



# **ASBESTOS CLAIMS AND LITIGATION**

## ***EFFECTS OF THE 2008 ELECTIONS: SUMMARY AND ANALYSIS***

***December 12, 2008***

## PURPOSE AND SUMMARY OF THIS REPORT

The Asbestos Liability Risk Assessment Group (ALRA Group) provides informed, timely, and sophisticated advice to affected parties, including defendants, potential defendants, the insurance and reinsurance industry, financial institutions, financial analysts, and policymakers, with respect to asbestos liability risk assessment issues. The ALRA Group arose as an outgrowth of a prior group, composed of the same principals, the Asbestos Trust Fund Services Group (ATFS),<sup>1</sup> which was formed to offer advice and counsel concerning proposed, and pending, federal legislation to channel asbestos claims, and pending litigation, into a federally-administered, and privately funded, trust fund for asbestos claims. The ATFS Group issued its first comprehensive Report,<sup>2</sup> containing a review and analysis of American asbestos litigation from its inception, with an emphasis on the science, medicine, and government regulatory issues which underlay the litigation, and traced the development of the litigation, including significant developments, defendant strategies, and company bankruptcies, ending with an analysis of the trend in the cases through calendar year 2005, on December 31, 2006. Following that Report, a demand for annual update Reports was created. This Group responded with its updates of the asbestos litigation in 2006, and again in 2007.<sup>3</sup>

These Reports were timely, and well received, as parties with an interest in trends in the asbestos litigation have had a continuing need in obtaining accurate data both about recent case filings, and the rapidly-developing changes and trends in the cases.

In addition to the annual Reports, the ALRA Group has also issued topical Reports on issues and legal trends of timely interest in the asbestos litigation, such as its Report concerning external insulation claims.<sup>4</sup> In response to a number of requests, the ALRA Group provides in

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<sup>1</sup> The ATFS changed its name, and formally became the ALRA Group on August 1, 2007.

<sup>2</sup> **ASBESTOS CLAIMS AND LITIGATION: ISSUES AND STRATEGY; AN ANALYSIS OF THE CASES THROUGH 2005 AGAINST AN HISTORICAL CONTEXT**, © Asbestos Trust Fund services Group, Dec. 1, 2006. The Report may be accessed in the Archive on this site under “News and Updates”.

<sup>3</sup> **ASBESTOS CLAIMS AND LITIGATION: UPDATE AND REVIEW: 2007 NEW CASE FILING SUMMARY AND ANALYSIS**, May 1, 2008; **ASBESTOS CLAIMS AND LITIGATION: UPDATE AND REVIEW: NEW CASE FILING SUMMARY AND ANALYSIS**, July 1, 2007. The Reports may be accessed on this site under “News and Updates.”

<sup>4</sup> **ASBESTOS CLAIMS AND LITIGATION: RECENT TRENDS IN THE LAW: EXTERNAL INSULATION CLAIMS SUMMARY AND ANALYSIS**, April 1, 2008. In this Report, a new trend emerging in jurisdictions such as California, New York, California, and Washington where Plaintiffs’ counsel sought to extend liability of equipment manufacturers for post-sale application of asbestos-containing insulation and other products not supplied or specified by the manufacturer. The Report may be accessed at this site under “News and Updates.”

this Report an overview of the effect of the 2008 presidential election on the asbestos litigation.

During eight years of the Bush administration, a gradual trend favorable to the defense had taken hold. Federal legislative efforts began as early as 2001, but became highly visible beginning in 2003 with the first version of the Fairness in Asbestos Injury Resolution (FAIR) Act, introduced in the United States Senate by Senator Orrin Hatch (R-Utah). The 2005 version of the FAIR act passed the Senate Judiciary Committee, but narrowly failed to survive a procedural cloture vote on the floor of the full Senate in February, 2006. Thereafter, the legislation, with modifications, was again introduced in the Senate, but did not come to a vote.<sup>5</sup>

Other activity included state reforms such as establishment and greater use of Inactive Dockets; Medical Criteria Statutes in Florida, Georgia, Kansas, Ohio, South Carolina, Tennessee and Texas; restrictions on case consolidation and venue rules; and other legislation.<sup>6</sup> Mass litigation medical screenings supported by Plaintiffs' counsel to generate thousands of claims, principally non-impaired pulmonary claims, have also been criticized and restricted. Critics such as Professor Lester Brickman of Benjamin N. Cardozo School of Law have commented critically on the issue.<sup>7</sup> The courts have followed suit, most notably in a highly publicized opinion of United States District Judge Janis Jack of Texas, who dismissed thousands of silicosis diagnoses, partly upon the improbable basis that the same plaintiffs also had asbestosis diagnoses, something rare in real life.<sup>8</sup>

Tort reform advocacy groups such as the American Tort Reform foundation, founded in 1997, became more prominent, especially with such publications as the widely disseminated "Judicial Hellhole" rankings, where the group issued an annual list of the worst courts and jurisdictions around the country from the Defendants perspective, in which to try cases. Asbestos

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Most recently, in a pair of decisions, the Washington Supreme Court ruled against this effort, siding with the equipment manufacturer Defendants. *Vernon Braaten, et al. v. Saberhagen Holdings, et al.*, 2008 WL 5175083; *Joseph A. Simonetta, et al. v. Viad Corp., f/k/a The Dial Corporation*, 2008 WL 5175068.

<sup>5</sup> For a full explanation, and legislative history, see the ATFS (ALRA Group) Report at note 1 above.

<sup>6</sup> For a summary *see, e.g.*, American Academy of Actuaries' Mass Torts Subcommittee, **Overview of Asbestos Claims Issues and Trends**, August, 2007.

<sup>7</sup> See, Brickman, Lester, **The Use of Litigation Screenings in Mass Torts: A Formula For Fraud?**, Working Paper No. 241, Benjamin N. Cardozo School of Law Jacob Burns Institute for Advanced Legal Studies, August, 2008, <http://www.ssrn.com/abstract=1217620>.

<sup>8</sup> *See In re Silica Products Litig.*, No. MDL 1553, 398 F. Supp. 2d 563 (2005).

cases figured prominently in these rankings.<sup>9</sup> Political pressure resulted in a number of reforms, such as the replacement of judges in Madison County, Illinois, a widely-cited “judicial hellhole” jurisdiction, where the long-time asbestos Judge was removed from the asbestos docket in 2004.

### THE 2008 ELECTION

The election of Barack Obama as President, and Joe Biden as Vice President on November 4, 2008, will, in the view of the ALRA Group, have a marked effect on the asbestos litigation. Elected with substantial Plaintiff trial lawyer support, and with the support of increased Democratic majorities in both the House and Senate, the new administration is expected to take action in support of asbestos cases, or, at least, reduce efforts to restrict asbestos cases. In an October 1, 2008 editorial the Wall Street Journal reported that a prominent Illinois Plaintiffs’ asbestos firm, SimmonsCooper, which had historically filed most of its cases in Madison County, Illinois, began moving its new filings to the state of Delaware, where it retained as its local counsel, the firm of Bifferato, Gentilotti & Biden, the Biden being the son of then-Senator, now-Vice President Elect, Joe Biden. The Wall street Journal also reported that, at that time, SimmonsCooper was Senator Biden’s largest campaign contributor.<sup>10</sup>

It is also clear that federal legislation, whether similar to the FAIR ACT or not, designed to restrict asbestos litigation, will not be presented, much less passed, as a result of the retention of the Democratic Senate, and Senator Patrick Leahy (D-Vt.), as Chairman of the Senate Judiciary Committee.

Other examples of change from the elections can be seen at the state level where, for example, the Texas statewide multi-district asbestos litigation Judge, MDL Judge Mark Davidson, lost his bid for reelection. Judge Davidson had brought clarity to Texas asbestos litigation rulings, and was well regarded by all counsel for that effort. In fact, all but four of the Harris County Civil District Judges lost election bids.<sup>11</sup> While there is a holdover effect in the Courts, which can react more slowly to changes by the public electorate, pro-Defendant holdings since the election, such as those by the Washington Supreme Court described at note 4 herein,

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<sup>9</sup> American Tort Reform Foundation, **Judicial Hellholes 2008/2009**, Washington, D.C., 2008. This Report may be accessed at <http://www.atra.org>.

<sup>10</sup> Wall Street Journal, **Biden & Partners How they’re making Delaware a mecca for the tort bar**, October 1, 2008.

<sup>11</sup> In an Order dated December 3, 2008, the Texas MDL Panel, based upon the fact that, despite his November 4, 2008 election loss, as of January 1, 2009, Judge Davidson will become a retired Judge, eligible for MDL assignments. Thus, for now, Judge Davidson will continue to work as Texas MDL asbestos Judge, in charge of all statewide asbestos pretrial proceedings. There is no indication of how long he will remain in that position, since the appointment is at the discretion of the Texas MDL Panel.

are not uniform. For example, on November 25, 2008, the Illinois Supreme Court issued an opinion holding that where a Plaintiff sues multiple Defendants, and settles with one or more before trial, the fault of the settling Defendants may not be considered by the jury for purposes of allocating fault to the remaining Defendants.<sup>12</sup> This will have a direct impact on the large asbestos dockets in Illinois, such as those in Cook County, and Madison County.

Given that asbestos disease trends, particularly for malignant mesothelioma, which currently run at approximately 2,500 cases annually in the United States, will decrease only gradually, it can be expected that asbestos litigation will remain at a steady pace, if not increase.<sup>13</sup>

### CONCLUSION

In this Report, the ALRA Group has provided an overview of changes following the 2008 elections and how the new administration and congress will affect the asbestos litigation in jurisdictions around the country. For further information concerning the matters expressed in this Report, please contact members of the ALRA Group. They may be contacted through <http://www.ALRAGroup.com>.

ALRA Group  
December 1, 2008

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<sup>12</sup> *Ready v. United/Goedeke Services, Inc.*, 2008 WL 5046833.

<sup>13</sup> *See e.g.*, Price Bertram and Ware, Adam, **Asbestos Exposure and Disease Trends in the 20th and 21th Centuries**, Asbestos and Its Diseases, Craighead, John E. and Gibbs, Allen R., eds., pp. 375, *et seq.*, Oxford University Press, 2008.

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