

IMPROVING ASBESTOS CASE MANAGEMENT IN THE SUPERIOR COURT OF SAN FRANCISCO

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Asbestos was among the first hazardous air pollutants regulated by the Clean Air Act of 1970 and has been known as a major health concern for even longer. So it comes as a surprise to many that the asbestos epidemic in America has yet to peak. Diagnoses and death rates of asbestos-related diseases, especially mesothelioma, continue to climb, driving up the number of claims and settlements and sending many employers into bankruptcy.¹

The RAND Institute for Civil Justice estimated that 730,000 asbestos claims had been filed nationally through 2002 and that nearly as many claimants had yet to come forward. The Congressional Budget Office estimated that another 1.7 million claims would be made over the next three decades nationwide. Others have suggested that the number of claims yet to be filed in the United States could reach as high as 2.6 million.²

Asbestos litigation has been called many things: an elephantine mass, the longest running and costliest mass

tort in U.S. history, and a crisis worsening more rapidly than even the most pessimistic projections.³ For the courts, the characteristics of these cases, the number of parties involved, and the overall impact on workload distinguish this litigation from all other civil case types, imposing unique and substantial burdens on judicial officers and court staff.

Drawing on the most recent empirical research conducted by the Superior Court of San Francisco County, this issue of *DataPoints* describes the scope and filing patterns of asbestos litigation in California, the unique characteristics of asbestos cases that strain the judicial and staffing resources of the state courts, and the case management strategies employed by the court to cope with the workload impact of this litigation.

Scope and Filing Patterns of Asbestos Litigation

The Superior Courts of Alameda, Los Angeles, and San Francisco Counties attract nearly all of the asbestos filings in California. These venues have been at the epicenter of California asbestos

litigation since its emergence in the 1970s and ranked among the top five venues in the nation from 1970 to 1987, receiving 29 percent of all asbestos claims then filed in the United States. At that time, the Superior Court of Los Angeles County received more asbestos filings than any other U.S. court.

However, from 1988 to 1992, California's share of asbestos claims plunged from a high of 31 percent to only 5 percent. Other courts shot to the top of the national heap in subsequent years, only to plummet from the list of top venues a few years later. Over the last decade, San Francisco has averaged more than 70 percent of California asbestos filings, but the state's courts as a whole have accounted for only 2 percent of asbestos claims filed in the United States (see Figure 1).⁴

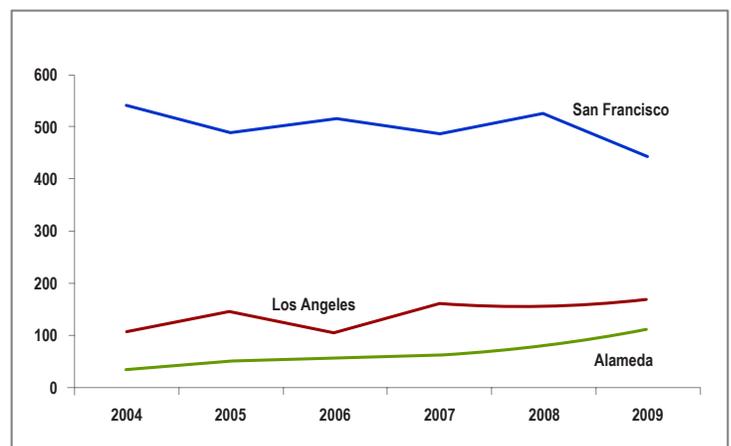
One might suspect that the progression of asbestos-related illness has driven these radical swings in litigation, but this has not been the case. RAND described the underlying phenomenon in its 2005 study:

Sharp changes in filing patterns over time more likely reflect changes in parties' strategies in relationship to changes in the (perceived) attractiveness (or lack thereof) of state substantive legal doctrine or procedural rules, judicial case management practices, and attitudes of judges and juries toward asbestos plaintiffs and defendants, than changes in the epidemiology of asbestos disease.⁵

Because a typical asbestos case involves multiple defendants, multiple insurance carriers, and countless locations of alleged exposure, plaintiffs enjoy considerable latitude in selecting their venues. Indeed, asbestos claims often have weak connections to the venue in which they are filed. In the Superior Court of San Francisco County, only 36 percent of claims filed in 2009 listed any locations of alleged exposure in San Francisco County, while only 46 percent listed a San Francisco location for exposure or for the business address. A majority (54 percent) listed neither a location of alleged exposure nor an employer address in San Francisco. Four percent did not even list a location in California (see Figure 2).⁶

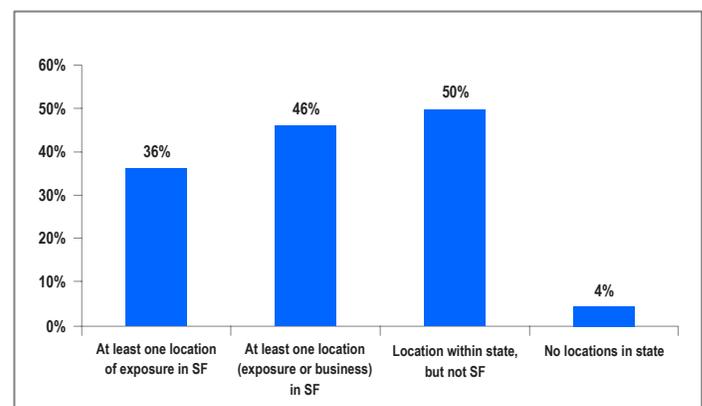
While courts in other states have long since surpassed California in total volume of filings, the

Figure 1. Nearly all new asbestos cases filed in California are filed in the Superior Courts of Alameda, Los Angeles, and San Francisco Counties.



Source: Superior Courts of Alameda, Los Angeles, and San Francisco Counties.

Figure 2. A majority of new asbestos cases filed in the Superior Court of San Francisco County involve neither an employer address nor a location of alleged exposure in San Francisco.



Notes: Based upon 255 cases sampled from the 443 new asbestos cases filed in the Superior Court of San Francisco County in 2009. Sample has a confidence interval of +/- 5 percent.
Source: Office of Business, Planning, and Research, Superior Court of San Francisco County.

pendulum may be swinging back. Former asbestos attorney Patrick Hanlon recently asserted that “plaintiffs’ firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles.”⁷ *Los Angeles Business Journal* reporter Emily Bryson York was even more blunt in her 2006 assessment: “California is positioned to become a front in the ongoing asbestos litigation war.”⁸

The Superior Court of Los Angeles County has experienced an increase in asbestos filings since 2007, just as a number of plaintiff firms from Texas and southern Illinois have opened offices there in response to reforms enacted in their home states.⁹ Such shifts are consistent with the filing patterns observed over time by RAND and may portend a sharp increase in California asbestos litigation in the near future.

Unique Characteristics Increase Workload

Though asbestos cases are designated as complex in San Francisco by General Order #1, these cases differ from most other complex litigation in that they involve neither novel questions of law nor a complexity of issues. Instead, asbestos cases are complex purely by virtue of the number of parties involved, which commonly includes multiple defendants and multiple insurance carriers. As a result, this litigation tends to place a disproportionate case management burden on court clerical staff.¹⁰

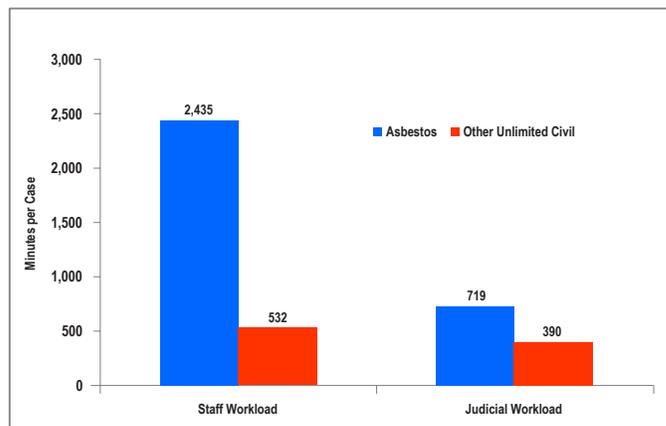
Previous state judicial branch workload studies have failed to capture the true resource requirements of asbestos litigation because these cases were not counted as a separate case type. Instead, they were lumped together with other unlimited civil case types, which are far more numerous and more uniformly distributed than asbestos cases. As a result, statewide models of judicial and staff workload

dilute the impact of asbestos litigation.¹¹

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In an effort to remedy this, the Superior Court of San Francisco County conducted a pair of workload assessments aimed at measuring the actual impact of asbestos litigation on judicial and staff resources. In fall 2009, the court conducted a time study of court staff and judicial officers. The study estimated that back-office staff spend more than 2,400 minutes per asbestos filing—four times longer than the statewide case weight for unlimited civil cases. For judicial officers, the study found that asbestos cases consumed over 700 minutes of judge time per filing, almost twice as much as other unlimited civil filings (see Figure 3).

Figure 3. Asbestos cases require almost twice as much judicial officer time and more than four times as much staff time to process as other unlimited civil filings.



Sources: California Judicial Workload (Assessed Judicial Needs) model, California Resource Allocation Study (RAS) model, and the Superior Court of San Francisco County Asbestos Time Study (2009).

The increased burden of asbestos litigation does not stop there. Asbestos cases are sent to trial and use jurors at far higher rates than other unlimited civil cases and other types of complex litigation. On average, the Superior Court of San Francisco County estimates that 20–25 percent of its asbestos cases were sent to trial in 2009, 10 times the state-wide rate at which other unlimited civil cases go to jury trial. As a result, asbestos cases use about half of all jurors sent to civil trials in San Francisco and nearly 10 times as many jurors per case filing as other unlimited civil case types. The San Francisco asbestos time study found that over half of judicial officer time in asbestos cases was devoted to jury trials.

The simplicity of issues involved in the typical asbestos case discourages early settlement because attorneys require little preparation time to argue their cases.

The unique characteristics of asbestos litigation drive these numbers. In contrast to the complexity of parties, the simplicity of issues involved in the typical asbestos case discourages early settlement because attorneys require little preparation time to argue their cases. As a result, defendants face relatively modest legal fees for allowing a case to go to trial. This poses minimal economic disincentive to protracted settlement discussions among the tangled thicket of defendants and insurers.

Case Management Strategies

To deal with the crush of asbestos-related workload, the Superior Court of San Francisco County has adopted a proactive case management strategy. New procedures have been implemented to effectively process high volumes of complex litigation;

ensure swift resolution of claims, especially those filed by the sickest of plaintiffs; and encourage earlier settlements to reduce the impact on juror pools.

Like many hubs of asbestos litigation, the San Francisco court uses e-filing and grouping to streamline its asbestos case management. Plaintiff attorneys recommend cases for grouping based on common characteristics (e.g., defendants and disease categories) and file motions to group cases that are heard every two months. Though each case within a group is treated separately, groups move through the case management process together. While this makes the court more efficient at processing high volumes of complex litigation, it may generate still higher filing rates if plaintiff firms flock to jurisdictions with a greater capacity to process these caseloads.¹²

Because asbestos cases tend to take several years to reach a resolution, preference motions are available for plaintiffs with short life expectancies. Preference status places a case on a fast track that ensures its resolution in 120 days. However, this strategy also generates increased pressure on other cases to find openings on crowded civil trial calendars. The heaviest impact of asbestos cases on civil trial department calendars is in the mass of cases that get sent to trial because the parties are not motivated to settle before this point. And despite high trial rates, asbestos cases rarely go to verdict.¹³

In the first nine months of the program, San Francisco has seen dramatic declines in the number of asbestos cases awaiting trial, the number of days in trial, and the number of jurors sent.

In an effort to ease the strain on trial calendars and reduce the impact on juror pools, the Superior Court of San Francisco County launched an ambitious effort to facilitate early settlement of asbestos cases in January 2010. The process involves consolidating all law and motion and discovery into a single asbestos department complete with a settlement manager. The settlement manager closely monitors all cases that have reached their trial date without settlement and does not assign them to trial until all settlement options have been exhausted.

In the first nine months of this new program, San Francisco has seen dramatic declines in the number of asbestos cases awaiting trial (-32 percent), the number of days in trial (-65 percent), and the number of jurors sent (-58 percent). Meanwhile, the number of settlements has climbed to the highest levels on record (see Figures 4 - 7).

Figure 4: The number of asbestos cases awaiting trial has declined 32 percent since January 2010.

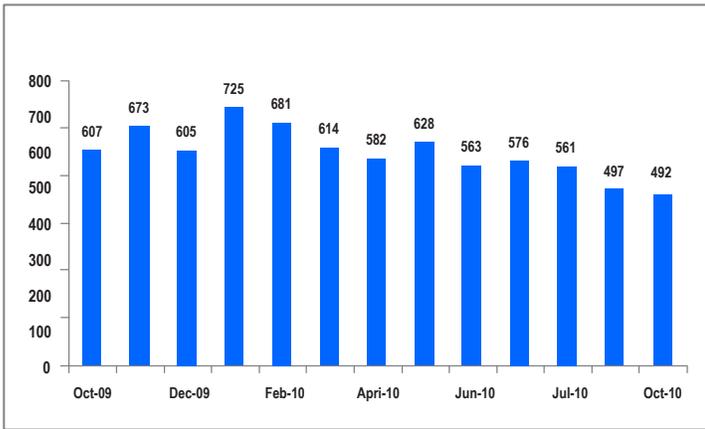


Figure 5: The average monthly court days spent in asbestos trial has declined 65 percent from last year.

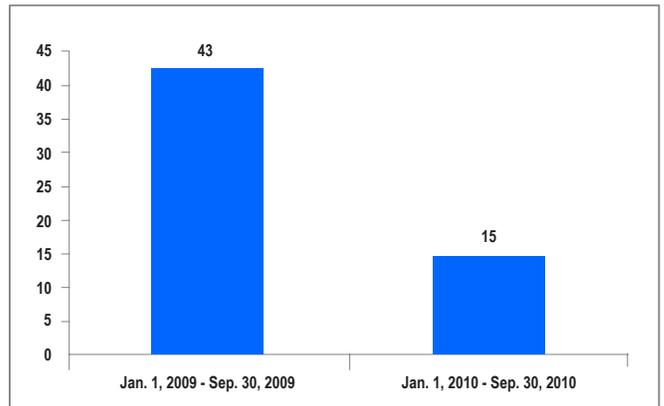


Figure 6: The average monthly jurors sent to asbestos trials has declined 58 percent from last year.

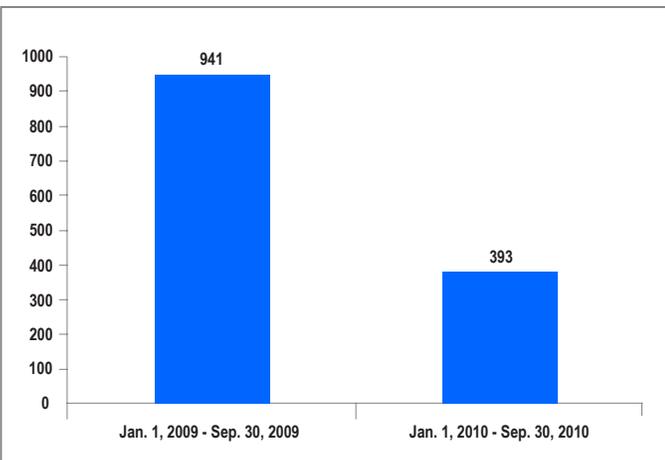
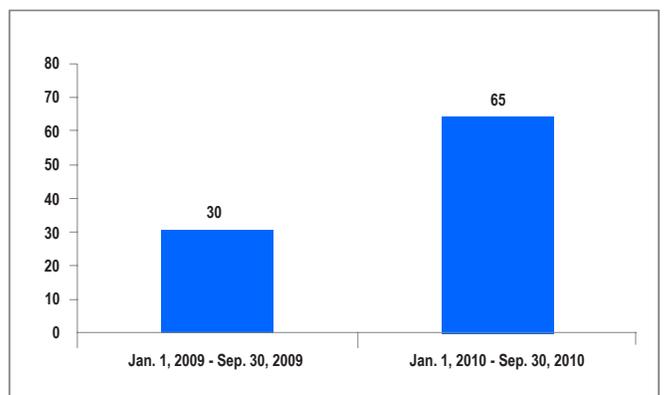


Figure 7: The average monthly asbestos cases settled has increased 114 percent from last year.



Conclusion

Asbestos litigation is not going away anytime soon. As diagnosis and death rates peak, the number of filings may begin to subside, but it will be many years before the unique burden of these cases is lifted from the trial courts. Flexibility in the selection of venues will make it difficult to predict which courts will become the next epicenters of filing activity.

Courts that improve the management of asbestos litigation may actually attract more filings, but encouraging early settlement of these cases is also essential to ensuring justice. By reducing the strain that these cases place on the courts, reorganization of case management can shift the burden away from trial departments and juries while simultaneously improving the court's service to the public. The Superior Court of San Francisco County is already realizing these benefits.

¹ The Centers for Disease Control reported 18,068 mesothelioma deaths in the United States from 1999 to 2005 and predicts that the death rate from this asbestos-related disease may peak in 2010. The Environmental Working Group estimates nearly 10,000 U.S. deaths per year from all asbestos-related illnesses and predicts that asbestos-related disease mortality may not peak until 2015. See Ki Moon Bang et al., "Malignant Mesothelioma Mortality—United States, 1999–2005," (April 24, 2009) 58(15) *Morbidity and Mortality Weekly Report*, Centers for Disease Control and Prevention, pages 393–396; Environmental Working Group, "The Asbestos Epidemic in America," www.ewg.org/sites/asbestos/facts/fact1.php (as of April 14, 2010). By 2002, more than 75 companies had filed for bankruptcy because of asbestos liabilities. See Michelle J. White, Professor of Economics, University of California, San Diego, "Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle," presented at the University of Cincinnati College of Law conference on "Bankruptcy and Corporate Reorganization in the New Millennium" (March 1, 2002), <http://econ.ucsd.edu/~mirwhite/asb-bank.pdf>.

² Stephen J. Carroll et al., *Asbestos Litigation* (RAND Institute for Civil Justice, 2005), p. xvii; Congressional Budget Office, Cost Estimate: S. 1125 Fairness in Asbestos Injury Resolution Act (October 2003); Dr. Laura S. Welch, MD, Medical Director, Center to Protect Workers Rights, in testimony before the Senate Judiciary Committee (June 2003).

³ See *Norfolk & Western Railroad. Co. v. Ayers* (2003) 123 S.Ct. 1210, 1228; *Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 821; Stephen J. Carroll et al., *Asbestos Litigation* (RAND Institute for Civil Justice, 2005), p. 106; Congressional Budget Office, Cost Estimate: S. 1125 Fairness in Asbestos Injury Resolution Act (October 2003); Dr. Laura S. Welch, MD, Medical Director, Center to Protect Workers Rights, in testimony before the Senate Judiciary Committee (June 2003); Griffin B. Bell, "Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis," (June 2002) 6(6) *Briefly* 7 (National Legal Center for the Public Interest monograph).

⁴ Stephen J. Carroll, *supra* at 64 and 62.

⁵ *Id.* at p. 63.

⁶ Based on 255 cases sampled from the 443 new asbestos cases filed in the Superior Court of San Francisco County in 2009. Sample has a confidence interval of +/- 5 percent. Source: Office of Business, Planning, and Research, Superior Court of California, County of San Francisco.

⁷ Patrick M. Hanlon and Anne Smetak, *Asbestos Changes* (2007) 62 New York University Annual Survey of American Law, p. 525.

⁸ Emily Bryson York, "More Asbestos Cases Heading to Courthouses Across Region," (February 27, 2006) *Los Angeles Business Journal*.

⁹ Mark Behrens and Phil Goldberg, "Home of the Asbestos Litigation 'Gold Rush?'" (November 19, 2009) *Daily Journal*.

¹⁰ As noted in the previous section, this form of complexity also presents litigants with the opportunity to select filing venues strategically, thereby compounding the burden on certain venues perceived to provide a tactical advantage.

¹¹ Even in San Francisco, non-asbestos unlimited civil case filings vastly outnumber new asbestos filings, and both the California Judicial Workload Model and the Resource Allocation Study derive their judicial and staffing case weight values from time studies that include only one county with significant asbestos filing activity. Revisions to both of these models are currently under way and will break out asbestos as a separate category of civil filing.

¹² Victor E. Schwartz, Mark Behrens, and Rochelle M. Tedesco, *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-sick* (2004) 31(271) *Pepperdine Law Review*, pp. 280–286.

¹³ Over the past five years, less than 3 percent of asbestos cases filed in San Francisco have reached a verdict.



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