



VIII. TORT REFORM

Legislators' Guide to the Issues

ASBESTOS	82
MEDICAL LIABILITY	84

Asbestos

THE ISSUE

The number of suits filed against manufacturers, contractors, suppliers, distributors, retailers, and property owners for asbestos damages has doubled over the past decade. Claimants, recruited by law firms and mass screenings, are rapidly increasing, although production and use of new asbestos products largely stopped in the early 1970s and most claims are filed by individuals who exhibit no medical injury, suffer no functional impairment, and may never be sick.

Asbestos-related litigation touches every industry as companies with distant, peripheral connection to asbestos are named as defendants. Today, over 8,500 companies have been named in litigation. Approximately \$70 billion has been spent in asbestos litigation, and analysts predict an additional \$130 billion in cost.

Despite costly litigation, there is little evidence the investment in asbestos awards are helping people who have suffered harm from exposure. A large percentage of plaintiffs have been awarded compensation for potential, future harm that research demonstrates may never occur, and many cases have been decided on faulty medical information.

The cost of asbestos litigation reaches beyond businesses to workers and communities. Litigation has pushed scores of companies into bankruptcy, costing workers hundreds of thousands of dollars in lost wages and economically depressing communities.

For individuals who have been harmed by asbestos, explosive litigation is clogging the civil justice system and delaying hearings. Excessive litigation is also draining limited resources needed to compensate the sick and injured. In the face of rising claims, trusts established by bankrupt companies have reduced compensation to 15 percent or less of claim value. Examining rising costs of litigation, the RAND Corporation questions whether there will be sufficient money to compensate future asbestos claims.

In Texas, the problem of asbestos litigation is catastrophic. From 1988 to present, Texas has led the nation in the number of cases filed and established landmark rulings for high awards without demonstrated injury. In 2001, Texas awarded \$3 million to three plaintiffs exposed to asbestos who sued because they were afraid of, but did not have, cancer. In the same year, another court awarded \$35 million to 22 plaintiffs for future medical impairment, although there was no evidence to suggest any would incur future asbestos-related disease.

To protect present and future individuals who truly suffer harm from asbestos, Texans must create a fair and expedient process for asbestos litigation.

THE FACTS

- ★ Texas leads the nation in asbestos claims filed from 1988 to 2000
- ★ The number of asbestos claimants has increased almost six-fold since 1982



- ☆ The number of asbestos defendants has increased over eight-fold since 1982
- ☆ Over 105,000 new asbestos claims were filed in 2003, although production and use of new asbestos products largely stopped in the early 1970s
- ☆ The average asbestos claimant sues 60 to 70 defendants
- ☆ 90 percent of new asbestos claims are filed by individuals who have no medical evidence of injury and may never be impaired by exposure
- ☆ 50 percent to 90 percent of judgments were decided on the basis of faulty medical information
- ☆ Only 43 percent of asbestos litigation dollars goes to compensate plaintiffs
- ☆ Total cost of asbestos litigation to American businesses increased from \$1 billion in 1982 to \$70 billion in 2002 – total cost is estimated to be up to \$210 billion
- ☆ Approximately 70 companies have been driven into bankruptcy by asbestos litigation – costing 60,000 jobs and \$200 million in lost wages
- ☆ Payouts of bankrupt companies from trusts have been reduced to 7.5 percent to 15.5 percent of claims

RECOMMENDATIONS

- ☆ Establish objective medical criteria to delay or dismiss claims where there is no evidence of functional impairment
- ☆ Extend relevant reforms from House Bill 4 (78th Legislature) to pending asbestos cases – remove the 15 percent threshold for joint and several liability, establish proportional responsibility, create multidistrict litigation panel for factually similar cases, and refuse cases that have no connection to Texas
- ☆ Disallow cases that join impaired plaintiffs with unimpaired, resulting in over-compensation for the unimpaired and under-compensation for injured plaintiffs
- ☆ End repetitive, punitive damages that reduce compensation for injured plaintiffs

RESOURCES

- *Asbestos Litigation Industry: Reforms Needed To Protect The Truly Sick* by Tammi L. McCoy, Texas Public Policy Foundation (Forthcoming 2005)
- *Asbestos And Its Impact On Texas* by Kay Andrews, 2nd Annual Policy Orientation for the Texas Legislature, Texas Public Policy Foundation, January 2004 (<http://www.texaspolicy.com/pdf/2004-PO-asbestos-ka-PPT.pdf>)
- *The Growing Asbestos Litigation Crisis In Texas* by Richard Faulk, Veritas, Texas Public Policy Foundation, January 2002 (<http://www.texaspolicy.com/pdf/2001-veritas-3-1-asbestos.pdf>)

Medical Liability

THE ISSUE

The 78th Texas Legislature limited non-economic damages in medical liability lawsuits, limits later buttressed by voters' approval of a constitutional amendment. There is ample evidence that House Bill 4 and Proposition 12 are beginning to fulfill hopes that tort reform will ameliorate Texas' medical crisis. The cost of medical malpractice insurance has been reduced for many physicians in Texas. Decreasing costs and relief from the threat of unmerited, exorbitant lawsuits are now encouraging more health care providers to practice in Texas and some medical facilities to expand.

However, it will take some time for the full impact of reforms to be realized. In the months before Proposition 12 took effect, there was a barrage of malpractice lawsuits; consequently, dramatic reductions in the cost of medical liability premiums will not be seen for several years – until insurers deal with costs incurred in winning or losing newly filed litigation. Using state regulation to set or roll back the rates of medical liability premiums to an artificially low cost can provide short-term relief for health care providers but will result in reduced availability of insurance in the longer term. Allowing insurance rates to be determined by market competition is the only proven way to reduce the cost of insurance and increase consumer choice.

The medical system has begun to heal, but state policymakers are still challenged to repair the damage resulting from years of legal and financial jeopardy. Tests and treatment that are medically unnecessary but ordered to protect against lawsuits (defensive medicine) and fear of acknowledging medical errors have undermined health care quality. Although health care professionals have taken strong steps to enforce strong standards of care and safety, providers must be assured that efforts to improve care by identifying errors will be protected. Some states now shield institutions and health care professionals engaging in formal procedures to improve health care outcomes.

THE FACTS

- ★ More than half of all Texas physicians had been sued prior to 2003
- ★ The cost of liability depressed the number of health care providers for Texans – after Proposition 12, the number of providers has increased
- ★ From 1999 to 2003, the number of liability insurers selling policies to Texas medical providers dropped from 17 to 3 – after Proposition 12, 10 new insurers filed to sell malpractice policies
- ★ Nueces County – known to have one of the state's highest number of medical



malpractice and personal injury cases – anticipates a 75 percent drop in lawsuits as a result of a state law passed in 2003

- ★ Texas' largest medical malpractice insurer reduced premiums 12 percent after Proposition 12 was passed and will make an additional 5 percent reduction at the beginning of 2005 – in some states without liability caps malpractice insurance rates doubled in 2003
- ★ A Corpus Christi hospital chain is projecting a \$21 million reduction in annual liability costs and has earmarked savings for expanding patient services
- ★ Over 76 percent of physicians surveyed believe that defensive medicine has eroded the quality of care
- ★ In the first 9 months of 2003 before Proposition 12 went into effect, there was a 300 percent to 500 percent increase in medical malpractice lawsuits filed in Texas – it is likely to take 2-3 years for these suits to be decided

RECOMMENDATIONS

- ★ Establish immunity for health care providers engaged in peer review or quality assurance programs that identify past errors to develop systems for improving patient care outcomes
- ★ Allow the market to determine the price of medical liability insurance premiums – refrain from enacting rate roll-backs and replace current state rate regulatory powers with a system of file and use for medical liability insurance, similar to the system for homeowners' insurance established by the 78th Legislature

RESOURCE

- *Critical Condition: How Lawsuit Abuse Is Hurting Health Care & What Texans Can Do About It* by Chris Patterson, Colleen Whalen & John Pisciotta, April 2003 (<http://www.texaspolicy.com/pdf/2003-04-29-CRITICALCONDITION.pdf>)