

Lead Paint Exposures

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Milliman, Inc.

Outline

- I. Background
- II. Litigation History
- III. Recent Developments
- IV. Coverage

I. Background

- A. History of Lead Paint
- B. Health Impact
- C. Awareness
- D. Regulations
- E. Current Status

History of Lead Paint

- White lead carbonate
- Used as a pigment in interior paints
- Valuable properties (similar to asbestos)
- Manufactured between 1900 and 1955

Health Impact

- White lead carbonate is absorbed into the bones
- Lead in paint chips is easily absorbed
- High levels can cause convulsions, coma, death
- Low levels can cause variety of problems (e.g., renal, cognitive, neurological)
- Greatest impact on young children
- No amount of exposure is “safe”; CDC threshold is 10 $\mu\text{g}/\text{dl}$

Awareness

- 1930's – Public Health Association recommends not using lead paint on babies' toys and furniture
- 1940's-60's – Research continues; trend away from using lead paint in homes
- 1951 – Baltimore bans use of lead in interior house paints in Baltimore
- 1955 – Manufacturers voluntarily cease production of interior lead-based paints
- 1978 – Congress bans use of residential lead-based paints

Regulations

- Residential Lead-Based Paint Hazard Reduction Act
- Proposed federal legislation for construction professionals working with lead
- State-specific statutes designed to reduce blood-lead levels in children

Current Status

- 38 million residences contain lead-based paint
- 2/3 of housing built before 1960 contains lead-based paint
- Decrease in number of children with elevated blood-lead levels (estimated 3-4 million in 1978; 310,000 in 2002)
- Goal of CDC to eliminate blood-lead poisoning by 2010

II. Litigation History

- A. Parties
- B. Theories of Liability
- C. Private Suits - Landlords
- D. Private Suits - Manufacturers

Parties

- Private plaintiffs
 - Individuals sue for bodily injury (asbestos)
- Defendants (relatively well-defined)
 - Landlords and property managers
 - Paint manufacturers – “insulated” (until recently)

Theories of Liability

- Failure to maintain premises/comply with regulations
- Product liability
- Public nuisance
- Others

Suits against Landlords

- Increased public awareness and legislation spawned suits
- Theory: landlord/property manager responsible for maintaining safe conditions (lead is harmful if ingested)
- Non-compliance with state or federal regulations eases plaintiff's case

Suits against Manufacturers

- Based on product liability
- Successfully defended (until recently)
 - Lack of product identification
 - Collective liability theories failed (e.g., market share and risk contribution)
 - Violates primary tenet of product liability law
 - Practical issues (e.g., defining market share)
 - No control over ultimate use of product
 - Different formulas used in manufacture

III. Recent Developments

- A. Public Plaintiffs – Government Suits for Nuisance
- B. Success of Risk Contribution Theory in Private Suit

Government Suits for Nuisance

- State attorneys general able to file suit against paint manufacturers
- First filed in late 1990's
- Theory: the presence of lead constitutes a continuing public nuisance created by manufacturers
- Seek abatement costs and funding for programs

Government Suits for Nuisance

- Government suit against manufacturers for nuisance dismissed in Chicago
- Basis:
 - Law requires landlords to remove deteriorated paint
 - Manufacturers produced lawfully and cannot control ultimate use

Government Suits for Nuisance

- RI, CA, WI, and NJ all have pending public nuisance lawsuits against paint manufacturers
- RI jury found several paint manufacturers liable for abatement based on nuisance theory
 - Found defendants' conduct was a substantial cause of the existence of a condition which causes injury to the public
 - No requirement that specific manufacturer's paint was used in the state

Government Suits for Nuisance

- NJ appellate court allows 26 cities and counties to sue paint manufacturers under public nuisance theory
- Milwaukee, WI suit was dismissed at trial then reversed on appeal; nuisance based on manufacturers' marketing/selling lead paint while aware of the hazards
- Santa Clara, CA (et al.) nuisance suit dismissed then reversed on appeal; nuisance based on affirmatively promoting lead paint for interior use

Risk Contribution Theory

- In 2005, the WI Supreme Court extended the risk contribution theory to white lead carbonate pigment (*Thomas v. Lead Industries Association*)
- Basis: defendants (or predecessors) knew of harm and continued to produce and promote
- Plaintiff does not have to prove that a particular manufacturer's product caused the injury, only that the defendant manufactured the same type of product

Risk Contribution Theory

- Plaintiff has to show that defendant's marketing of the product constituted a breach of duty
- Plaintiff does not have to show geographic or temporal market of the product
- Plaintiff does not have to prove that he has no other legal recourse
- Legislative measures enacted earlier this year to mitigate the impact of the *Thomas* holding were vetoed by the governor

IV. Coverage

- A. Private Suits for Bodily Injury against Landlords
- B. New Developments - Lawsuits against Manufacturers

Private Suits for Bodily Injury against Landlord

- Basic CGL policy covers bodily injury or property damage caused by an occurrence during the policy period
- Coverage depends on state and fact pattern, but some courts have held:
 - All policies in force during period of exposure are potentially triggered
 - No stacking
 - Pollution exclusion generally inapplicable
 - Insurers contribute based on time on the risk

New Developments - Lawsuits against Manufacturers

- Are abatement costs “damages”?
- Is it an “accident”?
- Is the presence of lead paint “property damage”?
- How many “occurrences”?
- Is it a products or a premises claim (i.e., subject to aggregate limits)?
- What is the applicable trigger?
- How will missing policies be treated?
- Is the pollution exclusion applicable?

Legal Reform: Legislative Update

Joanne Lendway McMahon

Swiss Re

September 11, 2006



Legal Reform Concepts

- Joint/several liability reform
- Venue/forum non conveniens reform
- Standards for calculating punitive damages
- Caps on non-economic damages
- Controls on attorney general lawsuits/fees
- Sanctions for filing frivolous suits
- Standards for admission of expert evidence
- Level playing field for all parties

Federal Legal Reform = Gridlock



**Legal Reform
Bills Introduced**

**Asbestos (FAIR Act)
Medical Malpractice
Lawsuit Abuse Reduction
Obesity**



No action

**House: Republican majority
Passes bills, but the bills stall in Senate**

**Senate: Requires 60 votes to invoke cloture
Republican majority, but less than 60**

Election year politics, competing issues

Exception:

Class Action Fairness Act

Passed Senate on 72-26 vote

Signed February 2005

State Legal Reform Considerations

Legislative support in both chambers

Governor support = critical

May require long-term effort for passage

Results will take time to assess

Constitutional and other court challenges

Preventative measure or solution?

Is Legal Reform a Solution in Judicial “Hellholes”

Factors that contribute to a Judicial Hellhole designation

Prevalence of forum shopping

Willingness of courts to expand liability via novel legal theories

Discovery abuse

Improper certification of class actions

Proliferation of “junk science”

Strong alliances between plaintiffs' lawyers, judges and attorneys general

Uneven application of evidentiary rules

Abusing consumer protection acts

Source: "Judicial Hellholes® 2005," American Tort Reform Association 2005.

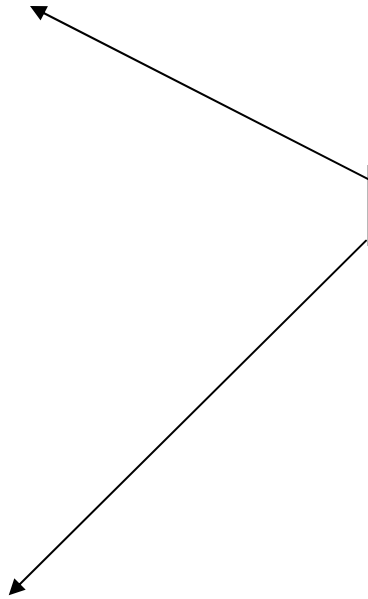
Judicial Hellholes 2003 - 2005



- **2003**

- Madison County, Illinois
- Jefferson County (Beaumont), Texas
- Mississippi's 22nd Judicial Circuit (Copiah, Claiborne and Jefferson Counties)
- Hidalgo County, Texas
- Orleans Parish, Louisiana
- Kanawha County, West Virginia
- Nueces County, Texas
- Los Angeles County, California
- Philadelphia Court of Common Pleas, Pennsylvania
- Miami-Dade County, Florida
- City of St. Louis, Missouri
- Holmes and Hinds Counties, Mississippi

5 counties in Mississippi



- Source: "Bringing Justice to Judicial Hellholes 2003," American Tort Reform Association 2003

2004 State Legal Reforms

General tort reform “omnibus” bills passed in MS, OH

Included both litigation reform and med mal reform

Non-economic damage caps in med mal cases (\$350K)

Joint/several liability reform

Venue reform

Frivolous lawsuit sanctions

Appeal bond reform

Punitive damages

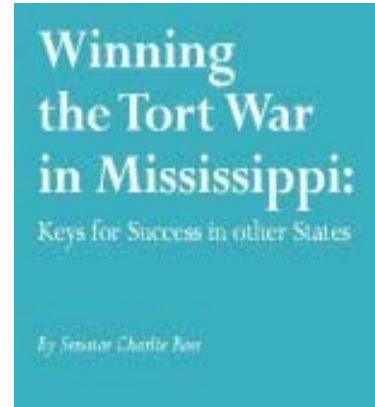
First asbestos & silica medical criteria bills passed in OH

Require claimants to demonstrate actual impairment; bars “fear of cancer” claims

Establishes medical criteria (based on AMA recommendations) for filing asbestos and silica claims

Preserves ability to bring claim when/if impairment manifests at a later time

Proposition 64 – California voters reject “shakedown” lawsuits





Judicial Hellholes 2003 - 2005

• 2003

- Madison County, Illinois
- Jefferson County (Beaumont), Texas
- **Mississippi's 22nd Judicial Circuit (Copiah, Claiborne and Jefferson Counties)**
- Hidalgo County, Texas
- Orleans Parish, Louisiana
- Kanawha County, West Virginia
- Nueces County, Texas
- Los Angeles County, California
- Philadelphia Court of Common Pleas, Pennsylvania
- Miami-Dade County, Florida
- City of St. Louis, Missouri
- **Holmes and Hinds Counties, Mississippi**

Source: "Bringing Justice to Judicial Hellholes 2003," American Tort Reform Association 2003

2004

- Madison County, Illinois
- St. Clair County, Illinois
- Hampton County, SC
- West Virginia (entire state)
- Jefferson County, Texas
- Orleans Parish, Louisiana
- South Florida
- Philadelphia, PA
- Los Angeles, California

Dishonorable Mentions:

- Oklahoma
- Utah Supreme Court
- District of Columbia
- New Mexico Appellate Courts

**Judicial Recovery:
Mississippi**

Source: "Judicial Hellholes® 2004": New Report Identifies Courts that Deny "Equal Justice Under Law," American Tort Reform Association 2004



2005 State Legal Reforms

General tort reform “omnibus” bills passed in GA, MO, SC

Includes both litigation reform and med mal reform

Frivolous lawsuit sanctions

Non-economic damage caps in med mal cases (\$350K)

Appeal bond reform

Joint/several liability reform

MO law - \$500K punitive damage cap

Venue reform

GA also passed class action reform

Medical Malpractice - IL

Asbestos/silica medical criteria passed in FL, GA, TX

Requires claimants to demonstrate actual impairment; bars “fear of cancer” claims

Establishes medical criteria (based on AMA recommendations) for filing asbestos and silica claims

Preserves ability to bring claim when/if impairment manifests at a later time

FL law bars punitive damages



Judicial Hellholes 2003 - 2005

• 2003

- Madison County, Illinois
- Jefferson County (Beaumont), Texas
- **Mississippi's 22nd Judicial Circuit (Copiah, Claiborne and Jefferson Counties)**
- Hidalgo County, Texas
- Orleans Parish, Louisiana
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- Los Angeles County, California
- Philadelphia Court of Common Pleas, Pennsylvania
- Miami-Dade County, Florida
- **City of St. Louis, Missouri**
- **Holmes and Hinds Counties, Mississippi**

• Source: "Bringing Justice to Judicial Hellholes 2003," American Tort Reform Association 2003

2004

- Madison County, Illinois
- St. Clair County, Illinois
- **Hampton County, SC**
- West Virginia (entire state)
- Jefferson County, Texas
- Orleans Parish, Louisiana
- South Florida
- Philadelphia, PA
- Los Angeles, California

Dishonorable Mentions:
 Oklahoma
 Utah Supreme Court
 District of Columbia
 New Mexico Appellate Courts

Judicial Recovery:
Mississippi


Source: "Judicial Hellholes® 2004": New Report Identifies Courts that Deny "Equal Justice Under Law," American Tort Reform Association 2004

2005

- Rio Grande Valley & Gulf Coast, Texas
- Cook County, Illinois
- West Virginia (entire state)
- Madison County, Illinois
- St. Clair County, Illinois
- South Florida

Dishonorable Mention:
 Wisconsin Supreme Court

Source: "Judicial Hellholes® 2005," American Tort Reform Association 2005.

MO & SC enact comprehensive legal reform

 Removed from 2005 list

Judicial Hellholes 2005 “Watch List”



Areas cited in previous Judicial Hellhole reports or new areas that are being closely monitored due to negative developments in the litigation environment

California
Eastern Kentucky
Eastern Alabama
Philadelphia, Pennsylvania
New Mexico
Delaware
Oklahoma
Orleans Parish, Louisiana
Washington, D.C.

2006 ILR/Harris Poll State Liability Systems Ranking Study



Ranks the 50 states based on how fair their court systems are perceived to be
 Based on a survey of over 1,400 practicing corporate attorneys and general counsels

Top Ten States	Bottom Ten States
1. Delaware	50. West Virginia
2. Nebraska	49. Louisiana
3. Virginia	48. Mississippi
4. Iowa	47. Alabama
5. Connecticut	46. Hawaii
6. New Hampshire	45. Illinois
7. South Dakota	44. California
8. Colorado	43. Texas
9. Maine	42. South Carolina
10. North Carolina	41. Arkansas

An overwhelming 81% report that the litigation environment in a state could affect important business decisions at their company, such as where to locate or do business.



Please Don't Feed The Trial Lawyers.

Best to Worst Legal System			
Texas	1	Delaware	33
Illinois	2	Georgia	37
Florida	3	Michigan	38
Ohio	4	Arizona	39
Connecticut	5	Idaho	40
New York	6	Colorado	41
South Dakota	7	Montgomery	42
California	8	Indiana	43
Mass	9	Wisconsin	44
North Carolina	10	Alaska	45
Utah	11	Alabama	46
North Dakota	12	Arkansas	47
South Carolina	13	Mississippi	48
Minnesota	14	West Virginia	49
Alaska	15	Louisiana	50
Washington	16	Missouri	51
Utah	17	West Virginia	52
South Dakota	18	Alabama	53
North Dakota	19	Arkansas	54
Minnesota	20	Mississippi	55
Alaska	21	West Virginia	56
Washington	22	Louisiana	57
Utah	23	Missouri	58
South Dakota	24	North Dakota	59
North Dakota	25	South Dakota	60

Disreputable trial lawyers feed the overburdened justice system the country in search of a quick payday. Along the way, they drain your assets, reputation for legal fairness and hurt your state's economy. Contact us now to learn more.

In fact, each American pays \$200+ a year in higher prices just to cover the cost of litigation. That amounts to \$17.8 billion for the entire population of Illinois.

As a result, many of our states have the legal systems of all 50 states. It just costs more to live in them.

Don't feed the trial lawyers. Demand that your elected officials fix the flaws in the justice system. Please let us know how you judge. For a copy of the survey and to learn how you can help, visit www.instituteforlegalreform.org.

Lawful Abuse Hurts Illinois. Support Legal Reform.
www.instituteforlegalreform.org

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Some Friendly Advice For Wisconsin:
Turn Back Now.

Best to Worst Legal System			
Texas	1	Delaware	33
Illinois	2	Georgia	37
Florida	3	Michigan	38
Ohio	4	Arizona	39
Connecticut	5	Idaho	40
New York	6	Colorado	41
South Dakota	7	Montgomery	42
California	8	Indiana	43
Mass	9	Wisconsin	44
North Carolina	10	Alaska	45
Utah	11	Alabama	46
North Dakota	12	Arkansas	47
Minnesota	13	Mississippi	48
Alaska	14	West Virginia	49
Washington	15	Louisiana	50
Utah	16	Missouri	51
South Dakota	17	North Dakota	52
North Dakota	18	South Dakota	53
Minnesota	19	Alabama	54
Alaska	20	Arkansas	55
Washington	21	Mississippi	56
Utah	22	West Virginia	57
South Dakota	23	Louisiana	58
North Dakota	24	Missouri	59
Minnesota	25	North Dakota	60

Massachusetts is a great state. But its legal system is heading in the wrong direction. And that can be dangerous.

Complete the education of the business community with a reputation for legal fairness. Don't let the trial lawyers drain your assets, reputation for legal fairness and hurt your state's economy. Contact us now to learn more.

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Lawful Abuse Hurts Wisconsin. And It Hurts You.
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2006 State Legal Reforms

General tort reform “omnibus” bill

OK

Targeted, issue-specific reform

FL joint/several liability repeal

class action reform

appeal bond cap

IL venue reform

PA joint/several liability revision

WI “risk contribution” theory

punitive damages

\$750K non-economic damage cap in med mal cases

Asbestos/silica medical criteria bills

AL

LA

KS

KY (silica only)

MI

MO

NY

PA

SC

TN (silica only)

VA

WV

2006 State Legal Reforms

General tort reform “omnibus” bill

XOK

Targeted, issue-specific tort reform

FL ✓ joint/several liability repeal
✓ class action reform
✓ appeal bond cap

IL **X** venue reform

PA **X** joint/several liability revision

WI **X** “risk contribution” theory

X punitive damages

✓ \$750K non-economic damage cap in med mal cases

Asbestos/silica medical criteria bills

AL

LA

KS

KY (silica only)

MI

MO

NY

PA

SC

TN (silica only)

VA

~~WV~~

2007 State Legal Reform Agenda ?

Too early to predict complete agenda before results of November elections

Several states

36 Gubernatorial races

30 Attorney General races

General tort reform “omnibus” bill - OK

Targeted, issue-specific reform in key states

CA class action, venue

FL premises liability

IL venue reform, joint/several liability

PA joint/several liability revision

WI “risk contribution” theory, punitive damages

Possible asbestos and/or silica bills: AL, IL, KY, LA, MI, MO, NY, PA, VA & WV

Other civil justice reforms: Consumer Protection, Expert Evidence Rules, Class Action

Asbestos developments – legislative/non-legislative

•“Improvements” in “Judicial Hellhole” in Madison County, IL

Defense verdict in Madison County Asbestos Case: In the first asbestos case to go to trial in 2 years (the last one was the \$250M verdict), GE was the sole defendant and jury took less than 20 minutes to rule in favor of GE

Illinois asbestos plaintiff firm moves voluminous Madison County case inventory to Delaware

Illinois Supreme Court dismissal on forum non conveniens in non-asbestos case sends message on forum shopping

•Greater scrutiny of potentially fraudulent asbestos/ silica claims

Judge Jack’s ruling in Silica MDL proceeding: 10,000 silica claims raised “red flags of fraud”
On-going federal grand jury in New York investigation

U.S. Representatives Joe Barton (R-Tex) and Ed Whitfield (R-Ky) of the House Energy and Commerce Committee inquiry/subpoenas to doctors and plaintiffs’ lawyers

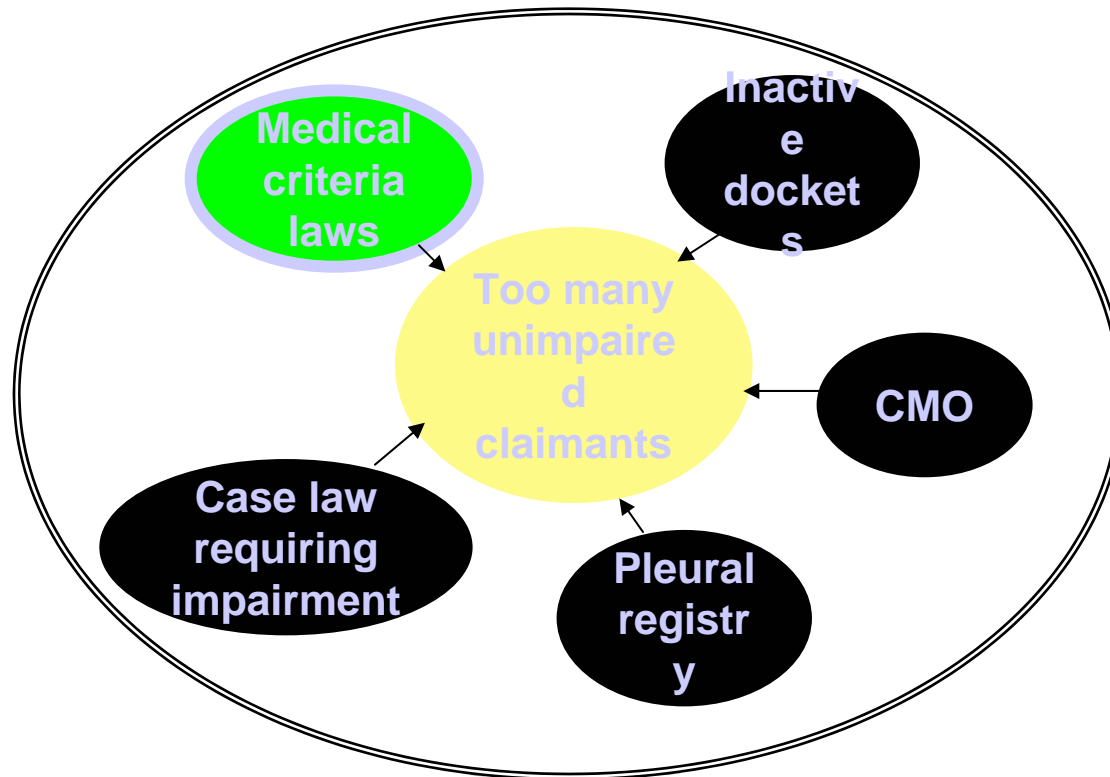
Bankruptcy trusts suspending acceptance of claims from certain medical screening companies and physicians (Manville - 9/2005; Eagle Pitcher – 10/2005)

•Increased Awareness by Courts of Conflicts of Interest/Problems in Asbestos Prepackaged Bankruptcy Proceedings

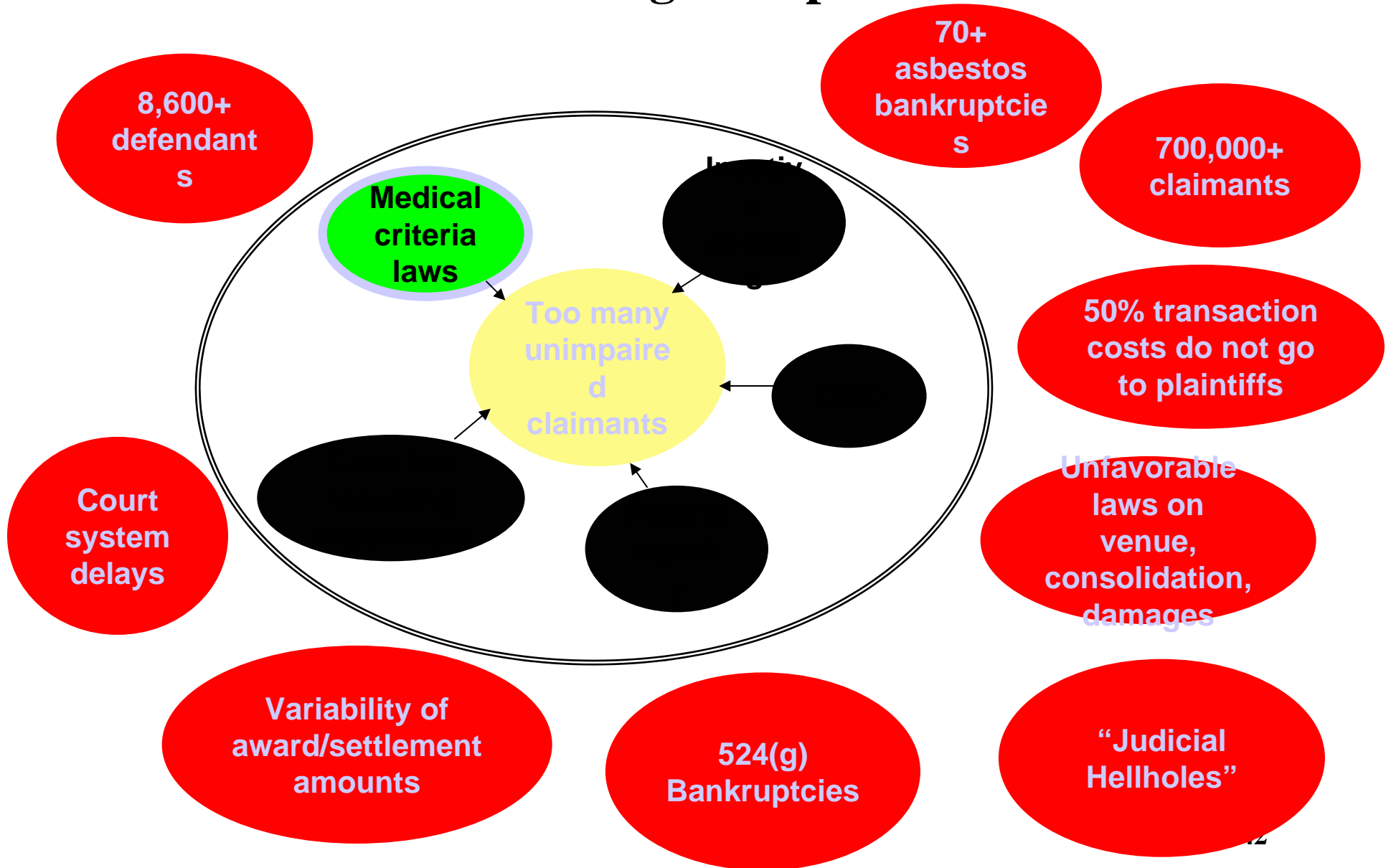
•Six states enact asbestos/silica medical criteria, with a 7th state enacting silica-only law

•But...constitutional challenges pending in FL, GA & OH

Medical criteria laws address one aspect of multi-faceted litigation problem



Medical criteria laws address one aspect of multi-faceted litigation problem



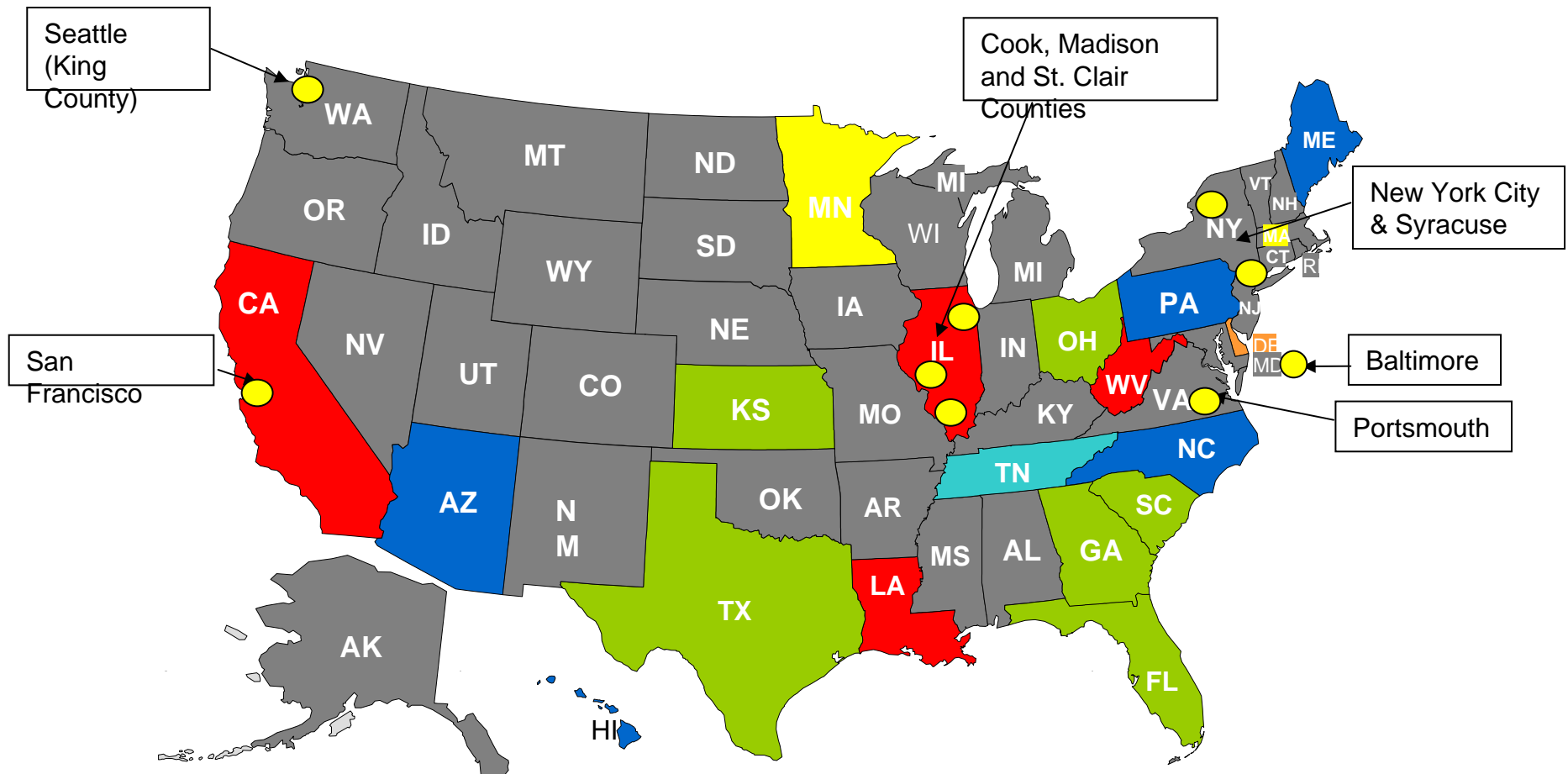
State-by-state approach to unimpaired claimants

Green: Asbestos/silica medical criteria law (FL, GA, KS, OH, TX)

Teal: Silica-only medical criteria law (TN)

Blue: Case law requires evidence of physical impairment (AZ, HI, ME, PA, NC)

Yellow: Inactive docket/Exigent docket/CMO/Pleural registry



**What is the impact
on actual claiming
behavior?**



**TOWERS
PERRIN**

TILLINGHAST

Effect of Legal Reforms on Asbestos Litigation

**Casualty Loss Reserve Seminar
Atlanta, GA
September 11, 2006**

Sandra Santomenno

Agenda

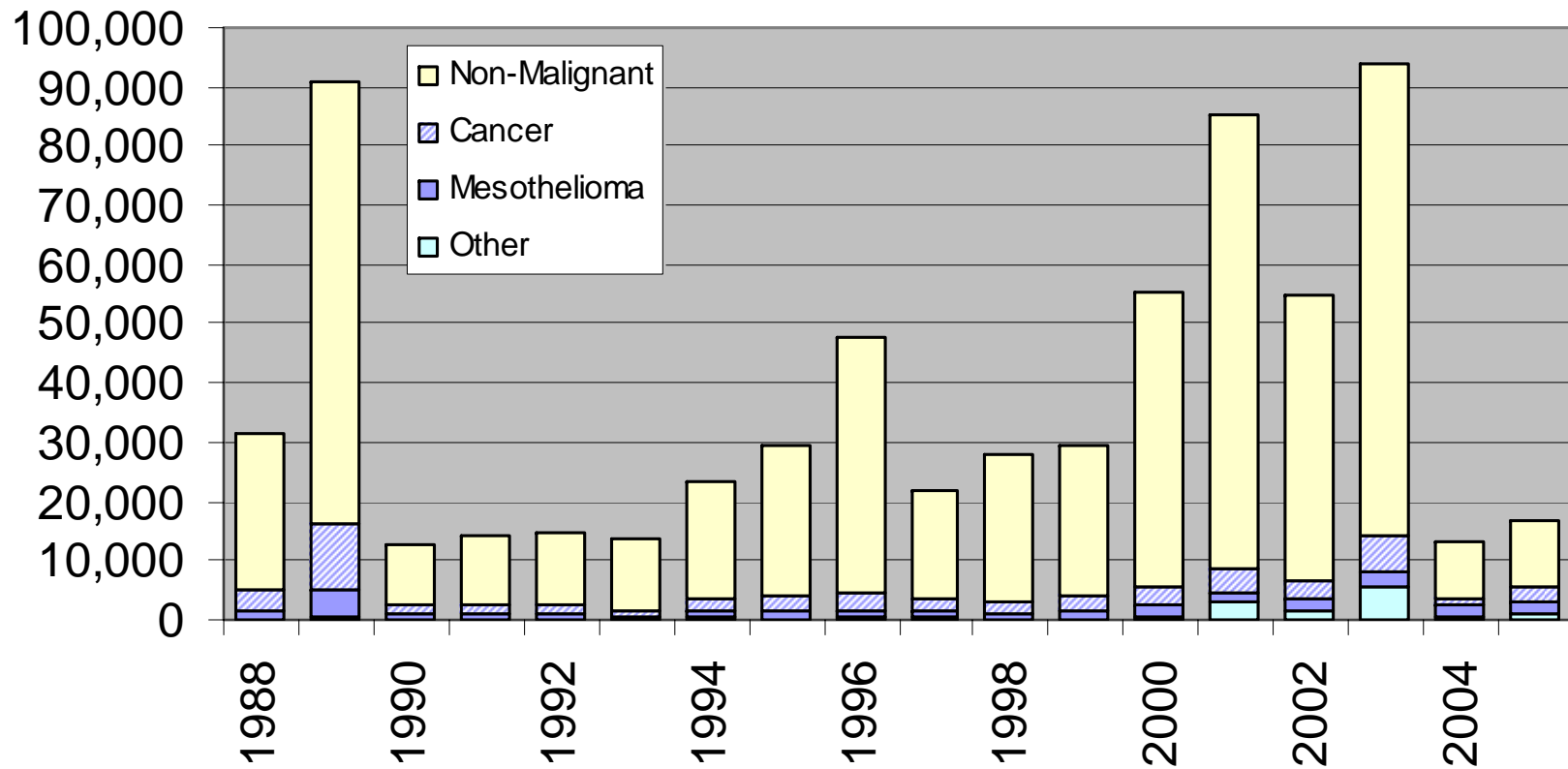
- Industry Data Showing an Increase in Malignant and a Decrease in Nonmalignant Claims
 - Manville Statistics
 - Scrutiny of Mass Screenings
- How Reforms Need to Be Reflected in Quantification of Asbestos Liabilities

Manville Data

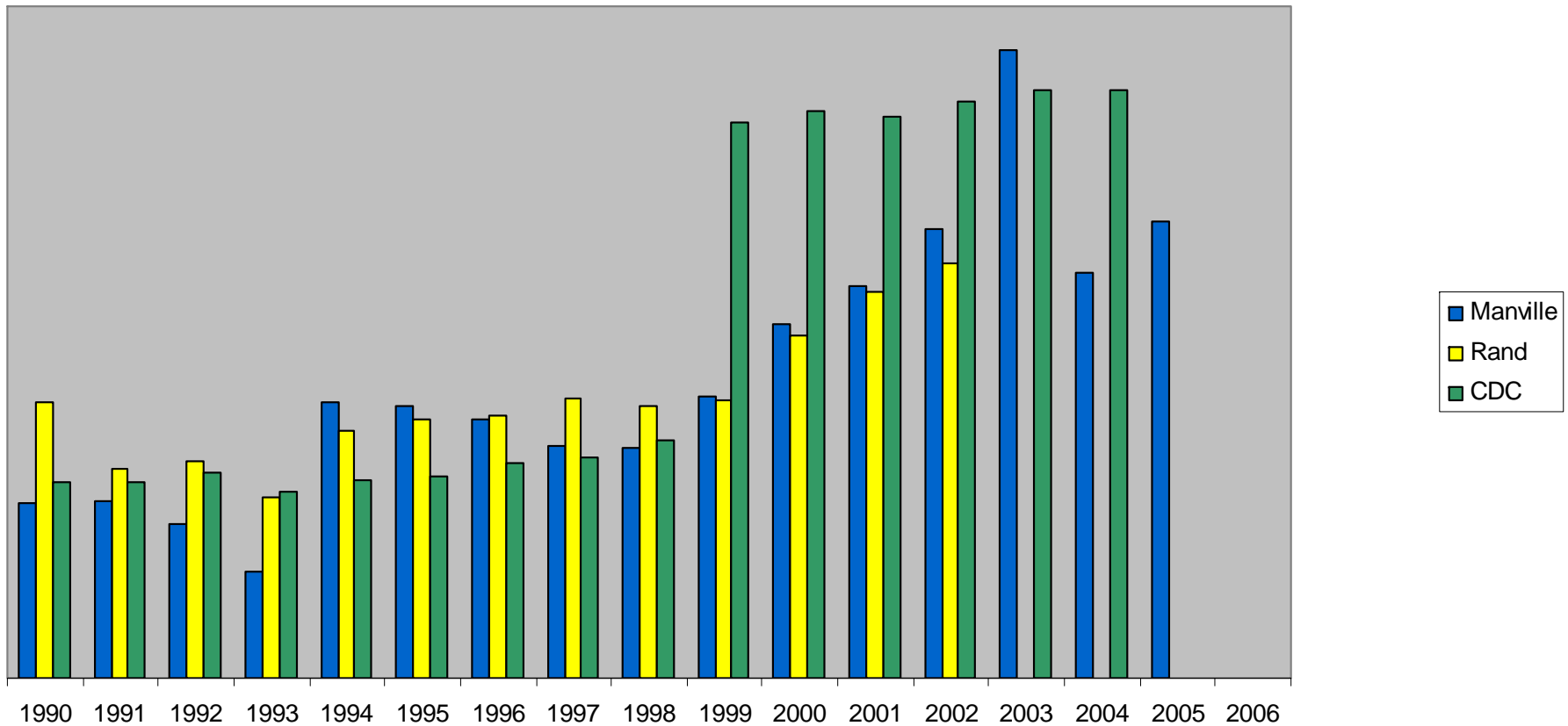
- Meso claims have increased
 - Higher exposed population than considered in early epidemiological studies (e.g., addl. occupations, family members)
 - Increase in propensity to sue – due to higher diagnosis rates and increased awareness of asbestos as a cause of compensable disease
- Cancer claims have been volatile
- Nonmalignant claims surged in 2000-2003 and then decreased dramatically for 2004+
 - Future of mass screenings

Historical Claim Filings Against Manville

Manville Trust - Injury by Year Filed



Historical Data Reflects an Increase in Meso Claims



Scrutiny of Potentially Fraudulent Claims

- 2004 Johns Hopkins study published in Academic Radiology
 - Reviewed 500 chest x-rays used as evidence in asbestos lawsuits
 - Initial conclusion: 96% showing disease
 - Study conclusion: Independent radiologists found abnormalities in only 4.5%

- Feb 2005 Silica Multi-District Litigation (MDL) hearings held by U.S. District Judge Janis Graham Jack in Corpus Christi, TX
 - More than 50% of silica claimants had previously filed asbestos claims with the Manville Trust
 - Physicians asked for counsel during depositions
 - Judge Jack found that “These diagnoses were driven by neither health nor justice: they were manufactured for money.”

Additional Scrutiny of Potentially Fraudulent Claims

- House Energy and Commerce Committee has subpoenaed records of certain physicians, screening companies, and plaintiff law firms
- Ongoing New York and Texas federal grand jury investigations
- As yet unpublished U.S. Chamber of Commerce study
- Suspension of claims from certain physicians and screening companies by some of the bankruptcy trusts (Manville, Celotex, and Eagle Picher)

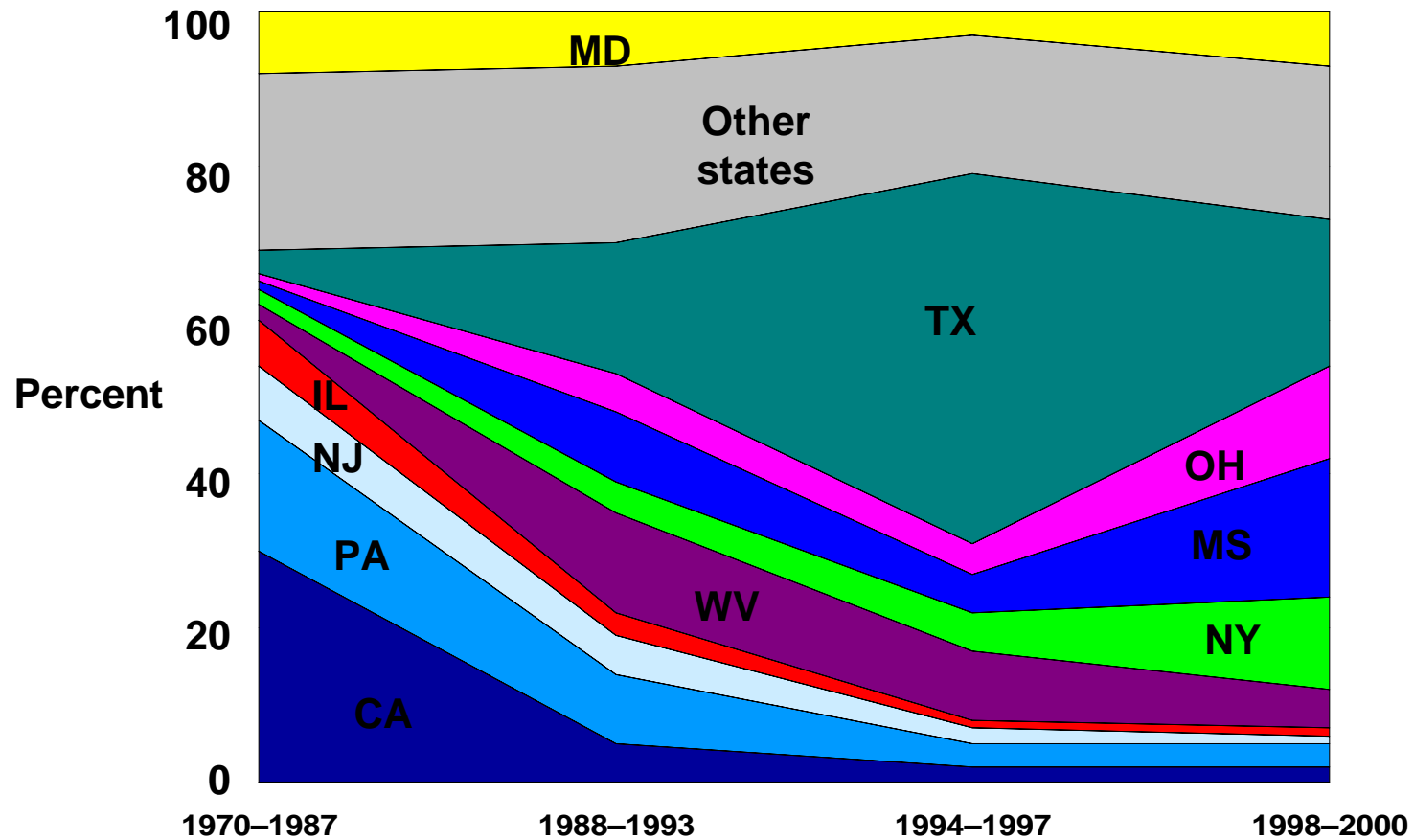
So, In Review:

- Malignant claims, especially mesothelioma, have increased
 - Currently ~2,500 annual meso claims
- Nonmalignant claims have dropped dramatically
 - Scrutiny of mass screenings

And

- State reforms now restrict many claims by the unimpaired

Reforms Now Passed in States with the Highest Historical Volume of Claims



Source: RAND, January 2003

State & Judicial Reforms Affecting Frequency

- Items to Consider

- Inactive Dockets (vary by jurisdiction)
 - Many claims do not meet criteria of active dockets
 - Retroactive or future filed basis
 - Geographic concentration – how many filings are affected
 - Data is often statewide, but reform is not
- Legislated Medical Criteria (varies by state)
 - Criteria
 - Medical conditions
 - Significant occupational exposure
 - Retroactive or future filed basis

State & Judicial Reforms Affecting Severity – Items to Consider

- Actions decreasing severity
 - Venue reform
 - Joint & several liability reform
 - Limits on non-economic damages
- Actions potentially increasing severity
 - Truly sick plaintiffs get on trial dockets
 - Plaintiff attorneys replace multiple plaintiff cases by concentrating on most severe cases
 - More bankruptcies, fewer solvent defendants left to pay decision cases
- Very difficult to quantify

Asbestos Analysis – Reform Impact Bolded

- Identify Exposure
- For each underlying insured account reviewed, develop ground-up ultimate loss and expense
 - **Frequency x Severity projection**
 - For direct business, obtain ground-up experience (e.g., # claims filed and closed, \$ indemnity and expense paid)
 - For reinsurance, typically rely on industry assumptions (distributions vary by tier)
- Allocate ultimate loss and expense to coverage year
- Compare ultimate loss and expense by year to specific coverage terms

Problem – Historical Data is NOT Representative of the Future – Adjustments to Reflect the Current Litigation Environment are Needed

■ **Frequency x Severity projection**

■ Frequency

- Filing data often needs to be obtained by state and disease
 - Reflect that the majority of claims filed in some jurisdictions (e.g., MS. OH) will not be paid

■ Severity

- Disease mix
- Changes in defense strategy
- Status of codefendants
- State reforms
- Trends

Key Areas of Future Uncertainty

- Increased attention to individual malignant claims
 - Frequency
 - Severity
 - Expense
- If / when the plaintiffs bar can find an efficient way to identify / submit large numbers of nonmalignant claims (e.g., to currently pending bankruptcy trusts) that satisfy medical criteria and meet challenges / hurdles from current legal scrutiny of mass screening
- Whether new “forums of choice” will emerge