

THE GAME IS NOT OVER – A LOOK AT FEDERAL COURT PRODUCT LIABILITY FILING INCREASES AND SOME OF THE REASONS FOR THEM

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Introduction

For those of us whose practice involves either prosecuting or defending products liability cases, and, of course, for product manufactures, sellers and distributors themselves, it is important to maintain an understanding of trends in filing numbers. Are the various legislative and lobbying efforts towards “tort reform” bringing down those numbers? Or, on the other hand, are the efforts of consumer advocate groups and others driving them up? This article will analyze product liability filing figures in federal court, and provide some thoughts as to what is behind them.

On balance, product liability claims are on the upswing and are expected to continue to be filed by plaintiffs’ attorneys. One study indicates that, among other motivations, new claims are “driven by emerging legal issues surrounding the use of genetic therapies in pharmaceutical testing, environmental regulators’ scrutiny of chemicals and pesticides, and health risks tied to energy exploration, including hydraulic fracturing.” Scurria, Andrew, [GCs Forecast Soft Product Liability Market in 2014](#), Law 360, (Sept. 9, 2013). Although some areas of product liability litigation may or will become dormant, we can anticipate the continued and most likely increased filing of products cases. Some of the reasons for these increases include the following:

1. Social Media is allowing plaintiffs’ attorneys to connect with more clients and potential plaintiffs are more educated about available causes of action;
2. Large plaintiffs’ verdicts draw more attention to product liability cases and thus more filings;
3. Increased product recalls and government intervention leads to surges in claims; and
4. Social attitudes are shifting toward a more litigious population as it relates to injuries related to products.

Before exploring some of these issues, a look at the actual numbers is appropriate.

Increase in Federal Court Filings

With some marginal declines in filings at the beginning of the 2000s, overall filings of product liability cases have showed an increased trend over the last fourteen years.¹ The most recent data on product liability cases filed in federal courts dating from the twelve month period ending on June 30, 2014, shows an uptick in filings. In the 2014 reporting year, 61,136 lawsuits were filed involving products cases. See 2015 Annual Report of the Director: Judicial Business of the United States Courts. This is a fairly significant increase over the previous year when 50,526 product liability cases were filed. These two years of growth followed a slight downward trend in 2012 when only 44,434 product liability cases were filed compared to 60,798 cases in 2011.

While the numbers went up and down since 2011, overall the filings have more than doubled since 2005, when only 30,295 product liability cases were filed. The role of asbestos case filings requires consideration when evaluating the product case filing trends. Despite a drastic decline in asbestos filings over the last three years (many of which have gone to state courts), other product liability claims are again on the upswing and have surpassed 2011 filings. Many of these cases involve pharmaceutical, pelvic mesh, hip replacement, birth control and other miscellaneous products. See Pending Federal Multidistrict Litigation, summarized on p. 6 of Lawsuit Ecosystem II, New Trends, Targets and Players, (Dec. 2004), U.S. Chamber Institute for Legal Reform.

Despite a mere 607 asbestos claims being brought in 2013 and 448 in 2014, product liability claims not involving airplane, marine or motor vehicles which caused personal injury accounted for 48,623 cases filed in 2013 and 59,274 in 2014. When overall product liability cases were down in 2007 by 24% from the previous year, there was also a 25% decrease in asbestos filings. The same is not true for recent years, thereby evidencing the increasingly large numbers of non-asbestos filings. To further illustrate this point, there was a 96% decrease in asbestos filings from 2012 to 2013, but overall product liability filings increased by 14%.

As noted, any evaluation of these cases must include an analysis of the effect of asbestos case filings on the overall numbers. These were at an all-time high in 2010-2012, but nearly disappeared from the federal docket in 2013 and 2014. Significantly, these cases made up only 1% of the total number of product liability claims brought federally in 2013, with only 607 cases filed. This is a 96% decrease from 2012 when 15,167 asbestos cases were filed. After a record year in 2010 with 41,133 filings representing 64% of the product liability docket, asbestos case numbers have continued to decline

¹ The lack of consistency in the uniformity of case definitions and case counting rules impacts the ability to study overall product liability claims in all 50 states. See The Landscape of Civil Litigation in State Courts, Civil Justice Initiative, National Center for State Courts, p. 8. A small portion of state cases are tort claims, comprising only 7% of the overall docket. *Id.* at pp. iii-iv. A 1992 Civil Justice Survey of State Courts study found that 7% of all cases filed were tort cases. In a separate study evaluating 2012-2013 data from ten counties and courts, medical malpractice and product liability cases were found to represent 5% of tort caseloads, which was less than 1% of the total civil caseload. *Id.* at p. 19 (See p. 15 for a list of counties and courts selected for data analysis.) From 1997 to 2006, there was a four percent decrease in product liability actions brought in Massachusetts, Florida, Oregon, Mississippi, Ohio, Wisconsin, Missouri, Connecticut and New Jersey. Examining the Work of State Courts, 2007, Civil Caseloads, available at <http://cdm16501.contentdm.ocw.org/cdm/ref/collection/ctadmin/id/1278>.

(again, these cases appear in state courts now). However, given the long latency period of asbestos illnesses and longer lifespans, federal asbestos cases may reappear. Additionally, bystander and lung cancer cases will likely create a new surge of asbestos cases in the future. There is also speculation that the increase in smoking cessation programs will counterintuitively lead to more asbestos-related claims. See Wilt, Bill and Alan Zimmerman, A Third Wave In Asbestos Liabilities Lies Ahead: Actuarial Models are Systematically Underestimating Exposures, LexisNexis Mealey’s International Asbestos Liability Report, (Feb. 19, 2014).

Putting asbestos cases aside, beginning in 2009, non-asbestos product liability cases increased significantly due to high-profile recalls. James, Ben, Law 360, High-Profile Recalls Drive Product Liability Filings, (November 19, 2008). Pending Federal Multidistrict Litigation case data provides a glimpse of this trend in the number of pending non-asbestos claims in existence on October 15, 2014. Pelvic mesh claims made up 66,196 cases on the docket. Lawsuit Ecosystem II, supra at p. 6. “Given the prospect of a jackpot verdict and the continued use of the devices, plaintiffs’ lawyers are likely to file more of these lawsuits for many years.” Id. at p. 5. Plaintiffs’ lawyers continue to monitor recall and government warnings and actions, which in turn correlate to increases in filings related to the subject of the recalls or government warnings.

Fig. 1 Product Liability Cases Filed in U.S. District Courts, Percentage by Nature of Suit ²

Fiscal Year	Total Cases Filed	Contract Actions, Torts to Land, Property Damage	Personal Injury				
			Airplane	Marine	Motor Vehicle	Other	Asbestos
1990	19,428	3.86%	1.01%	1.70%	2.96%	20.03%	70.45%
1995	28,226	2.41%	0.55%	0.19%	2.01%	70.35%	24.50%
2000	15,318	5.81%	1.07%	0.35%	2.75%	43.10%	46.92%
2005	30,295	2.50%	0.26%	0.15%	1.75%	91.23%	4.10%
2006	49,743	2.02%	0.15%	0.07%	1.13%	63.37%	33.26%
2007	37,566	2.92%	0.30%	0.12%	1.19%	62.45%	33.02%
2008	53,102	1.87%	0.19%	0.06%	0.73%	33.53%	63.61%

² Data in Fig. 1 compiled from data from Table 4.5 (2013), Annual Report of the Director: Judicial Business of the United States Courts and Table 4.5 (2009), Annual Report of the Director: Judicial Business of the United States Courts.

2009	59,504	1.96%	0.22%	0.05%	0.67%	26.87%	70.22%
2010	64,367	1.81%	0.29%	0.06%	0.79%	33.16%	63.90%
2011	60,798	1.71%	0.17%	0.02%	0.50%	35.52%	62.08%
2012	44,434	3.04%	0.15%	0.05%	0.65%	61.98%	34.13%
2013	50,526	1.98%	0.06%	0.06%	0.47%	96.23%	1.20%
2014	61,136	1.73%	0.09%	0.02%	0.48%	96.95%	0.73%

As the figures from Figure 1 indicate, products liability case filings continue to grow at the federal level. The gap left by the asbestos cases is more than being filled by other types of product claims. Of specific note is the “other” category, which has exploded since 2012 (with 2005 as an outlier). One assumes that this growing category includes pharmaceutical and medical device cases. As noted above, several factors seem to be behind this trend.

Social Media, Large Verdicts and Increased Product Recalls and Social Attitudes are Among the Factors Pushing the Upward Trend in Filings

The upward trend in product liability filings will likely continue in the near future, as the landscape of client retention and potential plaintiff awards has changed. Studies have opined that a dominant factor in the increase of claims is the growing prevalence of social media sites which have decreased the costs associated with client retention. “The plaintiffs bar’s sophistication with respect to using the Internet to identify budding controversies and find clients, has helped keep product liability filings on the rise, and that trend is expected to gain momentum” James, Ben, High-Profile Recalls Drive Product Liability Filings, Law 360, (Nov.19, 2008). ³

The influence of social media and internet advertising is in no way limited to asbestos litigation. Beyond the realm of asbestos, millions of dollars each month are being spent on recruiting potential clients for prescription drug and medical device litigation. “Lead generation” services are prevalent for mass tort litigation, whereby marketing firms operate call centers and leads are eventually sold, traded and consolidated. Lawsuit Ecosystem II, supra at p. 1-3. “Not only can the internet steer people with an existing inclination to sue toward legal counsel, but the web can alert individuals who might not have even realized that they could be potential plaintiffs that there is litigation underway over a given

³ While technically not part of this federal court survey, this phenomenon is seen in Madison County, Illinois which has had a dramatic increase in the number of lung cancer filings. The number of asbestos cases filed in Madison County increased from 325 in 2006 to 1,563 in 2012. Asbestos Litigation, Attorney Advertising & Bankruptcy Trusts: The Economic Incentives Behind the New Recruitment of Lung Cancer Cases, available at <http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2013/11/26/asbestos-litigation-attorney-advertising-amp-bankruptcy-trusts-the-economic-incentives-behind-the-new-recruitment-of-lung-cancer-cases.aspx>.

product. Attorneys can use the internet to find out about issues emerging at the regulatory level, as well as identify companies involved in the chain of commerce when a dangerous import – such as a food product from China- comes into the U.S. . . .” James, Ben, High-Profile Recalls Drive Product Liability Filings, Law 360, (November 19, 2008).

In addition to the information overload from the internet, 2014 saw the return of billion-dollar verdicts in product defect suits. The largest was for \$23.6 billion for the family of a smoker who died at 36. These large verdicts attract media attention and therefore more plaintiffs. Large Product Liability Awards Made Comeback in 2014, Insurance Journal (Feb. 19, 2015) available at <http://www.insurancejournal.com/news/national/2015/02/19/358021.htm>. The combination of these huge verdicts and the almost instantaneous ability to blast information about them nearly everywhere is contributing to the increase of the products cases of all types.

Product recalls are also playing a role. “An uptick in product liability suits shouldn’t come as a surprise in light of the numerous product recalls of goods, including pet food, toys and toothpaste. Regulatory action from agencies like the U.S. Food and Drug Administration and the Consumer Product Safety Commission typically leads to an uptick in new lawsuits fairly soon thereafter” James, Ben, High-Profile Recalls Drive Product Liability Filings, Law 360, (November 19, 2008). Additionally, “Consumer tolerance for risks from products has been eroding for decades, even as those products have become safer. Today’s consumers are more likely to look for fault on the part of a manufacturer if a product causes injury” Id.

Finally, a general increased propensity to sue in relation to product liability injuries can also be credited for the rise in filings. People are more likely to file lawsuits when the severity of their injuries and the associated compensation they may receive increases. Dunbar, Frederick C. and Faten Sabry , Forecasting Claims in an Era of Tort Reform, LJM’s Product Liability Law & Strategy, (Nov./Dec. 2004). Moreover, if they blame another party for their injuries, they are more likely to sue. Id.

Conclusion

The data indicates that while the particular types of products cases may vary, the amount of cases continues to increase. Whether the consistently louder product liability drumbeat is due to overenthusiastic attorneys and hyper-informed consumers on the one hand, or on less safe products on the other is a discussion for another day. What cannot be ignored, however, is that these cases are not going away soon.

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