



CIVIL JUSTICE ASSOCIATION

ASBESTOS PROJECT

Asbestos Research Project

Tracking Trends in Litigation and the Response by the Defendants

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Executive Summary

Asbestos litigation involves plaintiffs who, after allegedly developing a disease or condition in connection with their exposure to asbestos, bring lawsuits against companies who at some point produced or used asbestos products. Asbestos litigation is an ongoing concern for those tracking the legal system and advocating for responsible reform. California appears to be a favored filing jurisdiction. The number of asbestos-related cases filed has not been declining, even though plaintiffs firms have solicited new actions very publically for decades. The purpose of this report is therefore to determine if the nature of these actions is changing in California and, if so, what actions would help prevent unnecessary filings.

In recent years, Los Angeles County has become a hotbed for asbestos litigation, attracting a litany of plaintiffs not only from within California, but also from other jurisdictions. Our data shows that the number of cases filed in Los Angeles has steadily increased, and the nature of these actions has changed. Recent cases concern diseases other than mesothelioma and asbestosis, which are the most directly related to asbestos exposure. Additionally, the number of cases filed by a small, select number of plaintiffs' firms has grown. All of this points to a changing legal environment, possibly reflecting plaintiffs' increased ability to obtain favorable verdicts in this court.

This report is part of an ongoing project to understand the situation in Los Angeles, as well as California as a whole. Our data sheds light on a number of items associated with this type of litigation, such as the nature of defenses filed in answers, motions for forum non conveniens, disease claims in asbestos litigation, and much more. We have found that more defendants are claiming certain affirmative defenses but that they are not actually filing these motions, nor are they succeeding in related, subsequent motions. This inability to obtain relief may explain why filings are increasing.

We conclude that asbestos litigation appears to be increasingly consuming scarce court resources in Los Angeles, and that some reform is appropriate in response.

Introduction

The purpose of this report is to analyze asbestos cases filed in Los Angeles County over the period of 2010-2012, and to use that data to identify trends. This project is a continuation of a similar project conducted in 2009, and is designed primarily to compare those results with our new findings. Both reports looked at the number of cases filed, the diseases alleged, which plaintiff firms filed the most cases, and whether certain affirmative defenses were claimed.

The 2009 project focused on filings between 2003 and 2008. This report focuses on 2010-2012, starting in 2010 primarily because that is when Lexis File & Serve became a reliable source of data (see Methodology below for more information). Both data sets are from the Los Angeles Superior Court, which we chose because of anecdotal reports of a rapid rise in asbestos filings in that court. Additionally, because it groups all primarily-asbestos cases in one classification, and because it has a large number of filings that could show trends without being overly affected by outliers, it makes this court appropriate as a representation of the issue.

The specific data analyzed were:

- The alleged illness
- Plaintiff's residency
- California exposure
- Motions for summary judgment
- Motions for forum non conveniens (CCP 410.30) and/or repose of another jurisdiction (CCP 361)
- Identity of plaintiff's firms

Methodology

The data used to create this report comes from two sources: Lexis File & Serve and the Court's online docket service. File & Serve is a private electronic filing service utilized by the court, and as such has a list of cases in the relevant case class (JCCP 4674 In Re: LAOSD Asbestos Litigation). In addition to electronic filing, parties are allowed to file by mail or in person, so documents not present on File & Serve (i.e. not filed electronically) were located on the Court's online docket service.

The list of cases is taken exclusively from File & Serve, with the assumption that the court creates a record for each asbestos-classified case there whether or not parties make use of it. This is supported by our observation that some case numbers were present in File & Serve but did not contain any documents. Attempts to find a comparable list on Westlaw were unsuccessful because search terms included all filings that claimed asbestos exposure, whether or not that was the core issue in the case. This is because claims are self-reported by plaintiffs. File & Serve, however, represents the court's internal classification.

To compile our data, we created a spreadsheet representing all of the cases present on File & Serve for the time period we were evaluating. It appears that the court began using File & Serve for all active cases in 2010, so we started there; however, we note that some existing cases might not have been added to File & Serve. We then looked through the individual case records, reading through complaints, important motions, and other relevant documents to get a sense of the nature of the case. We recorded the relevant information we were looking for as mentioned in the Introduction. We followed this up with reading through every answer filed to see if certain affirmative defenses were claimed. All of this was recorded on the spreadsheet. We then went to the online docket to look for all answers that were not present on File & Serve. We recorded the same information from each of these answers in the spreadsheet. Although some records may have been misclassified on the online docket or not uploaded (for whatever reason), we are confident that the list represented most—if not all—records filed by mail or in person. Combined with the electronic filings from File & Serve, our record of answers is very accurate and complete. Any small number of cases or filings that were not present in either of these sources should not affect our data because the statistical relevance would be minimal compared to the larger whole.

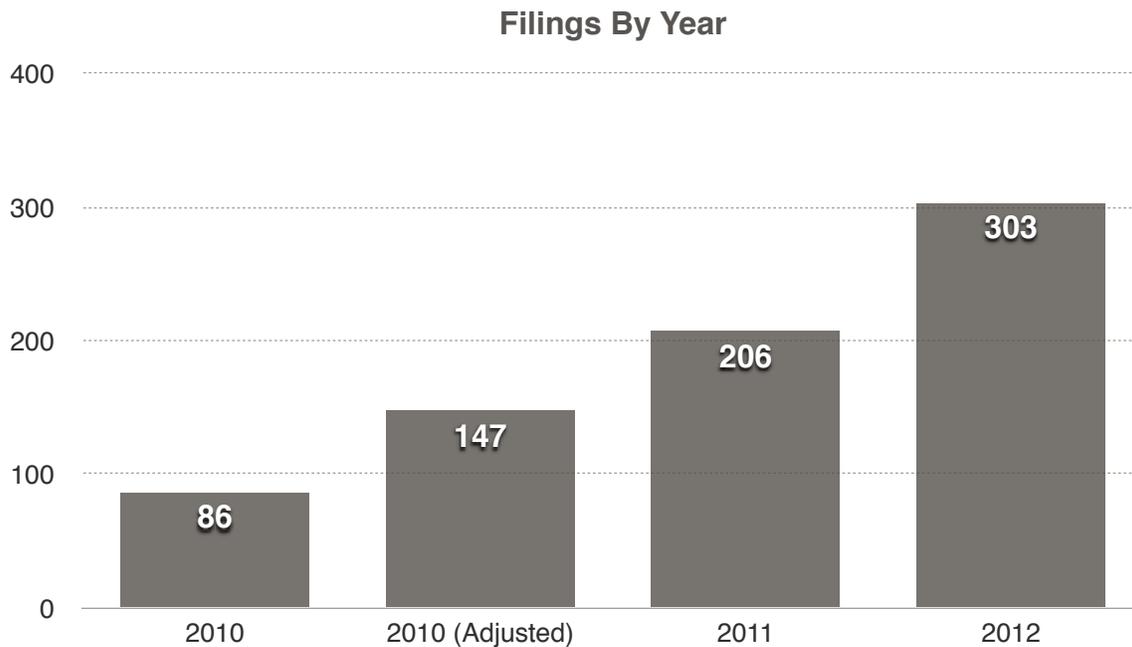
Findings

Case Volume¹

Reviewing the data, we can see an upward trend in the number of filing since 2010. In 2010, we had data on 86 cases; notably, this only covered a portion of the 2010 time period. If we project those findings over the course of the year, it is approximated that there would have been 147 filings in 2010. Then, in 2011, the number increased to 206, a forty percent increase over the number of projected filings in 2010. In 2012, the number of filings increased once again, this time at a greater rate—47%—for a total of 303 filings that year. This data suggests that asbestos filings are on a significant upward trend in Los Angeles. This might be explained, at least in part, by the decline in filings in San Francisco since 2009.²

¹ Data was not available on the number of filings between 2003 and 2008.

² See Michael Corriere, *Improving Asbestos Case Management In The Superior Court of San Francisco*, Data Points, Nov. 2010, <http://www.courts.ca.gov/documents/asbestos-final1112.pdf> (noting, in 2010, the beginning of a downward trend); see also Allison Low, *New Rules for Asbestos Cases in San Francisco*, Sedgwick Law Toxic Tort and Environmental Update, July 2012, <http://www.sdma.com/new-rules-for-asbestos-cases-in-san-francisco-07-17-2012> (noting this trend continued in 2012).



Plaintiff's Firms

When it comes to plaintiff's firms, there has been marked difference in their activity during the period of 2003-2008 and 2010-2012. In the 2003-2008 period, firms were involved in 484 cases; in 2010-2012—a period less than half as long as 2003-2008—firms were involved in 585 cases. The most active firm in the 2003-2008 period was Simon Greenstone, which was involved in 90 cases. During 2010-2012, Simon Greenstone fell to the fifth most active firm, and was involved in only 48 cases. The most active firm in 2010-2012 was DeBlase Brown Eyerly; which was a new firm formed by three asbestos attorneys previously working for other top asbestos law firms. DeBlase Brown Eyerly was involved in 105 cases from 2010-2012, again, a period less than half as long as the 2003-2008 period.

Another notable finding concerns the number of firms. In the data for 2003-2008, we see that only 10 firms were involved in the 484 cases before the court; in 2010-2012, there were 39 firms, among them 28 which were involved in 10 cases or less. This trend suggests more firms are trying to enter the LA asbestos market, reflecting the increasing number of claims being brought to the court and the court's appeal to asbestos plaintiffs' attorneys.

The top filing plaintiffs' firms between 2003 and 2008 and between 2010 and 2012 were:

2003 – 2008

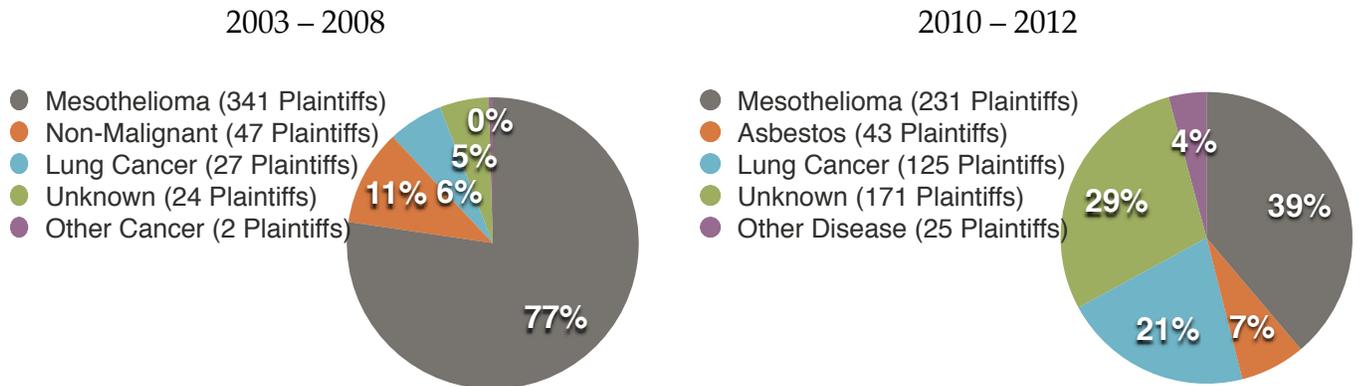
- Simon Greenstone (90 cases)
- Waters Kraus (82 cases)
- Rose Klein & Marias (74 cases)
- Lewis & Scholnick (65 cases)
- Barron & Budd (45 cases)
- Paul & Hanley LLP (42 cases)
- Brayton Purcell (34 cases)
- Keller Fishback & Jackson (21 cases)
- Simmons Browder Gianarris
- Angelides & Barnerd (17 cases)
- Keisel Boucher & Larson LLP (14 cases)

2010-2012

- DeBlase Brown Eyerly (105 cases)
- Brayton Purcell (80 cases)
- Waters Kraus (60 cases)
- Simmons Browder Gianarris
- Angelides & Barnerd (56 cases)
- Simon Greenstone (48 cases)
- Napoli Bern Ripka Shkolnik & Associates LLP (28 cases)
- Keller Fishback & Jackson (28 cases)
- Weitz Luxenberg (25 cases)
- Farrise Law Firm (24 cases)
- Lanier Law Firm (23 cases)
- Rose Klein & Marias (13 cases)

Disease

The data for 2003-2008 on disease filings is cumulative only, but our data for 2010-2012 allows us to see that the number of filings is on an upward trend. More specifically, it reveals that mesothelioma claims, which were the primary claims during the 2003-2008 period, have trended downward, while lung cancer claims have dramatically increased. Notably, of plaintiffs who alleged lung cancer, the proportion of those who smoked has increased over those of non-smokers.



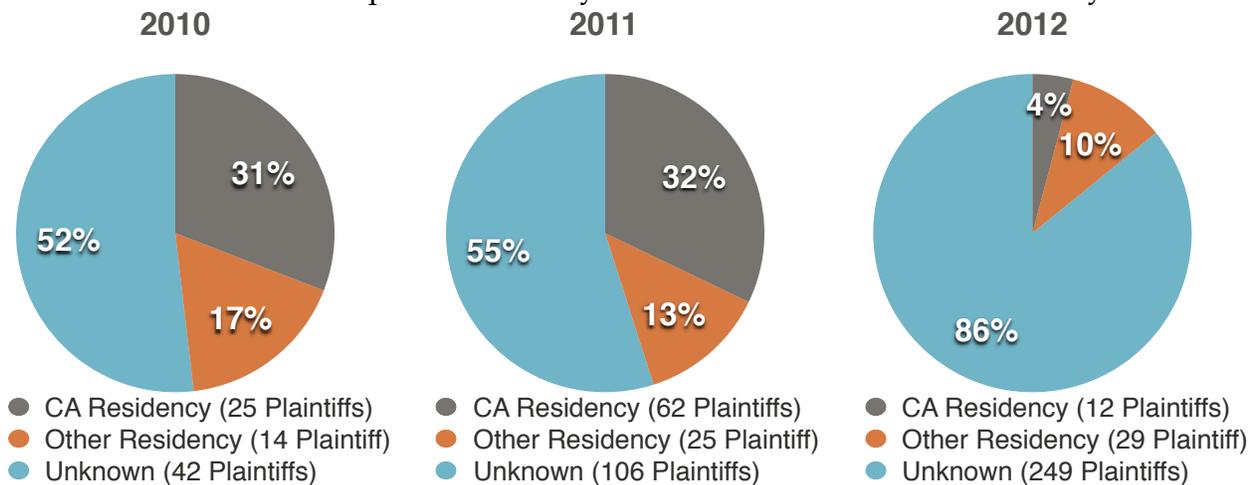
Our findings also show an increase in unknown diseases, which is a reflection of specific allegations being hidden in discovery as opposed to being alleged directly in the complaint. This marks a sharp contrast to earlier filings. Possible explanations for this trend include diseases, such as lung cancer, that are not as closely linked to asbestos as mesothelioma and

asbestosis and an increase in the number of filings by large firms with standard forms, who only give details in subsequent filings and testimony.

Plaintiff Residency

Our research sought to uncover the residency of all asbestos plaintiffs, but we quickly discovered that the most common entry was “unknown.” In 2010, there were 25 plaintiffs who had California residency,³ and there were 14 who were out-of-state residents. However, the residencies of 42 plaintiffs were unknown—or more than half of the total plaintiffs for that year. Then, in 2011, there were 62 Californian residents, 25 out-of-state residents, and a significant 106 plaintiffs with residencies which were unknown. Notably, the share of plaintiffs whose residencies were unknown increased by three percent, a trend which repeated itself—at a greater rate—in 2012, when 12 plaintiffs were Californian residents and 29 plaintiffs were out-of-state residents, but 249 plaintiffs residencies—or 85.9% of all plaintiffs for that year—were unknown.

The marked increase in cases where a plaintiff’s residency was unknown is troubling, as residency is an important factor in the viability of bringing motions to stay or dismiss pursuant to the doctrine of forum non conveniens.⁴ Notably, a frequent complaint seen in various motions is that the plaintiff initially tried to conceal his or her residency.



³ Note: Each “plaintiff” corresponds with a single case, even if there were more than one plaintiff. In cases where there was a mix of California and out-of-state residents, those plaintiffs were classified as California residents.

⁴ The doctrine of forum non conveniens allows the court to stay or dismiss a case when the defendant contends that there is a better forum for adjudication. CJAC’s findings on the forum non conveniens motion practice is discussed below.

Motions and Affirmative Defenses

A. California Civil Code of Procedure Section 361

Section 361 concerns actions arising in different jurisdictions where statutes of limitation would preclude the filing of an action. We noticed an increase in the proportion of answers that included this defense over the 2010-2012 period. However, we did not see a large number of cases being dismissed on this basis or transferred to other jurisdictions. This could mean that complaints are being filed in California when they primarily concern activities from other states. However, since motions following this are rarely alleged or granted, it appears that California courts are unlikely to dismiss cases on this basis. This could be troubling, meaning that plaintiffs are choosing to file in California, or at least Los Angeles, because our civil system is allowing plaintiffs to forum shop.

B. Forum Non Conveniens (California Civil Code of Procedure Section 410.30)

Section 410.30 is California's version of the doctrine of forum non conveniens. We found 65 answers (including multiple answers to a single case) that included this in answers in 2010, 540 in 2011, and 1566 in 2012. Yet, in practice, this motion was rarely used: in 2010 only 2 motions were made, in 2011 10 motions were made, and in 2012 that number dropped down to 6 motions. The staggering difference between those alleging forum non conveniens and those actually pursuing it is troubling, as many cases may properly belong in another state, and transferring a case to that state would relieve the burden on the taxpayer and the judicial system.

Several reasons may account for this divergence. For one, given the nature of answers, some of these allegations may have been included as mere boilerplate. We note that filings by certain firms were likely to look almost exactly the same, regardless of which defendant was answering. Second, some defendants may prefer to litigate in California. Third, many defendants may find that it is not worthwhile to file the motion because they may feel that the chances of success are low. Of the motions that were filed, both of the motions filed in 2010 succeeded, but 40% failed in 2011, and 50% failed in 2012.

Several cases shed light on the data, indicating that this third explanation is significant:

In *Flowers v. Ace Hardware Corp*, BC469011 (Sept. 6, 2011), the court denied a motion for forum non conveniens despite the fact that all of the plaintiff's exposure to asbestos occurred in Belize, the majority of witnesses were situated in Belize, and one witness had thus far refused to testify in California (the California court did not have the power to

compel him to testify; the Belize court would have had that power). The only argument proffered by the plaintiff was that some of the defendants did have operations in California, although those operations were unrelated to his exposure, and that some witnesses were in California, even though they were not in a position to witness his alleged exposure. The court provided no explanation for denying the motion.

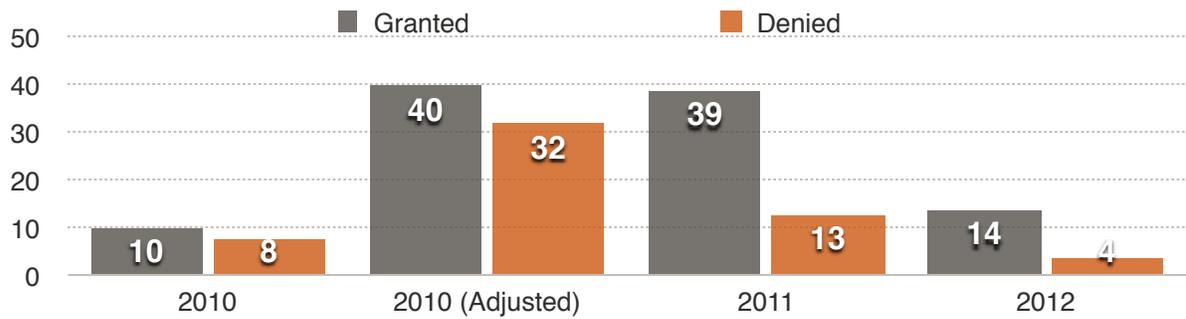
In *Clark v. Alfa Laval Inc*, BC469604 (Sept. 15, 2011), the plaintiff had been in California for less than four years as a member of the Navy, and in only one of those years was he actually on Californian soil; the rest of the exposure occurred in Ohio. The witnesses and important medical personnel were in Ohio as well. Nonetheless, the court denied the motion, again without specifying a reason for doing so. Plaintiff argued that California was the appropriate forum despite the fact that he was never treated in California, could not name any witnesses in California, never voted in California, never owned real property in California, and never filed a tax return in California.

These cases seem to indicate that courts are reluctant to grant motions for forum non conveniens. Because an increase in grants of such motions would ease the administrative and financial burden on the courts, as well as the burden on taxpayers, this issue should be explained by court leadership. One approach might be to ask the judge to issue rulings explaining his or her reasoning in denying or granting a motion for forum non conveniens. This will provide the court, litigants, lawyers, and others with critical insight into important issues of venue and use of court resources.

C. Summary Judgment

We collected data on motions for summary judgment, looking at the number filed and how they were resolved. 18 motions were filed in 2010 (adjusted for the full year to 72⁵), 52 in 2011, and 18 in 2012. This shows the following trends: from 2010 (adjusted) to 2011, there was a decrease in filings of 28%. From 2011 to 2012, there was a decrease of 65%. On the other hand, the percentage of motions granted increased each year.

⁵ The adjusted numbers reflect the fact that data was not fully available for 2010. The adjusted numbers forecasts what the total number of cases would have been had CJAC had access to that information and on the assumption that the missing months held a similar pace in asbestos filings overall as did the months in 2010 in which data did exist.



Conclusion

Our research indicates that asbestos litigation is on a significant upward trend in Los Angeles County. Comparing the years we reviewed with prior research, we see that asbestos litigation is growing almost twice as fast as it was over the years of 2003-2008. As we move forward, we should be aware of the litigation trends and approaches to handling cases in a manner best designed to maximize scarce court resources. Among our efforts, we should particularly focus on appropriate utilization of motions for forum non conveniens, which are currently underutilized and under-granted.