

History of the Asbestos Litigation Crisis

Why We're Here

America faces an asbestos litigation crisis that has dragged on for decades and continues to take its toll on the sick and their families. The Supreme Court has called three times for Congressional action to solve the asbestos crisis, so far without success. Today, hundreds of thousands of asbestos claims clog the courts with tens of thousands of new claims filed every year. While those who have become sick from an asbestos-containing product certainly must receive compensation, too many people who are not yet sick and may never become ill are filing claims. If something is not done soon to resolve the asbestos litigation crisis, compensation for the truly sick will be jeopardized now and in the future.

Those who have become sick from asbestos-containing products are the real victims of this situation, but the problem has affected the lives of others too. Employees, retirees and shareholders of defendant companies, whose jobs and savings are jeopardized or lost, are also hurt by the rising tide of asbestos litigation. The financial burden on the companies — that have already paid out approximately \$54 billion in settlements and court costs — is great and growing.

How did we get to this point? Millions of workers were exposed to asbestos on the job. From the first wave of known injuries, a tide of asbestos personal injury litigation followed, reaching the courts in the 1970s. The pace of these lawsuits picked up greatly during the 1980s and 1990s. Today, there are 600,000 asbestos claims pending and more than 40,000 new claims filed every year, choking state and federal courts. And the problem will not go away. While the vast majority of workers exposed to asbestos may never contract an asbestos-related illness, when illness does occur it can arise decades after exposure. It is estimated that asbestos claims may continue for another 50 years.

Why the System Doesn't Work

Some of the more serious reasons as to why the current system is broken include:

Indefensible delays: The U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice William Rehnquist in 1991, found that the typical asbestos case took 31 months — nearly three years — to wind its way to resolution through the court system, compared with 18 months for a typical liability suit. Since then the situation has worsened — many defendant companies have gone bankrupt. The bankrupt companies may take as long as nine years to pay claims to the sick. However, the disease does not wait — with the situation as it stands, victims may die without knowing whether their families will receive fair compensation.

Clogged court dockets: The vast majority of pending suits claim exposure to asbestos and seek compensation, even though many of these claimants are not yet sick and may never become ill. The claims of those who are not sick clog the courts, diverting resources from the genuinely sick in the future. By flooding court dockets, asbestos litigation also hinders the resolution of all civil

cases. The costs of dealing with this flood of cases are, of course, borne by the taxpayers, who pay for the overwhelmed judicial system.

No uniform medical criteria: There is currently no uniform standard to distinguish sick claimants from those who are not sick. The flood of claims from those who are not sick is straining the resources of otherwise financially secure companies. More than 50 companies have been driven to file for bankruptcy. This is putting at risk resources available to compensate the truly sick in the future.

Financially burdened companies: The vast number of cases and high costs of defense pile additional liabilities onto the balance sheets of otherwise healthy companies and strain their ability to fairly compensate individuals who have or will develop documented illnesses.

Consolidation of cases and venue-shopping: When cases are consolidated, it means that those with cancer, other sickness — and even those who are not sick — may be mixed together into a single case. This practice is not fair to those who are most seriously ill because cases that may not stand on their own merits are resulting in compensation. Venue-shopping means cases are often brought in courts in locations that have no relation to the claimants or their exposure, but simply have a reputation for large verdicts. Venue-shopping results in larger verdicts which eat away valuable resources that could go to the currently sick and those who may become sick in the future.

Nearly all of the challenges of the current system lead to one of its most serious problems — *people who get sick in the future are in danger of not being compensated.*

What's Been Done

For almost 25 years, industry and other interested parties have worked hard to resolve the asbestos litigation crisis. They have focused on finding a solution that will allow fair and prompt compensation for the genuinely ill, while simultaneously managing each company's liability to ensure that funds are available to pay those who become ill in the future.

In the early 1980s, a number of major defendant companies began to search for alternative solutions to the unworkable and inequitable tort system and in 1983, formed the Committee for Equitable Compensation (CEC). Given the U.S. government's mandated use of asbestos in shipbuilding, the CEC sought legislation for a shared industry and government compensation plan. Faced with legislative inaction, a group of companies opted to create their own claims management system, and in 1985 formed the Asbestos Claims Facility (ACF) to handle claims against them. Three years later, following the phase-out of ACF, the Center for Claims Resolution (CCR) was formed, comprising more than 20 defendant companies committed to fair and efficient resolution of asbestos claims against them.

Meanwhile, the federal courts also attempted to improve management of federal asbestos litigation. In 1991, eight federal judges, experienced in the management of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel) to consolidate in a single district all

pending federal asbestos cases. The MDL Panel accepted the recommendation and transferred all cases to the Eastern District of Pennsylvania.

Following the consolidation, plaintiff and defendant attorneys started settlement negotiations and the CCR continued to pursue a workable administrative system for the handling of future claims. These negotiations culminated in a settlement agreed to by the CCR companies and plaintiffs' counsel for a class including tens of thousands of people who were or may become sick from exposure to asbestos. The agreement also gained the backing of the Building and Construction Trades Department of the AFL-CIO. The settlement was designed to provide for an administrative procedure to compensate asbestos victims promptly; to ensure that those exposed, but not yet sick, would be compensated if and when disease developed; and to preserve the assets of defendants to compensate future victims.

Originally filed in January 1993, the settlement met fairness tests, was approved by a U.S. District Court in 1994 and was lauded as a model for tort reform. Although it found the settlement to be "arguably a brilliant partial solution," the Third Circuit Court of Appeals in May 1996 overturned the agreement on procedural grounds, holding that a class could not be certified solely for settlement purposes; and in June 1997, the U.S. Supreme Court affirmed that decision.

Writing for the Court in *Amchem Products, Inc. v Windsor*, Justice Ruth Bader Ginsburg found that the settlement failed to meet the requirements of Federal Rule of Civil Procedure 23 (the rule governing class actions in federal courts). The Court concluded that the class was simply too large and varied and that the interests of some of the parties were inconsistent. Most importantly, the Court plainly suggested that Congress is the most appropriate body to resolve the asbestos crisis.

Two years later, the Supreme Court issued a similar ruling in *Ortiz v Fibreboard*. In that case, which concerned a \$1.5 billion global settlement and more than 100,000 claimants, the justices ruled that the class was too diverse to be represented in a single action. Reiterating the call for Congressional action in the Amchem case, Chief Justice William Rehnquist said the number of asbestos claims "cries out for a legislative solution."

Where We Are Now

The asbestos litigation crisis continues and the only body capable of bringing resolution to this issue is Congress. Until Congress resolves the problem, more defendant companies may be forced to file for bankruptcy, putting at risk future payments to the victims. The truly sick may die uncertain of whether their families will receive fair compensation.

Industry representatives currently are working with other interested parties in calling for Congress to enact legislation to ensure that those who are sick will be promptly and fairly compensated. At the same time, those who have been exposed but are not now sick will have greater assurance that they will be compensated in the future if they become ill.