

Mass Tort Litigation: Asbestos

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Abstract

Litigation over harm due to asbestos exposure is the largest mass tort in U.S. history. This article explores why the asbestos mass tort grew so large and argues that a large set of factors, rather than a single cause, are needed to explain the size of the asbestos mass tort. Among these factors are the severity of asbestos diseases, the fact that harm due to asbestos exposure was concealed by producers of asbestos products, changes in the law and legal procedures that favored plaintiffs, the large number of both potential plaintiffs and potential defendants, and plaintiffs' lawyers high profit from finding and representing asbestos claimants. I also argue that because of the unique circumstances explaining asbestos litigation, future mass torts are unlikely to be as large. The article also discusses research on asbestos litigation and explores various approaches-successful and unsuccessful-that have been proposed and adopted to reduce the number of asbestos claims.

Keywords

Asbestos litigation
Mass tort
Bankruptcy
Punitive damages
Asbestos bankruptcy trust

Definition

Mass Tort: A mass tort involves numerous plaintiffs filing civil lawsuits against one or a few corporate defendants in state or federal court. The plaintiffs allege that they were harmed by exposure to products produced by the defendants. Lawsuits may or may not be grouped in a class action. Law firms representing plaintiffs in mass torts often use advertising to locate and recruit plaintiffs.

Asbestos litigation is the largest mass tort in US history. As of 2002, 730,000 people had filed lawsuits against more than 8,400 defendants, and the cost of resolving claims was estimated at \$70 billion. The number of claims increased fourfold in the 1990s, and, in 2000 alone, 12 large companies reported that 520,000 new claims were filed against them. Because individual plaintiffs typically sue many defendants, estimates of the total number of asbestos claims range as high as 10 million. As of 2003, 73 corporations had gone bankrupt due to asbestos liabilities (Carroll et al. 2005). Asbestos litigation has been extremely profitable for lawyers, since 57 % of spending goes to lawyers' fees (Carroll et al. 2003). Two studies in 2001 predicted that asbestos litigation in the USA would eventually cost \$200 billion (Angelina and Biggs 2001; Bhagavatula et al. 2001).

Asbestos was once considered to be a "miracle mineral" for its effectiveness as insulation and in preventing the spread of fires. It was used in ships, buildings, and consumer products, including wallboard, roofing, flooring, pipes, automotive brakes, hair dryers, children's toys, clothing, paper, and gardening products. Asbestos was used to coat the steel girders of skyscrapers such as the World Trade Center in New York, to insulate furnaces, and to make theater curtains fire resistant so that backstage fires would not spread to the seating area. Because asbestos had so many uses, estimates of the number of people who were exposed to it range from 27 to 100 million (Biggs et al. 2001).

But asbestos crumbles into microscopic fibers that become airborne and embed themselves in the lungs, causing a variety of diseases. Mesothelioma is cancer of the pleural lining around the chest and abdomen and is quickly fatal. Asbestosis is scarring of the lungs that reduces breathing capacity; it can range from non-disabling to fatal. These two are "signature diseases" that are uniquely associated with asbestos exposure. Other asbestos diseases include lung cancer, gastrointestinal cancer, and pleural plaque, which is non-disabling thickening of the pleural lining. These latter conditions can be caused either by asbestos exposure or by other factors, such as smoking. Most asbestos diseases have a long latency period, so that they do not develop until 20-40 years after exposure. Individuals' likelihood of developing asbestos disease is low, but increases as the length and intensity of exposure rise (Carroll et al. 2003).

Asbestos exposure was recognized to be harmful as early as the 1920s and safe substitutes for many of its uses were developed in the 1930s. But it nonetheless became widely used - US consumption of asbestos grew from 100,000 metric tons in 1932 to 750,000 in 1994 (Castleman 1996, p. 788). Since then, asbestos use has fallen nearly to zero, but new cases of asbestos disease continue to occur because of the long latency period.

One question concerning asbestos is why government regulation did not prevent it from becoming so widely used. The British government began in the early 1930s to regulate workplace safety in the asbestos industry and provide workers' compensation to those disabled by asbestos exposure. In the USA, many states set up workers' compensation programs around the same time. However workers' compensation programs were oriented toward providing compensation for immediate workplace

injuries, while asbestos exposure caused diseases that developed many years later and were not initially connected to asbestos. Because statutes of limitation were short, most workers no longer qualified for compensation by the time they developed asbestos disease.

Workers' compensation systems also protected asbestos producers from liability for harm to their workers, since these systems were workers' exclusive remedy against their employers for workplace-related harm. Thus injured asbestos workers did not qualify for workers' compensation and also were barred from suing their employers for damage. And because employers were not liable for asbestos-related harm to their workers, they had little incentive to improve workplace safety.

Workplace and product safety regulation also failed to protect workers who were exposed to asbestos. Occupational safety programs started in many US states in the 1950s and 1960s, but rules were often voluntary and poorly enforced. Some regulations actually increased workers' exposure to asbestos, such as building code regulations that required ventilation systems to be lined with asbestos insulation. As the insulation aged, it crumbled into microscopic fibers and fans blew the fibers through the workplace, where workers breathed them. Federal regulatory agencies such as the Occupational Health and Safety Administration (OSHA) and the Consumer Product Safety Commission (CPSC) came along in the 1970s and began to regulate asbestos exposure. But for many years, OSHA's workplace standards for preventing asbestos exposure were not tight enough to prevent workers from developing asbestos disease. Similarly, the CPSC's standards for limiting asbestos in consumer products in the 1970s and 1980s were mainly voluntary. Overall, state and Federal efforts to limit exposure to asbestos in the USA largely failed until the 1990s. This failure of regulation meant that many asbestos workers and product users suffered injuries due to asbestos exposure. This failure of regulation was not unique: other countries were no more successful in preventing asbestos exposure and they were generally slower than the USA to remove asbestos products from the market (White 2004; Wikipedia 2014).

In the next sections, I consider various factors that explain why asbestos litigation in the USA grew so large. I also review research on asbestos litigation and discuss various solutions - successful and unsuccessful - that have been proposed and used to resolve asbestos litigation.

Why Asbestos Litigation Grew

A combination of factors, rather than a single factor, was responsible for the growth of asbestos litigation. Because workers' compensation systems are workers' exclusive legal remedy against their employers for on-the-job injuries, employers were not liable when their workers developed asbestos-related diseases. But producers of asbestos products were not shielded from liability to users of their products, and asbestos litigation therefore developed based on product liability law. The first successful trial of a lawsuit for damage due to asbestos exposure occurred in 1973 and involved an insulation worker who sued one of the large manufacturers of asbestos insulation (*Borel v. Fibreboard*, 443 F.2nd 1076 [5th Cir. 1973]). During the ensuing decade, 25,000 additional lawsuits were filed against asbestos product manufacturers and the number of lawsuits continued to grow. Because asbestos lawsuits were brought under products liability law rather than workers' compensation, plaintiffs could receive both compensatory and punitive damage awards. Damage

awards could be in the millions of dollars, especially when juries awarded punitive damages (Berenson 2003).

One factor that favored asbestos plaintiffs was a change in products liability law in the 1960s that made producers strictly liable for harm to users of their products; previously, they were liable only if they were found to be negligent. The strict liability doctrine made producers liable as long as their products were "unreasonably dangerous," or users were not adequately warned of the danger. The change from negligence to strict liability made it easier for plaintiffs to win asbestos lawsuits, both because asbestos products were extremely dangerous and because they rarely contained warnings.

Another factor that favored plaintiffs in asbestos litigation is that a number of plaintiffs' law firms specialized in handling asbestos claims. These law firms invested in developing evidence against asbestos producers that could be used in all of their lawsuits. The need for law firms to invest in developing evidence kept the number of entrants small, so that the asbestos litigation "industry" remained concentrated, with the ten top law firms representing 50-75 % of asbestos claims filed. The high concentration meant that profits were high (Carroll et al. 2003).

In developing a strong legal case against asbestos manufacturers, plaintiffs' lawyers were aided by the fact that several independent epidemiological studies were published in the 1960s that demonstrated strong links between asbestos exposure and asbestos disease. Asbestos plaintiffs' lawyers also developed evidence that producers of asbestos products conducted research on the health effects of asbestos exposure starting in the 1930s and found that exposure was harmful. But producers kept the results secret and did not warn workers or product users of the danger. This evidence of a cover-up of the dangers of asbestos exposure strengthened plaintiffs' claims in subsequent asbestos trials (Carroll et al. 2003).

The evidence suggesting a cover-up of the dangers of asbestos caused juries to frequently award punitive damages as well as compensatory damages in trials involving asbestos claims. One-sixth of all damage awards in asbestos lawsuits include punitive damages - a high proportion compared to other types of litigation. Unlike compensatory damages, punitive damage awards are often not covered by defendants' products liability insurance. The high damage awards and lack of insurance coverage made defendants eager to settle rather than litigate asbestos claims. But when claims frequently settle, they are very profitable for plaintiffs' lawyers to file, since lawyers' costs occur mainly at trial. This meant that plaintiffs' lawyers had an incentive to locate potential plaintiffs and file as many claims as possible.

Asbestos plaintiffs also benefit from the fact that they can sue many defendants. Typical asbestos plaintiffs sue 25 or more defendants, including producers of all of the asbestos products that they might have been exposed to while working or engaging in other activities. In a number of states, joint and several liability applies, so that each defendant found liable for damages is liable for the full amount of the damage award. Joint and several liability makes damage awards more valuable, since plaintiffs can collect up to the full amount of the award from any defendant(s) or their insurers. Thus even if some defendants pay little or nothing, damage awards can be collected from other defendants.

Another advantage that plaintiffs have in asbestos litigation is that their lawyers choose the most favorable court in which to file lawsuits - a phenomenon known as "forum-shopping." Plaintiffs' lawyers handling asbestos claims have a choice between filing in Federal versus state courts, and, if

the latter, they can choose a state that has pro-plaintiff laws and legal procedures. Particular states are often favored because they do not require judges to approve lawyers' fees when claims are settled (this means legal fees can be higher), because they use joint and several liability and/or because they do not limit the size of punitive damage awards.

Within a particular state, plaintiffs' lawyers also choose a favorable location in which to file claims. Many asbestos claims are filed in out-of-the-way county courts where plaintiffs' lawyers have a continuing relationship with local judges. These judges can help plaintiffs' lawyers by reducing defendants' ability to conduct pretrial discovery, scheduling trials at short notice so that defendants' lawyers have difficulty getting to the court in time, directing juries to consider awarding punitive damages, and pressuring defendants to settle. In return, plaintiffs' lawyers contribute to judges' reelection campaigns and benefit the local region by bringing in economic activity that raises demand for local hotels and restaurants. Favored locations for asbestos litigation in the past have included Madison, Illinois, Kanawha, West Virginia, and Jefferson County, Mississippi, as well as larger cities such as Philadelphia, Houston, and San Francisco - the latter because they are home to large shipyards and many former sailors who were exposed to asbestos while serving on navy ships.

Judges also developed new legal doctrines and legal procedures that favored plaintiffs and therefore encouraged plaintiffs' lawyers to file claims. One important change was a decision that greatly increased insurers' liability to asbestos claimants by legally reclassifying products liability insurance policies as premises insurance policies. While products' liability policies have a coverage limit that limits insurers' total liability under the policy to a fixed dollar figure, premises policies apply the coverage limit to each occurrence - where each individual asbestos claim is interpreted as an occurrence. Other legal changes expanded insurers' liability for claims made after the time period when their policies were in effect. These changes greatly increased insurers' liability for asbestos damage by reviving old insurance policies that had already paid out their coverage limits (Epstein 1984; Anderson 1987).

Asbestos plaintiffs' lawyers initially tried to have all asbestos claims certified as a class action in Federal court and settled all at once, but the Supreme Court overruled two settlements of class actions involving asbestos claims (*Amchen Products v. Windsor*, 117 S.Ct. 2231 (1997) and *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295 (1999)). After these two decisions, plaintiffs' lawyers shifted to filing most asbestos claims in state courts. Another legal change was that judges allowed multiple asbestos lawsuits to be litigated together, thus creating informal class actions. These consolidations often combined multiple claims by out-of-state plaintiffs with a small number of claims by in-state plaintiffs. The total number of claims consolidated ranged from a few to up to 9,600. Judges would hold a single trial before a single jury for all claims, with the jury sometimes making separate decisions for each plaintiff and sometimes making a single decision for all plaintiffs (Carroll et al. 2005). Consolidations reduce lawyers' expenses and trial time because some of the same evidence is used in all trials, so that in a consolidated trial it can be presented only once for all plaintiffs. Combining multiple lawsuits for litigation also benefits plaintiffs by making the trial outcomes more positively correlated. This makes going to trial more risky for defendants, because losing many cases at once could exhaust their insurance coverage and force them to file for bankruptcy. The more claims that are combined, the more bargaining power plaintiffs' lawyers have. Thus when large numbers of asbestos claims are consolidated for trial, defendants are likely to settle even claims that are legally weak.

Another legal change that benefitted plaintiffs in asbestos lawsuits is the use of bifurcated or reverse bifurcated trials. In a bifurcated trial, evidence concerning liability is presented first and the jury decides separately on each defendant's liability. Then the trial is suspended while plaintiffs and defendants who have been found liable bargain over a settlement. If they fail to settle, the trial is resumed at a later date - sometimes with the same jury - for the damages portion of the trial. In a reverse bifurcated trial, the format is the same, but the damages portion of the trial occurs in the first stage and liability in the second stage. Bifurcation saves on trial time relative to holding a unitary trial if the parties settle after the first stage. The parties are also more likely to settle at the end of the first stage than before the trial starts, since some of the uncertainty of trial has been resolved.

Reverse bifurcation was developed specifically for asbestos trials and is particularly thought to benefit plaintiffs. This is because plaintiffs often have severe damage from their asbestos exposure - making damage awards high. In contrast, plaintiffs' claims are often weak on the liability side, because they cannot show that they were exposed to particular defendants' asbestos products. So using reverse rather than straight bifurcation strengthens plaintiffs' bargaining power in settlement negotiations, because the information generated by the first stage of the trial is very favorable to plaintiffs and thus raises their bargaining power in settlement negotiations.

Bouquet trials are another procedural innovation developed for asbestos litigation. In a bouquet trial, a small group of asbestos plaintiffs is selected for trial from a larger group of consolidated claims. The trial group includes plaintiffs with severe asbestos disease and plaintiffs with no impairment. The idea of the bouquet trial is that the outcomes at trial for the various types of plaintiffs will be used as a template for settling the remaining claims in the larger group. Using a bouquet trial allows larger numbers of claims to be consolidated, since a bouquet trial can be held even when the full consolidated group of claims is too large to hold a single trial. One well-known example is a trial of 12 asbestos claims in Mississippi that were selected from a larger group of 1,738 asbestos claims. At the bouquet trial, the jury awarded plaintiffs damage of \$4 million each. The prospect of the jury assessing similarly high damage awards for the remaining plaintiffs caused defendants to settle all the remaining claims on very favorable terms (Parloff 2002).

Another factor that allowed the asbestos mass tort to grow so large is the large number of potential plaintiffs. As discussed above, the widespread use of asbestos meant that millions of people were exposed. Typical plaintiffs include ex-sailors who were exposed to asbestos on ships during World War II, workers who install insulation, workers in shipyards and steel mills, and textile workers who were exposed to airborne asbestos fibers in factories. Plaintiffs' lawyers search for new plaintiffs by extensive advertising and by conducting mass screenings. A frequent procedure was to bring a van equipped with an X-ray machine to a factory and take chest X-rays of all the factory workers. Any found to have scarring or thickening of the lungs or the pleural lining would be signed up as asbestos plaintiffs. Doctors often read hundreds of X-rays per day and found that nearly all of them had asbestos-related damage. More recently, plaintiffs' law firms have shifted to television advertisements to recruit plaintiffs whose exposure to asbestos may be non-work-related.

Another issue that has allowed asbestos litigation to become so large is that claims are valuable even when plaintiffs have no impairment from their asbestos exposure or had no asbestos exposure, so that their claims are downright fraudulent. Because asbestos lawsuits are mainly settled rather than tried, non-impaired and fraudulent claims are valuable because they increase the size of consolidations and raise plaintiffs' lawyers bargaining power with defendants. Settlements cover both fraudulent and valid claims. Estimates suggest that as few as 10 % of plaintiffs with asbestos

claims have asbestos-related cancers - a widely used measure of disabling asbestos disease (Carroll et al. 2003). Legal standards that allowed non-impaired plaintiffs to collect damages are an important feature of asbestos litigation.

The asbestos mass tort also involves many types of defendants. In the first stage of the litigation, defendants were the major producers of asbestos insulation. These companies eventually went bankrupt. In the second stage, these defendants were replaced by producers of products containing asbestos, retailers that sold these products, and firms that operated workplaces containing asbestos. Examples include the automobile companies, sued because car brakes contained asbestos; Sears Roebuck, sued because its stores sold asbestos-containing products; 3M Corporation, sued because it made dust masks that didn't protect users from asbestos exposure if they used the masks improperly; and Crown Cork and Seal, sued because it briefly owned a company that included a division which produced asbestos-containing insulation. Crown Cork quickly sold the division that produced insulation, but nonetheless it eventually paid out \$700 million in asbestos settlements and damage awards. Both small and large firms were sued, since even small defendants have insurance. Each time new defendants were added to the litigation, previous plaintiffs filed new claims against them. Because there were so many plaintiffs and so many potential defendants, the asbestos mass tort continued to grow.

Finally, bankruptcy also played a role in encouraging asbestos litigation. Many of the large firms that produced asbestos insulation and asbestos-containing products went bankrupt due to their asbestos liabilities - the first was the Johns-Manville Corporation in 1982. When asbestos-producing firms go bankrupt, present and future damage claims against them are assigned to a trust which receives some or all of the reorganized firms' equity and uses the funds to pay compensation to asbestos victims. Congress adopted legislation defining these trusts in 1994 and required that they follow the general outlines of the Manville Trust that was set up following the Johns-Manville bankruptcy. Trusts first estimate the number and severity of future asbestos claims against them and then determine what level of compensation payments they can pay such that their funds will cover both present and future claims. Trusts payments vary with the severity of the claimant's asbestos disease and the length of exposure to asbestos. The trusts use quite loose standards for demonstrating exposure to the bankrupt firm's asbestos products and some of them do not require that claimants show impairment from their asbestos exposure. These practices were adopted in order to reduce transactions costs and increase the fraction of damage payments that went to claimants rather than lawyers. However the loose standards for receiving compensation caused the number of claims to increase, causing many of the trusts to cut their compensation payments. On average, claimants with no asbestos-related impairment receive a total of around \$8,000 in compensation from each trust, while claimants with moderate impairment receive around \$19,000 (Scarcella et al. 2013).

The bankruptcy trusts encourage asbestos litigation in two ways. First, when corporations go bankrupt, their damage payments fall drastically. This encourages plaintiffs' lawyers to find new asbestos defendants to substitute for those that have gone bankrupt. The bankruptcies thus have contributed to bringing in many new corporations as defendants whose involvement with asbestos is increasingly remote. Second, although the trusts' compensation payments are relatively small, representing trust claimants is nonetheless profitable for plaintiffs' lawyers if they represent large numbers of claims. The trusts therefore encourage plaintiffs' lawyers to continue recruiting large numbers of non-impaired claimants, since the loose compensation rules allow these claimants to receive payments from many trusts.

Overall, a combination of factors is needed to explain why asbestos litigation grew so large.

Research on Asbestos Litigation

In White (2006), I examined why judges adopt the procedural innovations used in asbestos trials and the effects of both forum-shopping and procedural innovations on trial outcomes. The procedural innovations, discussed above, are consolidation of multiple lawsuits for trial, bifurcation and reverse bifurcation, and bouquet trials.

Why do judges adopt these innovations for asbestos trials? Judges in favored jurisdictions for asbestos litigation have crowded dockets. Because it would be impossible to hold individual trials for all cases, judges favor procedures that encourage the parties to settle and therefore reduce trial time. Consolidating claims for trial is a method of reducing trial time, because only one jury must be selected and some of the evidence can be presented only once for all plaintiffs. Consolidation also increases the probability of settlement, because trial outcomes become more positively correlated and defendants therefore find it riskier to go to trial. Bifurcating trials reduces trial time relative to holding a unitary trial, because the information generated in the first phase of trial increases the probability of settlement when the parties bargain after the first phase. Finally, bouquet trials save trial time by allowing larger numbers of asbestos claims to be consolidated - if a trial is needed, then a bouquet trial can be held even when the number of claims in the consolidation is too large for a single trial.

The study uses a dataset consisting of all asbestos lawsuits that were tried in court to a verdict on liability or damages or both between 1987 and 2003. Each observation consists of a trial of a single plaintiff's asbestos claim against all defendants. There were around 5,200 plaintiff observations in the dataset, implying that less than 1 % of asbestos plaintiffs' claims go to trials.

The data include the plaintiffs' alleged disease, the trial venue, the trial outcome, whether the claim was consolidated for trial and the number of claims in the consolidated group, whether the trial was bifurcated or reverse bifurcated, whether a bouquet trial was used, and the number of defendants that each plaintiff sued.

Half of all claims had individual trials, while the rest were consolidated with at least one other claim for trial. Approximately one-fifth of trials were bifurcated or reverse bifurcated and 4 % were bouquet trials. Use of the procedural innovations was geographically concentrated: bifurcated trials were frequently used in Manhattan and Philadelphia, while bouquet trials mainly occurred in Mississippi. Sixty-four percent of plaintiffs were awarded compensatory damages and the average compensatory damage award (contingent on defendants being found liable) was \$1.3 million in 2003 dollars; 20% of plaintiffs were awarded punitive damages and the average punitive damage award (contingent on defendants being found liable for both compensatory and punitive damages) was \$1.8 million. Plaintiffs' expected return from going to trial was \$1.1 million for the entire sample, with those having mesothelioma receiving around \$4 million.

To examine the effect of consolidating claims for trial on the correlation of the trial outcomes, I computed a correlation coefficient for all trials involving two plaintiffs and compared the result with

the correlation coefficient for single-plaintiff trials when the plaintiffs were randomly assigned in pairs. I also followed the same procedure for three- and five-claim consolidations. The results show that the correlation coefficient of expected total damages ranges from 0.84 to 0.92 in the actual groups, compared to only 0.01 to 0.04 in the randomly assigned groups. The results were similar if only liability or only damages are considered. These results suggest that consolidating claims for trial makes trial outcomes much more positively correlated and supports the hypothesis that going to trial in a consolidation is much more risky for defendants.

To examine the effect of forum-shopping and the procedural innovations on trial outcomes, I estimated probit regressions explaining whether plaintiffs were awarded compensatory damages and whether they were awarded punitive damages conditional on receiving compensatory damages. I also estimated Tobit regressions explaining the amount of compensatory and punitive damages, with damages set equal to zero when the plaintiff loses. Forum-shopping was found to be extremely favorable to plaintiffs, with plaintiffs' probability of receiving compensatory damages increasing by up to 30 percentage points in the most favorable jurisdictions relative to the most commonly used jurisdiction. Also plaintiffs' probability of being awarded punitive damages rose by up to 91 percentage points in the most favorable jurisdiction relative to the most commonly used jurisdiction.

Use of the procedural innovations also increased plaintiffs' expected return from going to trial. Having a bifurcated trial raised plaintiffs' probability of being awarded compensatory damages by 27 percentage points and raised compensatory damage awards by \$924,000. Having a bifurcated trial also increased plaintiffs' expected return from going to trial by \$650,000. But bifurcated trials did not significantly increase plaintiffs' probability of winning punitive damages or the size of the punitive damage award. Having a bouquet trial raised plaintiffs' probability of being awarded punitive damages and caused both compensatory and punitive damage awards to be higher. Plaintiffs' expected return from going to trial increased by \$1.2 million when a bouquet trial was held. Having a small consolidated trial consisting of 2-5 plaintiffs' claims increased plaintiffs' probability of winning both compensatory and punitive damages, but was associated with lower compensatory damage awards. Surprisingly, having a larger consolidated trial of six or more plaintiffs did not significantly change plaintiffs' returns from going to trial.

Overall the results suggest that the return to plaintiffs and their lawyers from filing asbestos claims is greatly increased by forum-shopping and by plaintiffs' lawyers picking jurisdictions where judges use the procedural innovations. Although the research did not address the issue of how forum-shopping and procedural innovations affect the size of asbestos settlements, the standard economic model of settlements suggests that they mirror trial outcomes and are higher in courts where plaintiffs' expected returns from going to trial are higher (Mnookin and Kornhauser 1979). Thus forum-shopping and procedural innovations are also likely to raise the amount that defendants pay to settle asbestos claims.

Methods of Resolving Asbestos Litigation

In this section, I consider solutions for resolving asbestos litigation - including both proposed solutions that were never adopted and actual solutions that were.

One proposed solution in the 1990s was to certify a class action of all asbestos claimants. In a class action, all asbestos claims are combined in a single lawsuit and all are resolved at once, usually by a settlement. Both present and future asbestos claims are resolved. Individual plaintiffs would be bound by the outcome of the class action and would not have the right to opt out. The Federal courts certified two class actions of asbestos claimants, but - as discussed above - the US Supreme Court rejected both class certifications in 1997 and 1999, on the grounds that asbestos claimants were too diverse to be combined into a single class.

This was followed by another proposed solution for asbestos litigation: a Federal government-administered compensation scheme for asbestos victims. The proposed bill was the Fairness Asbestos Injury Resolution or "FAIR" Act of 2005, S. 852. It was based on two federally administered compensation programs, one that compensated miners who developed black lung disease and one that compensated children harmed by childhood vaccines. Compensation of up to \$140 billion would have been financed by levies on asbestos producers and insurers. Asbestos victims would lose their right to file lawsuits, but would instead receive compensation from the program. Claimants who had mesothelioma or cancer would receive the highest awards of \$1.1 million and those with less disabling diseases would receive \$25,000 or more. Non-impaired claimants would receive medical monitoring, but no compensation (Stengel 2006). However the FAIR Act was not enacted (Barnes 2011).

While both the class action settlement and the compensation scheme for asbestos claims failed, individual courts began in the early 2000s to adopt procedural innovations that reduced the amount of asbestos litigation. One such device was the "inactive docket" which put claims by non-impaired asbestos plaintiffs on an inactive basis, preserving their right to sue in the future, but preventing their claims from proceeding in the legal system until they become impaired from their asbestos exposure. Inactive dockets solve the problem that plaintiffs must file claims quickly after discovering their asbestos-related harm in order to satisfy statutes of limitations.

A number of Federal courts also began to reject the "any exposure" theory of causation in asbestos litigation, which argues that any exposure to asbestos—regardless of how brief or slight—is sufficient to cause asbestos-related disease and therefore to satisfy the requirements for defendants to be held liable for damage. These courts dismissed claims by plaintiffs with exposure to asbestos, but no asbestos-related disease (Simpson et al 2016).

Judges have become more likely to dismiss asbestos claims as fraudulent. The most famous example occurred in a related mass tort: claims for damage due to exposure to silica. Silica litigation is similar to asbestos litigation in that plaintiffs allege harm from inhaling airborne silica crystals that can lead to scarring of the lung lining or diseases such as lung cancer. Plaintiffs' lawyers representing silica claimants often piggy-backed on their own asbestos plaintiffs by filing claims of damage due to silica exposure on behalf of the same plaintiffs for whom they had already filed asbestos claims. They had doctors re-analyze the chest X-rays of asbestos plaintiffs to check for silica exposure and certify that these plaintiffs also had silica-related disease; this is despite the fact that it is rare for individuals to have been exposed to both silica and asbestos. However the judge who presided over the silica litigation dismissed nearly all of the claims on the grounds that they were fraudulent and threatened to bring criminal charges against the doctors who read plaintiffs' X-rays. This effectively ended the silica mass tort, leaving only a small number of lawsuits by plaintiffs with severe silica-related disease. The publicity given to the silica litigation made judges more likely to dismiss asbestos claims as well (Behrens and Goldberg 2005/2006).

Some states that were centers for asbestos litigation also adopted legal reforms intended to discourage the filing of asbestos claims. In several states, courts were barred from consolidating out-of-state with in-state asbestos claims for litigation. As a result, out-of-state claims could no longer be litigated in the state and this limited plaintiffs' lawyers' ability to put together large consolidations. Among states that previously allowed large consolidations of asbestos claims, West Virginia, Mississippi, and Illinois all made changes along these lines in the early 2000s. Several other states changed their legal rules to explicitly disallow large consolidations of asbestos claims, although they generally still allow out-of-state claims to be consolidated with in-state asbestos claims. Another change is that New York, Texas, and several other states substituted proportional liability for joint and several liability to asbestos claimants, so that individual defendants are no longer liable for plaintiffs' entire damage award. This shields non-bankrupt defendants from being held liable for bankrupt defendants' share of plaintiffs' damage (Hanlon and Geise 2007).

The result of all these changes in state and Federal law and legal procedure is that the total number of asbestos lawsuits filed each year has fallen dramatically. Over the period 2014-2019, the total number of asbestos lawsuits filed each year was in the range of 4,000 to 5,500, far below the number of filings in the early 2000's. Around three-quarters of recent asbestos filings are by plaintiffs with mesothelioma or lung cancer, a major change from earlier when most claims were by plaintiffs with less severe damage or exposure-only (Shockley 2019). Also the fraction of asbestos damage awards going to plaintiffs with serious asbestos-related disease has also risen sharply, from around 50 % in 1997-1999 to more than 95 % in 2013 (Scarcella et al. 2013). Most asbestos lawsuits now involve a much smaller number of claims by plaintiffs who have serious asbestos-related diseases and these claims are litigated individually or in small groups. This means that plaintiffs' lawyers can no longer litigate large groups of claims consisting mainly of non-impaired plaintiffs, and they therefore have less bargaining power to force defendants to settle and less incentive to recruit non-impaired plaintiffs in the first place.

Other Developments

Another important change in asbestos litigation is the increasing importance of the asbestos bankruptcy trusts. As discussed above, when firms go bankrupt due to asbestos claims, they use the equity of the reorganized firm to set up a trust to compensate asbestos victims. Over time, the number of asbestos bankruptcy trusts and the value of their assets has increased, making trust compensation more valuable. As of 2015-2016, more than 100 corporations had filed for bankruptcy due to asbestos claims and there were 58 active asbestos bankruptcy trusts. Bankrupt defendants and their insurers had contributed a total of \$40 billion to the trusts, the trusts had paid out a total of around \$17 billion to 2.4 million claimants and their combined assets were around \$27 billion (Dixon and McGovern 2015 and Kelso and Scarcella 2018).

The trusts pay compensation to claimants who have severe asbestos disease and sometimes also to claimants who have less severe disease or asbestos exposure, but no disease. Most claims are paid using an expedited procedure that requires claimants only to show evidence of disease and a work history of exposure to asbestos. Each trust has a schedule of payments that depends on the claimant's disease. Scheduled payments are based on the average settlement amounts paid by the firm to

plaintiffs having that disease prior to the firm's bankruptcy. However each trust reduces its scheduled payments by a factor that is intended to preserve the trust's assets so that it will have funds to cover claims by individuals who develop asbestos disease in the future. These payment reduction factors have increased over time for the older trusts, because the number of trust claimants has been larger than initially predicted. For trusts for which data are available, the payment reduction factor ranges from 0 to 99%, with a median value of 75%. As of 2008, average payments by asbestos trusts to mesothelioma victims ranged from \$13,000 to \$238,000, with a median value of \$41,000 (Dixon et al. 2010).

Individual asbestos victims can claim from many trusts at once, in addition to claiming from non-bankrupt defendants through the tort system. Data from claims filed against one trust suggest that individual claimants have collected from as many as 30 different asbestos trusts and as many as 72 tort system defendants. Individual claimants' total recoveries from both the trusts and the tort system range from \$90,000 to \$7 million (Hartley 2015).

The increasing number of asbestos trusts has caused plaintiffs' law firms to change their legal strategy vis-à-vis solvent defendants. Many states use joint and several liability to determine liability for damages in the tort system, which means that defendants found liable at trial are obliged to pay full compensation to victims, even when other defendants are partially responsible for victims' damage. Asbestos plaintiffs sue only solvent defendants in the tort system (they cannot sue defendants that have gone bankrupt) and they often identify mainly solvent defendants as producers of the asbestos products they were exposed to. This means that solvent defendants, if found liable, are liable for most or all of victims' damage, even though these defendants may have only been slightly responsible for victims' harm. The result is that plaintiffs can collect for their full damage from solvent defendants and can also collect additional compensation from the trusts. Thus the existence of the trusts is predicted to have increased victims' total compensation (Dixon and McGovern 2015).

Another new factor in asbestos litigation is the use of civil RICO (Racketeer Influenced and Corrupt Organizations Act) lawsuits by asbestos defendants against lawyers who represent asbestos plaintiffs. One RICO lawsuit, filed in 2014, was based on the claim that plaintiffs suing the Garlock Corporation—an asbestos defendant in multiple lawsuits—concealed that they had also been exposed to the asbestos products of 10 large producers of asbestos insulation that had all gone bankrupt. This prevented Garlock from arguing that its products were not a substantial factor in causing plaintiffs' harm. Other RICO lawsuits have alleged that plaintiffs' lawyers and doctors engaged in racketeering because plaintiffs' lawyers hired doctors to fraudulently certify that plaintiffs had asbestos-related disease. RICO lawsuits are clearly intended to discourage plaintiffs' lawyers from filing asbestos claims. Because plaintiffs in successful civil RICO lawsuits are entitled to triple damages and compensation for lawyers' fees, they can be particularly effective. However, judges have frequently dismissed RICO lawsuits against asbestos plaintiffs' lawyers and even when RICO cases have settled, the settlement amounts have been relatively small (Brickman 2019).

Spinoffs from Asbestos Litigation

Because asbestos litigation has been so lucrative, plaintiffs' lawyers have searched widely for other defective products that could serve as the basis for new mass torts, using the same techniques developed for asbestos litigation. Lawyers have attempted to develop mass torts based on exposure

to lead paint, harm due to guns, and claims of obesity due to consumption of fast food (White 2004). However none of these mass tort spinoffs have been successful in court.

But the asbestos mass tort itself continues to mutate into new forms that keep it alive. One recent spinoff is lawsuits filed by family members of asbestos workers who claim second-hand exposure to asbestos from relatives' clothing. Family members, unlike workers themselves, are not barred by workers' compensation from suing their relatives' employers. Thus they can both sue their relatives' employers and the producers of asbestos products that their relatives were exposed to. Another spinoff is claims by lung cancer victims against asbestos producers and the asbestos bankruptcy trusts. Most lung cancer is caused by smoking, but plaintiffs with lung cancer nonetheless claim that their cancer was caused by exposure to asbestos. These claims qualify for compensation from the asbestos bankruptcy trusts, and, because lung cancer is a serious disease, their lawsuits against non-bankrupt defendants are not placed on inactive dockets (Nocera 2013). And since there are 200,000 new lung cancer cases each year compared to only 2-3,000 new mesothelioma cases, lung cancer claims present a valuable opportunity for lawyers to continue the asbestos mass tort.

Another recent spinoff from asbestos litigation is talcum powder litigation. Talcum powder (or baby powder) is used as a body powder; it is made from talc, but has been alleged to contain asbestos since deposits of the two minerals often occur together. Women who develop ovarian cancer and used talcum powder have sued Johnson & Johnson, Colgate Palmolive and other producers of talcum powder for damages, based on the theory that the asbestos in talcum powder caused their cancers. Similar to asbestos litigation, plaintiffs' lawyers have argued that Johnson & Johnson knew since the 1950's that talcum powder contained asbestos, but denied and concealed the information. As of early 2020, 19,400 lawsuits related to talcum powder had been filed against Johnson & Johnson. Because ovarian cancer is a very serious disease with a high death rate, recent trials have found Johnson & Johnson liable for high compensatory damages and punitive damages, including a damage award of \$4.7 billion to 22 plaintiffs in 2018, which Johnson & Johnson is currently appealing (Hsu and Rabin 2020). Thus talcum powder represents a growth area that allows plaintiffs' law firms to apply techniques developed for asbestos litigation to a new and profitable area of litigation.

Cross-references

(none)

References

- Anderson DR (1987) Financing asbestos claims: coverage issues, Manville's bankruptcy and the claims facility. *J Risk Insur* 54(3):429-451
- Angelina M, Biggs J (2001) Sizing up asbestos exposure. *Mealey's Litigation Report: Asbestos* 16:32-38
- Barnes J (2011) Dust-up: asbestos litigation and the failure of commonsense policy reform. Georgetown University Press, Washington, DC
- Behrens MA, Goldberg P (2005/2006) The asbestos litigation crisis: the tide appears to be turning. *Conn Insur Law J* 12:477
- Brickman L (2019) Civil RICO: An Effective Deterrent to Fraudulent Asbestos Litigation?" *Cardozo . Rev* 40:2301.
- Berenson A (2003) 2 Large verdicts in new asbestos cases. *New York Times*, 1 Apr 2003
- Bhagavatula R, Moody R, Russ J (2001) Asbestos: a moving target. *AM Best Rev* 102:85-90
- Biggs JL et al (2001) Overview of asbestos: issues and trends. Report prepared by the American Academy of Actuaries Mass Torts Work Group. Available at www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf
- Carroll S, Hensler D, Abrahamse A, Gross J, White M, Scott Ashwood J, Sloss E (2003) Asbestos litigation costs and compensation. DRR-3280-ICJ. RAND Corporation, Santa Monica
- Carroll S, Hensler D, Gross J, Sloss EM, Schonlau M, Abrahamse A, Scott Ashwood J (2005) Asbestos litigation. DRR-3280-ICJ. RAND Corporation, Santa Monica
- Castleman BI (1996) Asbestos: medical and legal aspects, 4th edn. Aspen Law & Business, Englewood Cliffs
- Dixon L and G McGovern (2015), *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases*, Santa Monica: RAND Corporation.
- Dixon L, G McGovern, and A Coombe (2010), *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, Santa Monica: RAND Corporation.
- Epstein RA (1984) The legal and insurance dynamics of mass tort litigation. *J Legal Stud* XIII:475-506
- Hanlon PM, Geise ER (2007) Asbestos reform - past and future. *Mealey's Litigation Report: Asbestos* 22:5, 4 Apr 2007
- Hartley KT (2015) Commentary: Looking Further Behind the Curtain: Example of Mesothelioma Claim Stories. *Mealey's Litigation Report: Asbestos*, 30:22, 16 December 2015.
- Kelso P and M Scarcella (2018) *Dubious Distribution: Asbestos Bankruptcy Trust Assets and Compensation*, US Chamber Institute for Legal Reform.
- Hsu, T, RC Rabin (2020) Johnson & Johnson to End Talc-Based Baby Powder Sales in North America. *New York Times*, 19 May 2020.

- Mnookin R, Kornhauser L (1979) Bargaining in the shadow of the law: the case of divorce. *Yale Law J* 88(5):950-997
- Nocera J (2013) The asbestos scam. *New York Times*, 2 Dec 2013
- Parloff R (2002) The \$200 billion miscarriage of justice. *Fortune*, 4 May 2002
- Scarcella MC, Kelso PR, Cagnoli J (2013) Asbestos litigation, attorney advertising and bankruptcy trusts: the economic incentives behind the new recruitment of lung cancer cases. *Mealey Asbest Bankrupt Rep* 13:4
- Shockley, M (2019), National Trends Driving Asbestos Litigation, KCIC report (available at <https://www.kcic.com/trending/feed/national-trends-driving-asbestos-litigation/>).
- Simpson AM, Showalter JM, Antonioli A, Asche K, Chimienti M, Chintamaneni V, Galvan V, Garel-Frantzen V, Joshi B, Lanphear JL, Loring D, Middleton R, Murali R, O'Connell S, Reust DM, Thompson AL, and Veasy P (2016) Recent Developments In Toxic Tort & Environmental Law. *Tort & Ins. L.J.* 51:723
- Stengel JL (2006) The asbestos end-game. *NYU Annu Surv Am Law* 62:223
- White MJ (2004) Asbestos and the future of mass torts. *J Econ Perspect* 18:2
- White MJ (2006) Asbestos litigation: procedural innovations and forum-shopping. *J Legal Stud* 35(2):365-398
- Wikipedia (2014) Asbestos and the law. http://en.wikipedia.org/wiki/Asbestos_and_the_law, viewed 21 Apr 2014