



Plaintiffs' Counsel and the Changing Face of Asbestos Litigation

As Bankruptcies Shrink the Pool of Defendants, Counsel Are Finding New Ways to Ensure Full Value for Their Clients' Cases

Call it or its players what you will, the asbestos litigation isn't what it was 30 years ago, or even 30 weeks ago.

Recent media reports claim the asbestos litigation, mired in bankruptcies and collateral lawsuits, has forced plaintiffs' attorneys to shift their focus from the so-called "traditional" defendants to the "peripheral" defendants.

Others say those characterizations, in certain terms, don't even exist.

But while certain elements of the litigation have changed, one thing those who represent the victims of asbestos illness all agree on is that their cases haven't.

"The facts are what the facts are ... whether there are 30 defendants or two. And what was knowable in the 40s, 50s, 60s and 70s was knowable by everyone," says Baron & Budd attorney Allen Stewart, who recently recorded an \$18 million asbestos verdict for a single client in El Paso, Texas.

Stewart, like many of his colleagues, moves reluctantly around terms such as "peripheral" or "traditional," choosing instead to refer to those defendants who have previously flown under the asbestos litigation radar as "lesser known."

While companies such as Gillette, Campbell Soup, Nabisco and Sunbeam are as well known to anyone as Kraft Foods and Sears Roebuck, all have for years taken a back seat to more prominent names in the asbestos litigation.

But just because such entities don't have an Owens or an Armstrong embossed somewhere in their corporate moniker, or they aren't used to seeing their names in the trial call, doesn't mean their liability is sacred, plaintiffs' counsel say.

Especially not now.

"What has taken place recently is, if anything,

ets into the arena and forced firms to focus more attention on those that were rarely given a second look when companies such as GAF and Babcock & Wilcox were viable defendants.

"Certainly there are defendants who are more central to the overall exposures a person has suffered," Purcell says. "But that doesn't cause us to denigrate certain defendants as 'peripheral.'"

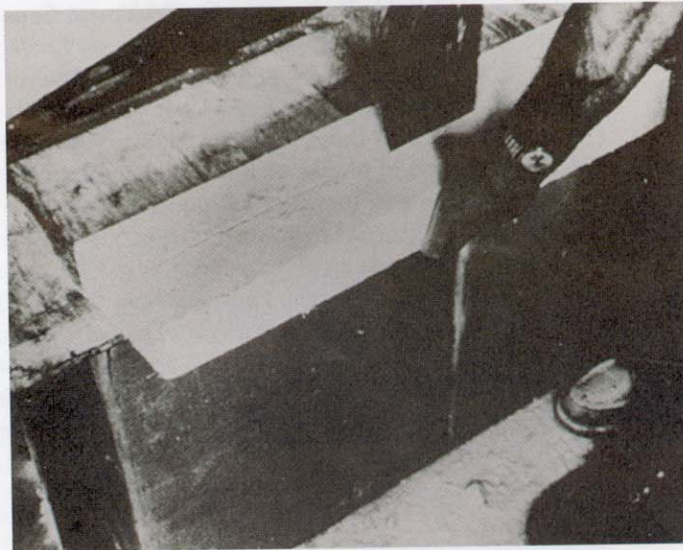
In with the New

More accurately, contends Purcell, plaintiffs are now more than ever continuing to seek redress from defendants long in this litigation — but in some new ways.

Purcell points to recent cases against Garlock, where counsel are pursuing redress not only for exposures to their asbestos-containing valve packings and gaskets, but also for exposures to products of other members of the Asbestos Textile Institute, where Garlock was a long-standing member.

"The theory is civil conspiracy as a doctrine of vicarious liability tied to at least causes of action for fraud and deceit in California," he says. "And we are currently up on appeal in testing whether civil conspiracy pertains as to products liability and negligence causes of action."

Each case, whether it be a mesothelioma, lung cancer or pleural thickening, has a value regardless of who is named in the suit, those who represent asbestos claimants contend. And, as a result of the recent bankruptcies of



An unidentified man cuts insulation materials as asbestos fibers contaminate his clothing and the work space around him.

a necessity to dig into more detail than ever what exposures a plaintiff has suffered in his or her past and to involve all viable companies responsible for the exposures, be they manufacturers, suppliers, distributors, premises owners or contractors," Gil Purcell of Brayton Purcell in Novato, Calif., says.

That necessity, Purcell says, has brought companies not previously found on asbestos dock-

companies like Owens Corning and G-I Holdings (formerly GAF), that value is now being left to a smaller number of not-so recognizable names.

As far as liability is concerned, there aren't many big manufacturers left that these lesser-known defendants can hide behind and claim it was their product that was responsible for the illness, Stewart asserts.

"Before, they were lucky enough to escape — it was a slam dunk against the manufacturer, and the cases were getting their full value," says Robert Gordon of Weitz & Luxenberg in New York. "Why then go after the others? Well, now we're going after them."

Time Warp

With a more intense focus on lesser-known defendants, some plaintiffs' counsel say they are seeing a return to the early days of the litigation when a handful of plaintiffs' attorneys were blazing discovery trails that led to defendants, some of which have long since exited.

"[The efforts are now] about on par with the efforts expanded by pioneers of this litigation — Bob Steinberg, [Steve] Kazan, [Ron] Motley — in the late 1970s and early 1980s. They did the heavy lifting as to the likes of Johns Manville and Raymark," recounts Purcell. "And now we find ourselves doing the same types of things in chasing down the facts, documents on defendants that have not been largely involved in the litigation."

"It makes us go back to the library, so to speak," Gordon acknowledges.

The relative obscurity and geographic location of a particular defendant can sometimes hinder discovery efforts, and as a result plaintiffs' counsel have found themselves stretching their resources to dig a little deeper.

One plaintiffs' firm recently went so far as Scotland to find shipyard workers who could testify that a certain Turner & Newall product was used on a British oceanliner that the firm's client was working on when he was allegedly exposed to asbestos.



An increasing number of lesser-known defendants are being named in asbestos lawsuits, among them suppliers and distributors of lumber and other building materials.

"We had no choice," said one of the attorneys involved in the case. "We had to do something."

The transatlantic subpoena and the testimony that arrived with it paid off, forcing a settlement that likely would have been less had it been reached before the foreign workers were found, the attorney said.

T&N and Quigley Co., which was on the short end of Stewart's \$18 million verdict, are both members of the recently restructured Center for Claims Resolution.

No longer settling claims as a group, the CCR's members are now receiving more individual attention. And, according to Purcell's partner, Al Brayton, the move to restructure is having a significant impact on the way cases are being resolved.

"The process is not flowing nearly as smoothly as it has in the past," Brayton says. "One of the problems is that the CCR defendants were not usually a target defendant for most cases, and the focus of any workup was not generally on the individual members."

That, coupled with an influx of defendants

who have thus far escaped the brunt of one of the country's most demanding mass torts, has resulted in what Gordon refers to as a flexing of one's muscles among some defense counsel. For example, they appear to be more aggressive in discovery, Gordon says.

"This is as true today as ever," agrees Purcell. "We are seeing new firms in our cases as well as those with extensive experience and prefer dealing, in large measure, with the latter."

Nevertheless, fresh counsel sometimes means a return to relatively novel defenses such as the one Purcell says he encountered recently during a trial against a ceramics distributor that supplied asbestos-containing gloves as part of a kiln product line.

According to Purcell, the new counsel revisited whether the consumer expectation test for product design defect in California applied to asbestos litigation.

"That was a unique strategy," he says. "We also encounter statute of limitations strategies from time to time that are novel — particularly in a case where we are filing a malignancy case for someone who previously had an

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asbestosis case.”

Purcell adds that he envisions a time when lesser-known defendants will eventually gravitate toward more experienced asbestos defense firms. Gordon says he’s already seeing the transition in New York, with a number of firms that once represented the Owens Corning and GAFs of the litigation representing a newer class of clients.

Defendants Keeping Low Profile

The new class members, however, admit they would rather see their clients remain just a blip on the radar screen.

Several defense attorneys contacted for this article preferred not to be interviewed, noting that the mere mention of a particular client could raise its profile.

Meanwhile, groups that claim they have now become “targets” of the litigation as a result of recent bankruptcies aren’t taking the prospect lightly.

HarrisMartin has learned that members of a coalition of New Jersey building materials dealers met recently with counsel to discuss a trend among plaintiffs’ attorneys to sue a widening array of what they called non-traditional asbestos defendants.

Calling the trend potentially disastrous, the group organized a seminar to discuss the history and status of asbestos litigation, as well as strategies for defending asbestos claims, including the importance of locating and maintaining sales and insurance records.

Attorneys at Lowenstein Sandler, the Roseland, N.J., firm that held the event, opted not to discuss details of the meeting or the names of those who were in attendance.

Several of the coalition’s members have already been named in asbestos lawsuits filed in New Jersey Superior Court, according to sources.

Future: Status Quo ... Eventually

Despite the changes brought about by the

recent bankruptcy filings, plaintiffs' attorneys are reacting in stride like many of them claim they have numerous times before.

"Not to be cavalier, but that's all we can do," Purcell says.

Faced with the fleeting concern — and admittedly unlikely prospect — that one day asbestos injuries might go without compensation, many are taking an even closer look at the claims they're handling.

For some of the older naval shipyard cases, it has become harder and harder to identify a sufficient number of solvent defendants to guarantee full compensation to injured victims, according to Brayton.

"In other cases, such as refinery, industrial, or construction cases, we don't see it to be as significant a problem," Brayton adds.

And plaintiffs' firms are now seeing an increase in malignancy cases where brief and low-dose exposures involved an ever-expanding breadth of scenarios that transcend the workplace to areas such as schools — even the home.

However, to many veterans of the asbestos litigation, today's changes are just a normal part of a career spent reacting to events such as bankruptcies, then watching as the litigation seems to reinvent itself for the next five years — or, in some cases, the next five months.

Gordon's been on the front lines for more than a decade.

"The litigation's gone through these phases since 1984," he says.

