

# Liability reform

The changing landscape of asbestos litigation **Interviewed by Chelan David**

**A**ccording to the U.S. Chamber of Commerce, companies have paid out an estimated \$70 billion on more than 700,000 asbestos injury claims, making it the most expensive type of litigation in U.S. history. Rife with fraud and abuse, the asbestos litigation system is clogged with questionable lawsuits.

"You may be struck by the tenuous nature of the connection to asbestos, but it may nevertheless be real," says Timothy Batton, partner at Secrest Wardle. "Size is no deterrent: *Fortune* 500 companies to mom-and-pop hardware stores have been sued."

*Smart Business* spoke with Batton about asbestos liability reform, who can be sued due to the presence of asbestos and how to proceed in the event that a claim is filed.

## What should businesses know about asbestos liability reform?

It is important to realize that changes have been jurisdictional and incremental. On a national level, all manner of reform has been attempted, including individual non-bankruptcy class settlements. However, the U.S. Supreme Court overturned a class settlement in 1999. This decision made it much more difficult to obtain approvals of such settlements in a nonbankruptcy setting. Before that decision, companies with significant exposure to asbestos cases nationwide had to consider bankruptcy in order to put the cases behind them.

In response to the burden that litigation was perceived to be imposing on businesses, Congress has repeatedly attempted to get involved to find a solution. This has usually involved the establishment of some sort of national trust fund that would be designed to compensate each claimant according to preset criteria. However, the proposed plans have not been passed into law. With the failure of national reform, individual states and jurisdictions have taken center stage.

## How has the landscape of asbestos litigation in Michigan changed in recent years?

Within the last several years, there has been an attempt to convince the Michigan Supreme Court to impose so-called inac-



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tive dockets. Asbestos cases can be divided into two categories: asbestotic and those involving cancer. Under these inactive dockets the asbestotic cases, which are typically the least injured plaintiffs and account for nearly 95 percent of the docket, would be rendered inactive. They would remain so until the more serious cancer cases have been resolved. Such a plan shifts the risk of bankruptcy and exhaustion of funds to the less injured plaintiffs. Although some states have adopted this approach, it has not been approved in Michigan.

More recently, the Michigan Supreme Court has imposed an 'anti-bundling' rule, which prevents trial judges from ordering more than one case to trial simultaneously. Previously, several cases could be tried at once, which translated to increased costs and risk for defendants.

## Who can be sued due to the presence of asbestos?

The types of companies who find themselves sued by asbestos claimants have broadened considerably since the litigation's inception. At first, the defendants were the major asbestos insulation manu-

facturers. With bankruptcies and global settlements, those have gone away. This has caused plaintiff attorneys to be very creative in finding and targeting new classes of defendants. They can now include manufacturers of all types of asbestos insulation or parts, including valves, pumps, floor tiles, ceiling tiles, fans, automobile parts and all types of construction materials. Any type of contractor who worked with asbestos can be sued, whether the contractor was involved in construction, repair or maintenance. If your premises contained asbestos, nonemployees who worked or visited there may sue you.

## In the event that a claim is filed, how should one proceed?

If your company receives an asbestos personal injury lawsuit, it is important that you retain an attorney skilled in this area of the law. It is vital that you select someone with experience in the jurisdiction in which you are sued and who is familiar with local plaintiff counsel. The complaint will probably not have much information and may not even notify you of what products your firm is allegedly associated with or the form of the alleged liability. It will be important to perform a full review of company history, operations and records to determine what, if any, historical relationship to asbestos existed. Your attorney should be closely involved in this review and be adept at identifying paths of asbestos exposures of which you may not be aware.

It is usually not desirable to seek an early settlement. For individual cases, the possible settlement amounts can be deceptively low. However, entering into those types of settlements can mark you as willing to settle, motivating plaintiff attorneys to sue you in many more cases, leading to an exponential increase in costs and making it more difficult to extricate you later. Attention then should be paid to retaining and developing records that will support a defense to the claim(s), while your attorney seeks methods of curtailing the filing of new cases. <<

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