



asbestos
trust fund
services
group

ASBESTOS CLAIMS AND LITIGATION

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ISSUES AND STRATEGY; AN ANALYSIS OF THE CASES THROUGH 2005 AGAINST A HISTORICAL CONTEXT

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PURPOSE AND SUMMARY OF THIS REPORT

The Asbestos Trust Fund Services Group (ATFS Group), arose as a result of demand for informed, timely, and sophisticated advice by affected parties, principally Defendants and their insurers, concerning proposed, and pending, federal legislation to channel asbestos claims, and pending litigation, into a federally-administered, and privately funded trust fund for asbestos claims.

The Asbestos Trust Fund Services Group - ATFS Group - is an organization providing counsel and guidance in the interpretation and implementation of the asbestos bodily injury claims process under the national Fairness in Asbestos Injury Resolution, "FAIR" Act. This Act brings a radically different, and new, process for the resolution of asbestos-related bodily injury claims in the United States. Under the provisions of the Act, payment of such claims would now be administered exclusively by a national Office of Asbestos Disease Compensation within the United States Department of Labor, and paid exclusively by a national Asbestos Injury Claims Resolution Fund, a mandatory trust fund privately funded by former Defendants in asbestos litigation, together with their domestic, and foreign, insurance companies.¹

The FAIR Act provides a radical departure for the administration, evaluation, and funding, of asbestos claims. No longer will injured workers bring their claims as tort cases in Court, a system which for decades resulted in billions of dollars paid, a Court-clogging mass of cases, and bankrupt Defendants from the full spectrum of industry.²

¹ www.asbestostrustfundservicesgroup.com

² See, e.g., Neil Martha, *Backing Away From the Abyss*, ABA JOURNAL, Sept. 2006, p. 26.



The ATFS Group is a team of highly experienced defense lawyers who have represented international, national, regional, and local, Defendants in the asbestos litigation in every major jurisdiction throughout the United States for nearly 30 years. Together, they form a group of the preeminent counsel who have handled, and supervised, the defense of over 300,000 asbestos bodily injury cases. Their experience includes work as National Coordinating Counsel for Defendants in diverse industries comprising all major aspects of the products and exposures giving rise to asbestos bodily injury claims. As national, regional, and local state counsel, they have handled trials, settlements, and appeals, of numerous cases, including major consolidated cases ranging from dozens, to thousands, of individual claims, and the major class action cases containing hundreds, to tens of thousands, of individual claims. Most importantly, the hallmark of their efforts has been success amid the shifting, complex sands of asbestos litigation.

Members of the Asbestos Trust Fund Services Group have been at the forefront of developing, analyzing, and presenting, scientific, technical, and medical developments pertaining to asbestos exposure, and disease.

Uniquely, members of the ATFS Group have managed and handled the funding of expense, and settlement, of asbestos bodily injury cases, over a period of many years, for a diverse group of Defendants, and major insurance companies.

The FAIR Act would, if passed, dramatically change the landscape of handling, administering, evaluating, and funding asbestos bodily injury claims. The Asbestos Trust Fund Services Group brings the unique and crucial counsel and experience necessary to successfully navigate the new, complex, and untested administrative system into which all American asbestos bodily injury claims would be placed.

Despite what appears to be the likelihood that the FAIR Act will not be enacted during 2006, if past history is a guide, it, or similar legislation, will be again introduced in the next session of Congress in 2007. Regardless of the ultimate outcome of the FAIR Act, the work of the ATFS members has enabled them to provide services in the analysis and projection of future asbestos claims, and identify trends in the makeup, and filing, of such claims within the tort system. As discussed in more detail below, as a larger proportion of the asbestos claim volume is handled administratively through asbestos bankruptcy trusts, for which there is readily available, and published data, the litigation remaining in the courts has become more fragmented, and difficult to quantify on a national basis.

In this Report, the ATFS Group presents a review of such cases in selected states through 2005. In what are expected to be annual Reports, the ATFS will update this data going forward. This provides a needed source of statistical data currently missing in most published work on the



status of the asbestos litigation.³

INTRODUCTION AND HISTORICAL BACKGROUND

Since the late 1970's, the American asbestos personal injury and property damage litigation has resulted in billions of dollars in claims and expenses. It derives from the fact that asbestos usage, from the 1930's to the 1970's and beyond, and the resultant disease, was an occupational and industrial hygiene health episode of large proportions whose effects are still being felt and will be felt far into the future. Asbestos disease is a latent, or long term, disease process, whose effects, especially for malignant mesothelioma, can occur thirty to forty, or more, years after asbestos exposure ceases. Following disease has come litigation, some based upon real disease, while other litigation has been based upon spurious disease claims or, in the case of the asbestos property damage litigation, poorly defined, and small, risk of disease.

The litigation began in the late 1960's, with the first notable case being the landmark case of *Borel v. Fibreboard Paper Products Corp.*, arising from Texas, decided by the Fifth Circuit Court of Appeals in 1973.⁴ In *Borel* the plaintiff was an industrial insulation worker in Texas from 1936 to 1969.⁵ He retired in 1969 after being disabled by asbestosis.⁶ Plaintiff sued manufacturers of insulation materials containing asbestos to recover damages for injuries caused by the defendants' alleged breach of duty in failing to warn of the dangers involved in handling asbestos.⁷ He alleged that he had contracted the diseases of asbestosis and mesothelioma as a result of his exposure to the defendants' products over a thirty-three year beginning in 1936.⁸ According to the court a jury could find that the danger to Plaintiff and other insulation workers from inhaling asbestos dust was foreseeable to the defendants at the time the products causing Plaintiff's injuries were sold.⁹ The court held that the danger from inhaling asbestos dust was not sufficiently obvious to asbestos insulation workers to relieve manufacturers of duty to warn.¹⁰ The defendants, each of whom was cause in fact of some injury to the plaintiff, could be held jointly and severally liable for total damages, under Texas law.¹¹

The litigation rapidly expanded throughout the 1980's. Throughout the 1980's innovative litigation strategies were devised by the parties and courts, including class actions (cites),

³ See, e.g., Stallard, E., Manton, K.G., Cohen, J., *Forecasting Product Liability Claims; Epidemiology and Modeling in the Manville Asbestos Case*, SPRINGER SCIENCE + BUSINESS MEDIA, INC., New York, NY, 2005. Dunbar, Frederick C., Martin, Denise Neumann, Dhrymes, Phoebus J., *Estimating Future Claims: Case studies From Mass Tort and Product Liability*, ANDREWS PROFESSIONAL BOOKS, Wayne, Pa., 2004.

⁴ *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076.

⁵ *Id.* at 1081.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1093.

¹⁰ *Id.*

¹¹ *Id.* at 1096.



consolidated cases (cites), and expedited and bifurcated trial proceedings (cites). Many state courts devised Case Management Orders (cites), and assigned asbestos cases to specific judges (cites).

The use of class actions was first severely curtailed, in 1997 in *Amchem Products, Inc. v. Windsor*¹², and then eliminated in 1999 in *Ortiz v. Fibreboard Corp.*¹³, by the United States Supreme Court.

In 1991, the federal Judicial Panel for Multidistrict Litigation created a multidistrict proceeding, MDL 875, and assigned all pending and future asbestos cases venued in federal court to Judge Charles Weiner of the Eastern District of Pennsylvania. At that time, it was estimated the MDL 875 court would oversee approximately 70,000 cases.

More recently, the Rand Corporation estimated in 2000 that over 600,000 cases had been filed against 6,000 defendants.¹⁴

As Justice Souter of the United States Supreme Court famously observed, “The elephantine mass of asbestos cases...defies judicial administration and calls for national legislation.”¹⁵

Over the last several Congresses, a number of bills to create a national legislative solution have been introduced. Culminating in the most recent effort, the Asbestos Compensation Fairness Act of 2005, the so-called FAIR ACT.

The following is a summary of some of the scientific, medical, and legal issues with respect to the asbestos litigation.

¹² *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997). In *Amchem* plaintiffs attempted to certify, for settlement purposes, a class comprising everyone with asbestos exposure who had not filed a lawsuit as of the commencement of the action. *Id.* at 597. The Court focused on whether the proposed class had “sufficient unity so that absent members c[ould] fairly be bound by decisions of class representatives.” *Id.* at 621. Addressing the Rule 23 requirement that “[common] questions of law or fact ... predominate over any questions affecting only individual members” the Court held that the two predominance factors the district court used to certify the class (class members’ shared experience of asbestos exposure and their common “interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system”) were not sufficient to create a class. *Id.* at 622. The proper inquiry focuses on the legal or factual questions that qualify each class member’s case as a genuine controversy. *Id.* at 623.

¹³ 527 U.S. 815 (1999).

¹⁴ STEPHEN J. CARROLL, ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 51 (2002), available at <http://www.rand.org/publications/DB/DB397/DB397.pdf> (last visited April 4, 2006).

¹⁵ *Ortiz*, 527 U.S. at 821.



MINERALOGY OF ASBESTOS

Asbestos is a naturally occurring rock that is mined from the earth. It has been mined commercially in South Africa, Zimbabwe, Quebec, Canada, Ontario, Canada, Western Australia, California and Vermont in the United States, and in the Urals region of Russia and the Ukraine. The term “asbestos” is not a single type of rock but refers to a group of mineral fibers that share properties of thermal and chemical resistance, flexibility, and high tensile strength. The word comes from Greek, meaning “inextinguishable.”

The use of asbestos dates back at least 2500 years when it was incorporated into textiles and wicks for lamps. Throughout history, its fire resistant properties were known. There is a famous tale of the Emperor Charlemagne who had an asbestos tablecloth that he simply threw into the fire after a banquet to clean it off. Because the asbestos minerals are fibrous in form, they can be incorporated into textiles. Their fibers also make an excellent binding agent, useful in the manufacture of cement, paper, shingles, glue, plaster and other building materials. It is estimated that asbestos has been incorporated into over 3,000 products. Large scale mining and commercial use began in the late nineteenth century and increased dramatically throughout the first half of the twentieth century. Because of its insulating and fireproofing qualities, it was used extensively in ships, submarines, and vehicles in the Second World War.

There are different types of asbestos minerals. They fall into two main categories; the serpentine, and the amphibole. It is important to note that both come in fibrous, and nonfibrous varieties. The fibrous contain actual asbestos fibers while the nonfibrous have the same general characteristics but actually not mineral fibers but fragments called cleavage fragments which look like fibers. Nonfibrous asbestos does not cause adverse health effects.

Amphibole asbestos comes in several varieties. The commercially mined are crocidolite (blue), and amosite (brown) asbestos. There are three other amphibole minerals; actinolite, anthophyllite, and tremolite, that were not mined commercially, and are not players in asbestos litigation.

The serpentine asbestos comes in one commercial variety; chrysotile (white). It is chemically different from the amphibole types. It is a hydrated magnesium silicate while the amphiboles are hydrated silicates without the magnesium component. Chrysotile is called serpentine because its fibers are curled while amphiboles are straight.¹⁶

With respect to health effects, crocidolite is considered most dangerous, with amosite

¹⁶ See, Lemen, Richard, ed., *Dusts and Disease: Proceedings of the Conference on Occupational Exposures to Fibrous and Particulate Dust and their Extension into the Environment*, PATHATOX PUBLISHERS, INC., Park Forest South, IL, 1979.

