

Asbestos: A \$275 Billion Time Bomb Threatens More than Just Insurers

It's now expected that the total cost of asbestos litigation will far surpass all the direct and indirect costs of the World Trade Center attack. It could be more than double the cost of a war with Iraq. And it will no doubt toss scores of U.S. companies, only peripherally involved in the asbestos tangle, into bankruptcy if nothing is done.

By: Barbara A. Morris

Looking to the future of asbestos litigation, one insurance industry expert comments with a half-hearted smile that the troubling reality that underlies the legal morass is "insurers don't have a printing press."

Another expert says the insurance industry is "easy pickings" for plaintiff lawyers. "Free money" can be had with "boilerplate lawyering" simply by alleging one might become sick due to asbestos exposure--regardless of how remote that exposure may be or even if those feared symptoms never manifest themselves.

The current asbestos litigation crisis has become a steamroller. The damage is widespread, not just to the insurance industry but to collateral victims--corporate America has become vulnerable to asbestos litigation.

"The pool of (asbestos) defendant companies keeps growing and moving outward with litigation sweeping up companies that have very little to do with asbestos in general," observes Julie Rochman, senior vice president, public affairs, at the Washington, D.C. headquarters of the American Insurance Association (AIA). In fact, she likens the trend to the fate of the doomed Titanic. "What we are seeing is only the tip of the iceberg--it will sink the U.S. economy--taking a hole right out of its side."

The numbers tell an even more dramatic tale.

According to a paper published by the AIA titled "Myths and Facts about Asbestos Litigation," experts estimate that the total economic toll of asbestos liability on businesses could reach \$275 billion, more than cost estimates for all Superfund cleanup sites combined, Hurricane Andrew, or the September 11 terrorist attacks. Today, continues the report, there are about 200,000 individual claimants in pending cases, with each claimant suing, on average, 20 defendants. And of the 200,000 claims currently pending, most have been filed by people who are not sick.

Bankruptcy: The Logical Outcome

The impact of asbestos litigation on companies was also explored in a report entitled "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms." The AIA-commissioned report, authored by 2001 Nobel Prize winner in economics Joseph E. Stiglitz, Jonathan M. Orszag and Peter R. Orszag, looked at 61 companies bankrupted by asbestos liabilities during the first 10 months of 2002. Before bankruptcy, the 61 companies employed more than 200,000 people, the reported noted. Each displaced worker will lose an estimated \$25,000 to \$50,000 in wages over his or her career because of the bankruptcy.

Asbestos was phased out of most non-essential uses by the late 1970s and early 1980s. "Yet contrary to medicine and common sense, the number of claimants is expanding exponentially," says Rochman, "this confounds the experts, who, going by the actuarial tables, expected that by now we would see the numbers of cases stabilizing."

The AIA, in "Myths & Facts About Asbestos Litigation," attributes this trend to several factors, including mass x-ray screenings often sponsored by trial lawyers used to "swell the asbestos plaintiff class with thousands of people, many of whom either are unimpaired and quite healthy or are suffering from medical conditions not caused by exposure to asbestos." The report also blamed asbestos lawyers for lumping cases together and mixing in very sick claimants with hundreds of healthy ones. Because such cases are extremely expensive to defend, most never go to a jury and end instead in big settlements.

Another contributing factor is the expanding number of defendant companies, with lawsuits against thousands of companies which never manufactured asbestos and had only peripheral involvement with it.

Gerard Altonji, senior financial analyst at the insurance rating agency A.M. Best, in Oldwick, N.J., cites these and other "significant root causes" for the surge in asbestos losses in a report entitled "Largest Increase in A&E (Asbestos and Environmental) Losses to Date Seen in 2001." Among the underlying causes of increased asbestos litigation are rapid bankruptcy filings of most of the major asbestos producers, reclassification of previously settled product liability cases, the collapse of a number of plaintiff/insured/insurer payment schemes, most recently the Center for Claims Resolution (CCR) in late 2000; and a rise in the number of asbestos practices among plaintiff attorneys. These trends, noted Altonji, translate into a steadily rising financial toll now borne by the property/casualty industry, as evidenced by recent loss data. Specifically, Altonji reported that incurred asbestos-related losses reported by the property/casualty industry has risen exponentially from \$2 billion annually, doubling to just over \$4 billion in 2001, and doubling yet again to an estimated \$8 billion last year. However, Altonji added, Best does not expect this "doubling" trend to continue as we anticipated that insurers would significantly strengthen their A&E reserves during the early 2000s before such losses would begin to level off. Still, as asbestos litigation continues its surge, more and more corporate defendants are being crushed in its path.

"The first tier of (asbestos defendants) is bankrupt--no longer in existence, but the plaintiff bar is expanding their defendant base," observes Ken Schloman, counsel, at the Washington, D.C. office of the Alliance of American Insurers (AAI). He says asbestos-related lawsuits are being lodged against secondary users of the product car manufacturers that used it in brake pads, for example, or the company that never handled the product but whose only connection is through an acquisition or merger.

Innocent Bystanders

- The escalating trend that is seeing peripheral users of asbestos brought directly into the fray has drawn the attention of many who closely track the asbestos claims issue. An article by the Mass Torts Work Group of the Washington, D.C.-based American Academy of Actuaries, identified the key concerns of peripheral defendants in asbestos litigation. They insist that:
- They should not be held liable for asbestos-related injuries because asbestos in their products was encapsulated and should not have contributed to injury.
- They are taking on a share of liabilities that was previously borne by the bankrupt asbestos manufacturers.
- It is unfair to hold them accountable for the same knowledge of health risks as the major defendants in the same lawsuit.
- The courts too often fail to require the use of objective evidence to evaluate whether claimants are injured.
- They are being held responsible for the liability that should be borne by non-U.S. companies. These foreign-based firms are not being pursued by plaintiffs because of the difficulty in bringing such suits and legal requirements that such actions would have to be resolved in federal courts, while lawyers typically prefer to sue in state courts.

Biggs also pointed out that defense expenses related to plaintiffs awards are considerably higher for peripheral defendants. This is due in part to the fact that a peripheral defendant may be named early in a suit, but because discovery often takes place very close to trial the peripheral defendant may find it nearly impossible to obtain dismissal from the case before incurring significant costs. Peripheral defendants, says Jennifer L. Biggs, chairwoman of the American Academy of Actuaries, often pay to settle even when they do not believe they have liability because the risk of winning at trial when nearly everyone else has settled is extremely high due to the rules that apply in many states. Stressed Biggs: "This group wants to achieve finality and be able to put the consequences of past business judgments behind them."

Possible Solutions

Recognizing the endless and costly asbestos claims litigation ahead, there's a movement afoot to address the issues. Several Congressional hearings have recently been held to explore asbestos litigation while several legislators now champion new proposals. Those proposals include creation of a federally administered asbestos fund; instituting a retroactive tax-relief for asbestos manufacturers; and establishing an alternative dispute resolution (ADR) process aimed at reducing lawsuits. Additionally, more than 150 companies, trade associations and insurers have formed The Asbestos Alliance, with the goal of pushing for reforms to address the asbestos liability crisis.

Michael Baroody, executive vice president of the Washington, D.C.-based National Association of Manufacturers (NAM) and head of The Asbestos Alliance steering committee, delivered testimony recently before the Senate Budget Committee in which he explored the "far-reaching impact" of asbestos litigation on the U.S. economy.

"We are all paying the price of the asbestos litigation crisis and something must be done," said Baroody. He noted that The Asbestos Alliance "is working diligently with the Senate and House to try to get legislation passed this year. It is essential," stressed Baroody, "not only to ensure that the sick and dying obtain the compensation they deserve, but also to protect the other victims of asbestos litigation--shareholders, employees, and communities that are injured when companies are made the targets of thousands of frivolous lawsuits."

Who Really Benefits?

In his testimony Baroody also stressed a major concern of The Asbestos Alliance, that the lion's share of settlement dollars are not going to the sick. Questionable claims are depleting monies that should be earmarked to pay for those who have suffered exposure to asbestos linked to their subsequent medical conditions. "It would be a different matter altogether if this huge sum (estimated asbestos-related costs) was the amount needed to compensate people with deadly cancers and other serious diseases caused by exposure to asbestos. But in fact, exactly the reverse is true," Baroody told the Senate committee. "The heart of the problem is that asbestos claimants who are not sick today and who probably will never become sick are filing claims and winning millions of dollars," said Baroody, pointing to studies estimating that between two-thirds and 90 percent of all claimants are functionally unimpaired.

He went on to caution that "questionable claims and the resulting settlement and verdicts are forcing companies into dire financial straits and sparking bankruptcy filings. At the same time, many of those who are seriously ill from exposure to asbestos are seeing their compensation delayed and reduced."

Driven by these concerns and disturbing trends, The Asbestos Alliance has proposed several actions aimed at, as Baroody characterized, "lifting this burden from the neck of American business. Without the asbestos

albatross the thousands of affected firms would be more likely to increase profits, expand their business, make capital investments and create jobs. Reform is also likely to stop the flood of asbestos bankruptcies. These impacts," he told the Senate committee, "would almost certainly increase federal tax revenues, reduce unemployment claims and help resolve the country's budget problems."

Darren McKinney, director of media relations for NAM, said that one of the goals of is to establish objective medical criteria to determine asbestos-related impairment as a prerequisite for filing an asbestos claim. Hand in hand with this goal is an indefinite extension of the statute of limitations to file an asbestos claim, with the current average limitation of three years viewed by The Asbestos Alliance as a key driver of asbestos litigation.

"The clock is ticking from the date someone learns of exposure (to asbestos) to when they can file a lawsuit, which in most cases is three years," noted McKinney. "People panic. Even those who have no symptoms and in which symptoms are likely not to emerge at all hurry to the courthouse."

In an effort to eliminate the incentive which often prompts premature filings, the Alliance is advocating a liberalization of the statute of limitations combined with the creation of a federal registry to be used by individuals who believe exposure has occurred which will reserve their future right to sue.

The Alliance also wants to eliminate venue shopping--seeking out trial locations perceived to be favorable to plaintiffs--by requiring that the venue in which an asbestos case is tried has some specific connection to the parties involved. Additionally, the Alliance calls for elimination of consolidating complaints into class action litigation, instead requiring plaintiff attorneys to try individual cases on their own merits.

Using Bankruptcy to Attack

In the meantime, notes Altonji, "a number of major players in the asbestos manufacturing or distributing world have begun to try alternative methods of mitigating potential losses." Up until midyear 2001, he observed, "the only practical alternative to sustaining massive losses by the growing number of claims was to file for bankruptcy protection, set up a trust fund and attempt to emerge from bankruptcy at the other end of the tunnel." But since then, several new approaches have emerged. They include using the bankruptcy court to challenge the validity of asbestos claims. In one instance, a bankrupt defendant company's trust fund and plaintiffs' attorneys agreed to a payment scheme that established eight disease levels with payments increasing up to the eighth level, which was designated for the most serious injuries. Another strategy adopted by companies to stay out of bankruptcy has seen them attaching asbestos claims to companies already in Chapter 11. A third approach identified by Altonji has seen several defendants persuade the U.S. Supreme Court to hear arguments against paying otherwise healthy claimants who are only worried about getting asbestos-related illnesses. The U.S. Supreme Court recently heard this argument and ruled against the defendants.

Altonji also reports that insurers have also begun to tighten their asbestos claims documentation requirements before paying up. And in light of the current asbestos claims crisis, A.M. Best has been asking insurers for "a ground up analysis" of individual insurer exposures--looking at actual claims to determine a range of loss estimates. "Our concern is for the financial strength and health of the insurance industry," stresses Altonji. But looking at the bigger picture, he observes that the negative impact of continued "mushrooming" asbestos litigation will reach beyond the insurance industry. If the majority of cases are litigated by people who are not even sick, "there will be nothing left for those who have serious illness," he says.

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