Liability for Asbestos Related Diseases

February 3, 2010

Introduction

Normally, injured workers receive compensation for work-related injuries or illnesses from their employer through state workers compensation insurance systems. Workers compensation pays for medical care and rehabilitation. It also compensates for lost wages and provides death benefits for the dependants of workers who die from their injuries. But in cases of asbestos-related diseases, obtaining compensation through this system may be difficult.

Before workers compensation programs were created in the first half of the twentieth century, workers who were injured on the job were rarely compensated. They could sue their employer for negligence in failing to keep the workplace safe, but the legal system in most states denied them compensation if they were even slightly to blame for their injuries. Workers compensation programs addressed that problem. As part of the social contract upon which workers compensation insurance is based, workers are compensated for on-the-job injuries regardless of who is responsible for the accident, but in return they must give up the right to sue their employer for negligence.

After most workplace accidents, the injury is apparent immediately or shortly afterwards. However, the illnesses that may develop after exposure to asbestos dust may not be evident for many years. Workers with asbestos-related illnesses and other long-latent diseases who seek compensation through the workers compensation system therefore face several hurdles. First, they must identify the employer who last exposed them to the harmful substance often many years before. 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. And, since benefits are computed based on when the incident occurred, even if they are successful in locating the company, the value of benefits that they would be entitled to would have been substantially eroded by years of inflation.

Thus, workers who developed asbestos-related diseases have turned to the courts. Since they could not sue their former employer under workers compensation statutes, they sued third parties, the companies that made or used the products that caused their illnesses. These companies, in turn, filed claims against their insurance companies under their commercial liability insurance policies. New claims continue to be filed although the pace is slowing, see chart at the end of this report. For U.S. insurers, asbestos-related losses could eventually reach $65 billion, almost as much as the combined total for Hurricane Katrina and the September 11 terrorist attacks.

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 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 dust. Besides asbestosis, a scarring of the lungs which may lead to chronic, disabling and sometimes fatal lung disease, they are lung cancer and mesothelioma, also a type of cancer specifically 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 if 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 has been 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 claimants with a nonmalignant condition. 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, if some defendants cannot pay their share of damages, other 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

Between 1991 and 2004 U.S. insurers paid out of over $24 billion on asbestos claims. Insurers paid another $9 billion from 2005 to 2008, see chart. In 2001 Tillinghast estimated U.S. insurers and reinsurers would eventually see total net losses of between $55 billion and $65 billion. Earlier asbestos-
related insurance claims were mostly filed under the products liability section of commercial insurance policies, which sets a limit on coverage. But as claims against major asbestos manufacturers? "products/completed operations" liability coverage reached that limit, a trend toward filing new claims under "premises and operations" coverage developed. "Premises and operations" provides unlimited liability. Other asbestos manufacturers began to see claims filed against them under their "care, custody and control" coverage. Where there are no aggregate limits on liability, policies 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. As of the end of 2002, RAND said, over 730,000 people had filed asbestos-related claims. The impact on American businesses 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. At the time of the study, over 90 percent of American industries had had at least one company hit with asbestos litigation, although the majority of claims were 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 Congress and the courts, no comprehensive settlement scheme has been arrived at.

Long-Term Forecast on Asbestos Claims

A report released in November 2007 by A.M. Best suggests that the worst of the asbestos liability crisis may be behind the insurance industry now, although individual companies will continue to incur charges for years. The report, A&E (Asbestos and Environmental) 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.

Estimated Asbestos Losses, 2008-2017 (1)

($) billions

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(1) All amounts are net of reinsurance recoveries.
(2) Incurred losses are losses related to events that have occurred, regardless of whether or not the
claims have been paid, net of reinsurance. Includes loss adjustment expenses.
(3) Because of changes in the population of insurers reporting data each year, the beginning reserve
may not equal the ending reserve of the prior year.

Source: NAIC data, sourced from S&P Global Market Intelligence, Insurance Information Institute.