Asbestos Liability

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THE TOPIC

Asbestos is a fibrous mineral used in construction materials that can cause a variety of diseases, including cancer. Workers who develop asbestos-related illnesses can file lawsuits against the company they believe exposed them to asbestos and that company, in turn, can file claims with its insurance company.

Until the late-1990s asbestos claims seemed to have stabilized. Then they surged again. Asbestos liability looked to be one of the largest ever faced by businesses in the United States and abroad. For the U.S. insurance industry asbestos-related losses could eventually reach as much as $65 billion, almost as much as the combined total for the September 11 terrorist attacks and Hurricane Katrina.

One reason for the new wave of claims was the realization on the part of claimants that many asbestos manufacturers had already been driven into bankruptcy and settlement funds were drying up. Up to 90 percent of current claimants had no signs of serious illness but were filing claims while there was still hope for some compensation. Some asbestos-related illnesses have a latency period of up to 40 years.

Also fueling litigation was the expansion of defendants to include firms that had a less direct connection with asbestos, such as current owners of companies that formerly produced products containing asbestos, with the result that asbestos liabilities have been a factor in the bankruptcy of more than 70 companies since 1976.

But starting around 2005 a new trend emerged, spurred by a number of factors, including tort reforms on the state level. State legislatures became more active addressing the issue of asbestos and silica liability, particularly in the field of medical criteria laws. These laws direct payouts to those most in need by requiring asbestos claimants to satisfy medical criteria before being allowed to file a claim. Some states have considered laws that preclude trial courts from bundling asbestos cases, an approach used by trial lawyers to get the claims of potentially thousands of healthy plaintiffs considered along with those of a few plaintiffs who are ill. And some state courts have created inactive dockets, which shift plaintiffs who believe they have been exposed to asbestos but cannot support an asbestos claim through a physical manifestation out of active civil dockets until the time that their condition changes.

In November 2007 A.M. Best released a report that suggests that the worst of the asbestos liability crisis

may be behind the insurance industry, although individual companies will continue to incur charges for years. The report, ?A&E Losses Halved in 2006; Asbestos Shortfall Nearly Erased,? found that almost 96 percent of ultimate asbestos loss estimates were funded through year-end 2006. Projections of ultimate total industry losses of $65 billion remain unchanged.

BACKGROUND

Introduction: Normally, injured workers receive compensation for their injuries or work-related illnesses through state workers compensation systems, which exclude recourse to the courts. In the case of asbestos and silica claims, however, many workers and their families have turned to the courts, suing third parties, the companies that made or used products containing the substances that caused their illnesses. In cases of long-latent diseases where the source of the illness, in this case exposure to asbestos, occurred many years ago, obtaining compensation through state workers compensation systems can be difficult . First, injured workers must identify the employer that last exposed them to the harmful substance. Then they must file a claim against the firm, which in the intervening years may have merged, gone out of business, or moved to a different state subject to different laws. In addition, the value of benefits that workers would be entitled to at that time would have been eroded by years of inflation.

What is asbestos?: The word asbestos refers to several types of fibrous minerals that exist in nature. These fibers are strong, durable, and resistant to heat and fire. They are also long, thin and flexible. Because of these qualities, the material has been used in thousands of consumer, industrial, maritime, automotive, scientific and building products. During the twentieth century, about 33 million tons of asbestos were used in industrial sites, homes, schools, shipyards and commercial buildings in the United States. Some of the more common asbestos-containing products are pipe-covering, insulating cement, insulating block, asbestos cloth, gaskets, packing materials, thermal seals, refractory and boiler insulation materials, asbestos cement pipe, fireproofing spray, joint compound, vinyl floor tile, ceiling tile, adhesives, coatings, acoustical textures, duct insulation for heating, ventilation and air conditioning (HVAC) systems, roofing products, insulated electrical wire and panels, and brake and clutch assemblies.

As long ago as the first century A.D., Roman and Greek chroniclers noted lung illnesses among slaves who worked with asbestos. The first documented modern case of an asbestos-related death dates to 1924. It was reported by Dr. W.E. Cooke in the British Medical Journal. Cooke also named the disease, a form of fibrosis, asbestosis. While asbestos-related diseases were given much consideration in Britain from that period on, including the passage of a law in 1931 requiring better ventilation and cleanup in asbestos factories and periodic medical examinations of workers, scant attention was paid in the United States until 1964 when Dr. Irving Selikoff, a medical researcher, published his findings that established the link between asbestos dust and disease. Researchers have identified three basic diseases which are related to the inhalation of the various types of asbestos fiber. Besides asbestosis they are lung cancer and mesothelioma, also a type of cancer identified with exposure to asbestos. Some of these diseases have latency periods of as long as 40 years. The widespread use of asbestos, particularly during the period 1940 to 1979, suggests that an estimated 27 million people may have been exposed to the fiber in the workplace, according to RAND. Tillinghast estimates that a total of 100 million Americans may have been exposed through products containing asbestos and asbestos used in buildings.

While asbestos has generally not been used in manufacturing and construction since the late 1970s, its existence in buildings and products is still legal in the United States. A 1989 Environmental Protection Agency ban on the material was remanded by the Supreme Court in 1991.

The Beginnings of Litigation: The first asbestos-related lawsuit was filed in Beaumont, Texas, in 1966. Up through the end of the 1970s some 950 asbestos cases were filed in federal courts. But filings began to increase dramatically in the first half of the 1980s; approximately 10,000 were filed from 1980 to 1984. The last half of the decade saw another sharp increase in the number of claims filed. RAND estimates that about 37,000 cases were filed between 1985 and 1989. It is difficult to know whether the rise was comparable on

the state level because in general state courts do not categorize cases by type, such as asbestos actions.

Manville Personal Injury Settlement Trust: One of the key events in the history of asbestos litigation was the 1982 Chapter 11 bankruptcy of the Johns-Manville Corporation, a leading manufacturer of building and fireproofing materials that opened its doors for business in 1858. The Chapter 11 bankruptcy suspended all personal injury lawsuits that had been filed against the company to that date, allowing it to reorganize and preserve its financial viability.

To compensate asbestos claimants, Manville developed a Plan of Reorganization that was approved in December 1986 by the United States Bankruptcy Court for the Southern District of New York. The plan created the Manville Personal Injury Settlement Trust, whose mission was to ?deliver fair, adequate and equitable compensation to (claimants), whether known or unknown,? without need to litigate. During its first nine months in 1988, over 12,600 claims for about $500 million were settled. But it rapidly became apparent that the assets in the trust would not be sufficient to pay all claims. Claimants rushed to file their claims, overwhelming the trust to the point that by the end of 1989, it had 89,000 cases on its books.

Redefined as a limited fund in 1990 by the U.S. Court for the Eastern District of New York, it was decided that claims would be paid on a scheduled basis in accordance with seven disease categories at an initial level of 10 percent on the dollar. Thus, someone with a $100,000 claim against the company was paid only $10,000.

New Wave of Litigation: For a period that lasted approximately from the mid- to the late-1990s there was a lull in the number of new asbestos claims being filed and many observers began to believe that the worst was over. That was a reasonable supposition in that billions of dollars had already been spent to settle thousands of claims, many asbestos producers had already declared bankruptcy and gone out of business, and many of the seriously ill had already died and their survivors had been compensated. But by 1999 a number of interacting factors spurred a new wave of litigation.

One of the most marked changes in asbestos litigation was a widening of the net. Since so many companies directly implicated in the production of asbestos were no longer there to sue, lawyers began going after companies less directly linked with asbestos--those that used the material rather than manufactured the product and those that became owners of firms that had once produced asbestos. One of the most notable of these is W.R. Grace, a construction materials and chemicals company, which in 1963 bought Zonolite, a Libby, Montana, company that mined a mineral that is contaminated with asbestos. Another is Federal Mogul, a manufacturing firm whose core business is furnishing auto manufacturers with auto parts.

A trend with an even greater impact on the expansion of litigation was the filing of claims by people with little or no current disability except scarring of their lung cavity, a condition characterized as nonmalignant. A Tillinghast study found that fully 94 percent of the 59,200 claims filed in 2000 were by nonmalignant claimants. Another factor broadening the impact of asbestos litigation is the legal concept of joint and several liability, which comes into play when courts determine liability. Under this principle defendants can be required to pay a larger portion of damages than they are found liable for. For example, an entity found 10 percent liable can be forced to pay as much as 50 or 100 percent of damages if other entities cannot pay their portion. As asbestos claims drive more firms into bankruptcy, the remaining companies are forced to assume more liability, which results in more bankruptcy filings. This creates a vicious circle. And as more companies hit with asbestos litigation choose Chapter 11 bankruptcy, lawyers rush to file cases before it is too late. To be included on the creditor list in a bankruptcy, claims must be filed by a certain date.

Insurance Claims: In December 2007 Tillinghast-Towers Perrin, an actuarial consulting firm estimated that ultimately U.S. insurer and reinsurer losses will reach between $55 billion and $65 billion. Tillinghast also calculated that cumulative liability will reach $200 billion. Insurers will be liable for 61 percent of the amount, according to Tillinghast. Of that share, 30 percent will come from U.S. insurers and 31 percent from foreign insurers. The remaining 39 percent will come from defendant companies that have exhausted their insurance coverage. Tillinghast notes that in some cases defendants have paid over $1 billion in defense

costs.

Earlier asbestos-related insurance claims were mostly filed under the products liability section of commercial policies, which sets a limit on coverage. But as major asbestos manufacturers saw their "products/completed operations" liability exhausted, a trend toward filing new claims under "premises and operations" coverage developed. "Premises and operations" provides unlimited liability. Other asbestos manufacturers began to seek to have other claims against them, which fall into the "care, custody and control" category, covered. This opened up portions of many insurance policies that have no aggregate limits on liability, and so can be tapped repeatedly.

Economic Impact: A RAND Institute for Civil Justice study, released in May 2005, described asbestos litigation as the longest-running mass tort litigation in the United States and found that the number of asbestos claims continues to rise sharply. As of the end of 2002, over 730,000 people had filed asbestos-related claims, costing businesses and insurers more than $70 billion. Forty-two percent of that amount has gone to claimants, 31 percent toward defense costs from insurers and other sources and 27 percent to plaintiffs? lawyers. The study also noted that claims filed by people with little or no current disability, known as nonmalignant claimants, account for 90 percent of all new claims.

The RAND study also focused on the impact on American businesses, which can be measured by the 8,400 entities that had been named as defendants in asbestos cases through mid-2004, along with the bankruptcies of 73 firms named in a substantial number of these asbestos claims through the same period. Over 90 percent of American industries have had at least one company hit with asbestos litigation, although the majority of claims are concentrated in eight industries. The study also notes that the dynamics of asbestos litigation seem different from most other mass torts. In spite of great efforts by all parties involved, including the courts, no comprehensive settlement scheme has been arrived at.

State Legislation and Court Actions: Beginning in the early part of the 21st century state legislatures became more active addressing the issue of asbestos and silica liability, particularly in the field of medical criteria laws. These laws direct payouts to those most in need by requiring asbestos claimants to satisfy medical criteria before being allowed to file a claim. Florida, Georgia, Kansas, Ohio, South Carolina, Tennessee and Texas are among states that have such laws in force, according to the American Academy of Actuaries. Some states have considered laws that preclude trial courts from bundling asbestos cases, an approach used by trial lawyers to get the claims of potentially thousands of healthy plaintiffs considered along with those of a few plaintiffs who are ill. Jurisdictions in Mississippi, Texas and West Virginia, are among those that have revised laws governing case consolidation, according to the American Academy of Actuaries. Some state courts have created inactive dockets, which shift plaintiffs who believe they have been exposed to asbestos but cannot support an asbestos claim through a physical manifestation out of active civil dockets until the time that their condition changes. The American Academy of Actuaries reports that courts in Illinois, Maryland, Massachusetts, Minnesota, New York, Virginia and Washington have created inactive dockets.

Suspected Fraud: In the early years of the 21st century increasing evidence that many asbestos and silica injury claims were not genuine spurred judges to become more active in issuing opinions intended to limit fraud in lawsuits brought before their courts. In June 2005, in a well-publicized decision, U.S. District Judge Janis Graham Jack threw out some 10,000 silicosis lung disease diagnoses in multidistrict litigation (In Re: Silica Products Liability Litigation) against industrial companies she was overseeing on the grounds that the diagnoses were ?manufactured? and inadmissible in court. In remanding the claims to Mississippi courts, Jack recommended that the cases be dismissed and that the law firms that brought the claims be sanctioned.

SILICA

Background: Silica refers to the chemical compound silicon dioxide (SiO_2) and occurs in a crystalline or noncrystalline form. Crystalline silica, also known as quartz, is the second most common mineral in the

earth?s crust and is a major component of soil, sand, rock and many other minerals. When workers chip, cut, drill or grind objects that contain quartz, respirable size particles may be produced. Overexposure to respirable crystalline silica can cause a disabling and sometimes fatal lung disease called silicosis.

Workers in many occupations and industries are potentially exposed to quartz dust. According to the National Institute for Occupational Safety and Health (NIOSH) and the Department of Labor, currently at least 1.7 million U.S. workers are exposed to crystalline silica each year. There is no cure for silicosis, but it is highly preventable. Inhalation of crystalline silica particles has also been associated with other diseases, such as bronchitis, tuberculosis, autoimmune diseases and fibrosis (scarring) of the lungs. In addition, some studies indicate an association with lung cancer. Data regarding health and safety of silica-related products, their appropriate use and the protection of workers are available from the Occupational Safety and Health Administration (OSHA). Deaths from silicosis have been declining steadily, according to NIOSH, suggesting that fewer workers are being exposed to inhalation of the dust. The agency reports that the number dropped dramatically from 1,157 in 1968 to 187 in 1999.

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