $130 million and $55 million in asbestos-related claims. Texas juries, however, have awarded plaintiffs sizable damages awards in recent years, such as a $25.7 million verdict in Behringer v. Alcoa Inc. Similarly, Florida, where the sample size of reported

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verdicts is considerably smaller, has had some alarming jury verdicts both before and after the enactment of its asbestos reform legislation in 2005, most recently a $24 million verdict in 2008 in Honeywell International Inc. v. Guilder.

Conclusion

Although only a handful of states have enacted asbestos reform legislation to date, it is likely that other states will move in that direction in upcoming years. In response to the strict requirements of this legislation in states that were once favorable forums for asbestos claimants, plaintiffs lawyers have shifted their attention to filing cases in jurisdictions that have not attempted to control or restrict the asbestos litigation. Although the outcome of cases at trial may not be affected by state asbestos reform, these statutes have undoubtedly made it more difficult for plaintiffs lawyers to pursue cases in those jurisdictions.

States that have resisted asbestos reform, such as California, will continue to see an increasing number of plaintiffs file suit in its already crowded state courts, plaintiffs who may have otherwise brought suit in states such as Texas, Mississippi or Florida but for the asbestos reform legislation. Faced with this rising number of claims, states such as California and Illinois may have no choice but to consider some of the asbestos reform efforts described above at some point in the near future.

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