Legislative Efforts in Handling Industry-Wide Litigation

Ronald B. Lee, Esq. and Ryan P. Kennedy, Esq.
Roetzel & Andress LPA

Introduction

An emerging trend which has gained some attention as of late is the attempt to handle industry-wide litigation through legislation. Most notably, the Ohio General Assembly has enacted groundbreaking legislation aimed at asbestos and silica/mixed dust cases, as well as products liability cases in general. The success of such legislation will likely cause other states to pursue these types of reforms. On the federal level, the president and Congress have again begun to push for asbestos reform legislation, despite the failure past legislative efforts. Asbestos litigation has exploded over recent years with more than 300,000 cases pending in 2004. One major concern, specifically addressed by the Ohio legislation, is the clogging of the court system with asbestos claims brought by the non-sick. In addition, the number of defendants being sued in asbestos cases has increased from 300 in 1983 to more than 8,400 today, including small businesses and larger companies with only a distant connection to asbestos. See generally RAND Institute for Civil Justice, “Asbestos Litigations Costs and Compensation” (2002). Accordingly, lawmakers have become increasingly interested in exploring new ways to control this type of litigation.

The Ohio Experiment

In June 2004, Governor Taft signed House Bill 292 and House Bill 342, and made Ohio the first state to enact legislation requiring a person to demonstrate actual impairment under objective medical criteria in order to support an asbestos or silica/mixed dust exposure claim. The success of this legislation is likely to energize other state legislative reform efforts in this area.

The Asbestos Reform Bill

In enacting the Asbestos Reform Bill, H.B. 292, the Ohio General Assembly stated that its intent was to: “give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos, fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure, enhance the ability of the state’s judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings and conserve the scarce resources of the defendant to allow compensation for those who may suffer physical impairments in the future.” Am. Sub. H.B. No. 292, Section 3(B). The most significant provisions of H.B. 292 set forth new minimum medical standards for cases involving three different groups of plaintiffs:

1. Claimants advancing a claim based upon the “non-malignant condition”;
2. Claimants who are smokers advancing a lung cancer claim; and
3. Claimants who are advancing a wrongful death claim.

Plaintiffs in each of these three categories must make a prima facie showing of exposure to asbestos, and meet minimum medical requirements through the use of competent medical authority.
A “competent medical authority” is defined in the bill as a medical doctor who is board-certified internist, pulmonary specialist, oncologist, pathologist or occupational medicine specialist who is providing a diagnosis for purposes of constituting prima facie evidence of a physical impairment. The competent medical authority is also required to be a treating physician or have a doctor-patient relationship with the plaintiff. The bill prohibits a doctor from relying upon any information from any other doctors who have not established such a relationship with the plaintiff.

The bill prohibits plaintiffs from advancing a claim based upon a “non-malignant condition” in the absence of a prima facie showing meeting the following minimum requirements:

1. Evidence that a competent medical authority has taken a detailed occupational and exposure history including all the claimant’s principal places of employment and the general level and duration of exposure;
2. Evidence that a competent medical authority has taken a detailed medical and smoking history; and,
3. A diagnosis from a competent medical authority that the exposed person has a permanent respiratory impairment based upon AMA guidelines. R.C. 2307.92(B).

Likewise, plaintiffs who are smokers and are advancing a lung cancer claim must produce diagnosis of primary lung cancer from a competent medical authority providing that exposure to asbestos was a substantial contributing factor to that condition, as well as evidence that ten years has passed since the date of first exposure. R.C. 2307.92(C)(1) Finally, plaintiffs advancing a wrongful death claim must produce evidence of substantial occupational exposure along with a diagnosis that exposure to asbestos was a substantial contributing factor to the death of the exposed person. R.C. 2307.92(D)(1).

Under the bill, an asbestos plaintiff is required to file a written report and supporting test results constituting the prima facie evidence within 30 days after filing the complaint. R.C. 2307.93(A)(1). Any defendant then has 120 days to challenge the adequacy of the report using their own competent medical authority. Id. The General Assembly also made the bill applicable to any pending claims, requiring the plaintiff to file a report within 120 days of the bill's effective date. R.C. 2307.93(A)(2) and (3). If the plaintiff cannot meet the requirements to maintain their claim, the court is required to administratively dismiss the case, however, the court maintains jurisdiction. Id. A case can be reinstated if the plaintiff later becomes able to meet the bill's minimum requirements. R.C. 2307.93(B) and (C).

It is important to note that a trial court in Ohio has recently struck down portions of H.B. 292 as violative of the Ohio Constitution. In that case, the judges of the specially created asbestos docket in the Cuyahoga County Court of Common Pleas held that the bill substantively altered existing Ohio law by imposing additional higher criteria which retroactively impaired or eliminated the plaintiffs' claims. While the case only involved plaintiffs who were smokers and were advancing lung cancer claims, it may signal larger problems with the “retroactive” provisions of the bill. If the court’s decision is upheld it would severely diminish the effectivenes of H.B. 292 by preventing its application to the thousands of claims filed prior to the bill's effective date. The issue will likely work its way to the Ohio Supreme Court in the near future.

Silica/Mixed Dust Bill

The Ohio General Assembly also enacted House Bill 342, which establishes medical standards in silica/mixed dust cases. Am. Sub. H.B. No. 342. The intent of the bill was to require the consideration of factors consistent with those listed by the court in Lohrmann v. Pittsburgh Corning Co., 782 F.2d 1156. See H.B. 342, Section 4. The legislature took a “holistic approach” in adopting H.B. 342 to address silica lawsuits at the same time as H.B. 292. The legislature sought to avoid having silica filings exacerbated by lawyers
who might be discouraged from bringing weak or meritless asbestos suits as a result of H.B. 292. The bill sets forth nearly identical requirements as H.B. 292 for the same three categories of plaintiffs. See R.C. 2307.85(A-D). In addition to the specific legislation addressing asbestos and silica claims, the Ohio General Assembly has also passed a wide-ranging Tort Reform Bill, Am. Sub. S.B. 80. That bill places caps on non-economic damages and limits punitive damage awards in all tort actions. R.C. 2315.18 and 2315.21. It also creates a ten-year statute of repose applicable to product liability actions. R.C. 2125.02 and 2305.10. Finally, the bill provides for comparative fault in product liability actions, which allows parties to introduce evidence of a plaintiff’s right to receive collateral source benefits. R.C. 2315.43

Federal Asbestos Reform Efforts

In addition to efforts at the state level, the federal government has been attempting to enact wide-ranging asbestos reform. President Bush again placed the issue in the forefront during his State of the Union address and he has vowed to push for the passage of an asbestos reform bill this year. Recently, Senate Judicial Chairman Arlen Spector circulated a discussion draft of the Fairness in Asbestos Injury Resolution Act of 2005, which he intends to introduce during this Congress. The new bill is the result of 18 months of private negotiations by a senior appellate judge, business, labor and trial lawyers. Given the failure of past legislative efforts, it is likely that the process of trying to enact such a bill in this Congress will be contentious. However, President Bush and his supporters in Congress have made it clear that the time for asbestos reform is now.

The FAIR Act of 2005 would create an asbestos trust fund of approximately $140 billion funded by assessments from businesses and insurers. The bill provides for front-end funding of approximately $40 billion for the first five years. In exchange, asbestos claimants will “give up” their right to sue.

The difficulty encountering the supporters of this bill became even more evident in early February of 2005, when Senate Majority Leader Bill Frist asked Senator Spector to delay formal introduction of the bill. A big reason for the bill’s delay is the strong opposition put forth by a coalition of insurers, defendant firms and reinsurers. The group, calling itself the Coalition for Asbestos Reform, has expressed serious concerns about the trust fund provisions of the bill and expressed an interest in creative solutions to the asbestos crisis including the adoption of meaningful medical criteria such as those enacted in Ohio.

A similar bill, the FAIR Act of 2004 (S.2290), stalled in the Senate in May 2004 when parties mutually agreed to disagree over how big the trust fund should be. That bill would have established an Office of Asbestos Disease Compensation in the Department of Labor headed by an Administrator responsible for processing claims for compensation and managing the asbestos injury claims resolution fund. Also, the bill would have established procedures for handling claims, including medical evidence and auditing review procedures. It also would have established a four year statute of limitations for filing claims. The failure of the this piece of legislation only serves to underscore the difficulty that the president and lawmakers will face in passing this new bill.

In addition to the asbestos bill, the president and lawmakers have sought other tort reform legislation including legislation to curb medical malpractice and class action lawsuits. On this front, President Bush recently signed his first piece of legislation of 2005 limiting class actions lawsuits filed in state courts. The bill covers class actions seeking damages totaling more than $5 million. Now, in order for a case to remain in state court, at least one-third of the plaintiffs must be from the same state as the lead plaintiff. The bill also limits plaintiffs’ attorneys’ monetary share of an award in consumer class-actions in which settlements take the form of product coupons issued to plaintiffs. The bill is aimed at curbing forum shopping by attorneys who file their lawsuits in localities that are allegedly more plaintiff-friendly.
Conclusion

With the passage of the Asbestos and Silica/Mixed Dust Bills, Ohio has taken the lead in legislative efforts to handle industry-wide litigation. On the federal level, the president and his supporters in Congress appear determined to pass a wide-ranging federal asbestos reform bill this year. Only time will demonstrate the success or failure of these recent attempts to handle industry-wide litigation. However, it appears inevitable that other states will follow the lead of Ohio and other jurisdictions who have engaged in such wide-ranging tort reform efforts.

Ronald B. Lee
330.849.6648 | rlee@ralaw.com

Ron is Practice Group Co-Manager of Roetzel’s Product Liability & Toxic Tort practice and is located in the firm’s Akron office. His practice focuses on toxic tort and mass tort as well as general liability defense and litigation, insurance coverage.

Ryan P. Kennedy
330.849.6651 | rkennedy@ralaw.com

Ryan is an Associate in Roetzel’s Akron office. He focuses on litigation matters and has represented clients on matters involving professional liability, product liability, toxic tort, insurance coverage and commercial disputes.