



Chapter Title: Introduction

Book Title: Asbestos Litigation

Book Author(s): Stephen J. Carroll, Deborah Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahamse and J. Scott Ashwood

Published by: RAND Corporation

Stable URL: <https://www.jstor.org/stable/10.7249/mg162icj.9>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



This content is licensed under a RAND Corporation License. To view a copy of this license, visit <https://www.rand.org/pubs/permissions.html>.



RAND Corporation is collaborating with JSTOR to digitize, preserve and extend access to *Asbestos Litigation*

JSTOR

Introduction

In 1973, asbestos manufacturers were found strictly liable to workers injured as a result of exposure to their products (*Borel v. Fibreboard*, Fifth Circuit, U.S. Court of Appeals, 1973). Following that decision, increasing numbers of product liability claims against asbestos manufacturers flowed into the courts. By the early 1980s, more than 20,000 claimants had initiated lawsuits alleging injuries from exposure to asbestos. The growing volume of this type of litigation began to attract the attention of public policymakers.

Many of those involved in asbestos litigation devised procedures to streamline the litigation process and reduce the burdens and costs they faced. Courts developed formal and informal approaches to managing asbestos litigation. A series of court decisions resolved most of the coverage disputes between defendants and insurers. Many defendants chose not to aggressively contest liability and instead negotiated settlements of large numbers of cases with leading plaintiff attorney firms. These agreements typically called for settling hundreds or thousands of cases per year at amounts specified in administrative “schedules” that reflected differences in injury severity and other characteristics deemed to affect the value of cases. Asbestos litigation continued to be a critical concern for the firms frequently named as defendants, but at the time there were only a few dozen firms in this position. Most observers tended to view asbestos litigation as “manageable” in the sense that the effects of the litigation were largely limited to those few dozen or so defendants. Asbestos litigation became a lower priority on the national political agenda.

In the past decade, however, and particularly in the past few years, the situation has changed dramatically. Sharp increases in the number of asbestos claims filed annually, the number and types of firms named as defendants, the costs of the litigation to these defendants and their insurers, and the number of firms filing for bankruptcy have reawakened policy concerns. In particular, there are growing concerns that these trends put at risk the compensation of future claimants who suffer from serious injuries. Asbestos litigation poses challenges for asbestos-injury victims seeking compensation, plaintiff attorneys representing those claimants, defendants who must respond to the litigation while protecting shareholders’ interests, insurers who must cover the

losses, and financial institutions attempting to accurately assess the magnitude of current losses and future liabilities. Because of the number of people exposed to asbestos in the United States, the injuries those people have incurred, the financial losses attendant to those injuries and the ensuing litigation, and the potential economic impact of that litigation, asbestos litigation also poses unique challenges for the civil justice system.

This RAND Institute for Civil Justice (ICJ) study is intended to provide objective data and analysis to stakeholders and policymakers so that they can address the key policy questions: How well is the current process working? Can it be improved?

Research Objectives

A clear understanding of the dimensions of asbestos litigation is essential to the design of an effective policy response to the litigation. What do past patterns of asbestos exposure tell us about the number of future claims that can be anticipated? How has the litigation evolved over time? How many claims are being filed? By whom? Against whom? For what injuries? How much are claimants recovering? How many defendants have been charged with responsibility, and what industries do they represent? How many bankruptcies have been attributed to asbestos litigation, and what are the overall economic effects of the litigation? More generally, what does the future hold? This study set out to answer those questions to the extent possible given the limitations in the data available.

Scope of This Study

As the questions posed in the previous section suggest, this study focuses on how the litigation system is performing in resolving asbestos claims. Within the available time and given the available resources, we could not examine the circumstances of those who were injured by asbestos exposure, nor could we investigate what companies that have been defendants in the litigation did or did not do to protect the health and safety of workers. Tens of millions of Americans were exposed to asbestos in the workplace over the past several decades. Of those, more than 700,000 have brought claims, and just as many, and possibly even more, claimants may come forward with claims in the future. We focus on what happened to those who claimed injury and what happened to the defendants in those cases.

Research Approach

The critical challenge to conducting research on asbestos litigation is that so little data are publicly available. There is no national registry of asbestos claimants. Some claims are not filed formally in court as lawsuits. Federal courts report the number of asbestos lawsuits filed, but in recent years most lawsuits have been filed in state courts, which do not routinely identify and report annual asbestos lawsuit filings.

The typical asbestos claimant brings a claim against many defendants. In recent years, defendants have typically named several dozen defendants, and each of those defendants generally settles claims separately and keeps its own records. Any one defendant knows about the claims against it and its settlements, but it usually does not know how much other defendants are paying on a claim. Claimants may receive money from settlements over a long period of time. They may settle with some defendants today and other defendants next year and still others later on down the line.

Further, because there are so many conflicting interests, and because so much money is involved, even the limited data possessed by those involved in the litigation are viewed as highly sensitive and confidential. So, answers to simple questions such as how many claims are there? and what does the litigation cost? are not readily available.

We approached this problem in a number of ways. First, we drew on data and knowledge gained in previous RAND Corporation research on asbestos and other mass toxic tort litigation (Kakalik et al., 1983; Kakalik et al., 1984; Hensler et al., 1985; Peterson and Selvin, 1991; Hensler, 1992; Hensler and Peterson, 1993; Hensler, 1995; Hensler et al., 2000). We drew on the knowledge we acquired in these studies to establish historical and interpretative contexts for new information.

Second, we collected publicly available data from a variety of sources, ranging from asbestos litigation reporters to corporations' Securities and Exchange Commission (SEC) filings. Where we found inconsistencies, we either note them or did not make use of the data. When corporations attribute their filing for bankruptcy to asbestos litigation, they often report the number of asbestos claims filed against them in their bankruptcy petitions. We obtained these data as well. Asbestos bankruptcy trusts (entities that are formed to pay asbestos claims after Chapter 11 reorganization) typically report the number of claims filed against them to the court that has jurisdiction over the bankruptcy. All of these records are public, although they are not always easy to locate.

Third, we obtained both public and confidential analyses from many of the financial analysts and insurance analysts who have conducted their own studies of asbestos litigation. If they used proprietary data in their studies, we asked the analysts to review their analytic methods with us. Most of the analysts we interviewed were willing to discuss their approach with us and show us how they arrived at their re-

sults, even if they could not share their data with us. We relied on only those studies that we determined were sound.

Fourth, we obtained confidential data from many participants in the litigation. In each instance, we specified the data we sought and conducted sufficient investigation (for example, comparing information from multiple sources) to assure ourselves that the data provided to us were reliable. We used only data that we confirmed with other data or with other participants in the litigation. In the first phase of the research, we obtained data, on a confidential basis, on each of the claims brought against almost 200 defendants and trusts through 2000. We then updated that dataset with data on claims brought against some of the major defendants and trusts in 2001 and 2002. Because time and resource constraints limited the second round of data collection, we did not attempt to update every data series we collected in the initial effort.

We obtained data on claimants from a number of defendants and insurers. Many defendants that have been prominent in the litigation have received claims from tens of thousands, and in some cases hundreds of thousands, of people. Because, as mentioned earlier, asbestos claimants typically file claims against multiple defendants, many of the claimants on the list for one defendant also appeared on the lists for other defendants. This overlap frequently allowed us to compare the information we obtained for a claimant from one defendant with the information we obtained for that claimant from other defendants to determine the reliability of the data. For our analysis, we included only those data that proved to be reliable in the sense that the data from different defendants agreed.

Some claimants filed two or more claims at different times and, occasionally, in different states. These claimants typically were those who brought a suit against some defendants at one time in one state and filed claims with one or more trusts at other times, possibly in another state. We counted each claimant only once—at the time and in the state in which that claimant first appeared in any of the data available to us. For example, the analysis of trends and patterns in filings by state reported in Chapter Three considers only the initial filing by any particular claimant and does not include any subsequent filings by that claimant. For this reason, the distributions of filings reported in that chapter undercount the total number of claims filed in any state in any time period, to the extent that the state saw filings against some defendants or trusts in that time period by persons who had filed asbestos claims against other defendants or trusts at an earlier date.

We also obtained aggregate annual data on indemnity payments and defense costs from a large number of defendants and insurers. Some defendants and insurers provided data going back to the early 1980s. Others were able to provide data only for the past few years. In all, the data include more than 60,000 defendant-year observations. Almost all the defendants for whom we have data had some insurance coverage, all of which had coverage limits. Because there is always the possibility that

a defendant and insurer can dispute whether a coverage limit has been reached, both defendants and insurers have strong incentives to maintain accurate data on indemnity payments and loss adjustment costs. For that reason, we believe these data are accurate.

Finally, we conducted more than 60 interviews with key participants in the litigation, including plaintiff attorneys, corporate counsel, outside defense counsel, insurance company claims managers, investment analysts, and court-appointed “neutrals.” All of these interviews lasted at least one hour, and some took considerably longer. In some instances, we conducted multiple interviews with a single source. The picture of the current state of asbestos litigation that emerged from these interviews was remarkably consistent. Where some interviewees had sharply different views of the litigation than others, they noted that themselves and discussed why their perceptions differed. All the interviews were conducted under the promise of confidentiality to encourage candor, and we explained the purposes of the study and our general approach to all the interviewees.

Differences Between This Report and an Earlier Interim Report on Asbestos Litigation

This monograph extends the work presented in an earlier RAND documented briefing on asbestos litigation (*Asbestos Litigation Costs and Compensation: An Interim Report*, DB-397-ICJ, 2002) in a number of ways. This report includes

- an expanded review of the epidemiological literature on asbestos-related injuries and a review of the most widely accepted projections of the number of mesothelioma cases that would occur between 1985 and 2009 (see Chapter Two)
- an updated discussion of the evolution of asbestos litigation, including more information on deferred and expedited dockets, consolidated trials and bankruptcy, and some additional details about trends in jury verdicts (see Chapter Three)
- updated estimates of the total number of individuals who had filed asbestos personal injury claims through 2002 and the total number of defendants named on those claims, and new analyses of the distribution of asbestos defendants across industries (see Chapter Four)
- more details about how we carried out the analysis, much of which is provided in the appendices to this report
- updated estimates of the total amount of money spent on asbestos personal injury claims through 2002, how much of that money was consumed by transaction costs, and how much ended up in claimants’ pockets (see Chapter Five)

- updated estimates of the number of bankruptcies that have been attributed to asbestos litigation (see Chapter Six)
- discussion of asbestos litigation reform proposals (see Chapter Seven).

The revisions to the estimates published in the interim report are based on several considerations. Some estimates have changed because the analysis was incomplete when the interim report came out. For example, that report estimated that 6,000 defendants had been named in the litigation; this report updates that number to 8,400. The increase does not mean we that we estimated that 2,400 new defendants have been named on asbestos claims since the publication of the interim report. Rather, when we wrote the interim report, we had not completed the task of checking all the lists of defendants we had received from various sources for duplicates and subsidiaries. We estimated that the lists provided to us included well in excess of 6,000 defendants and, so, reported that estimate in the interim report. We have since completed checking those lists and estimate that 8,400 entities have been named as asbestos defendants.

Other estimates changed because we updated them. The interim report, for example, gave estimates of the numbers of claimants and total dollars spent on asbestos litigation through the year 2000. This report updates those estimates through 2002. Similarly, the interim report estimated the number of asbestos-related bankruptcies through spring 2002; we now provide an estimate of the number of asbestos-related bankruptcies through summer 2004. We also updated our discussion of the evolution of the litigation to include significant new developments.

It is important to note, however, that not all our data have been updated to 2002. Many of the estimates in this report still reflect data collected through 2000. We did not have the resources necessary to collect new data and revise the analysis in every case.

Terminology

We use a number of terms in this report that call for clarification at the outset.

Defendants

Several leading asbestos defendants filed for bankruptcy and subsequently emerged reorganized. The reorganizations included the formation of a trust funded by the defendant and its insurers. The trust is the only recourse for asbestos claimants, who are barred by injunction from pursuing the reorganized company.¹ Rather than repeat the

¹ 68 B.R. at 624. The bar is known as a “channeling injunction” and has since been codified in the U.S. Bankruptcy Code at 11 U.S.C. §524(g).

phrase “defendants and trusts” in references to the entities against whom claims are brought or to the entities paying claims, we generally use the word *defendants* with the understanding that that word refers to both defendants and trusts.

Defense Costs

At various points in this report we refer to the *defense costs* (or *expenses* or *spending*) of defendants and insurers. These terms always refer to the amounts defendants spent on asbestos litigation, net of any reimbursement by insurers and the amounts insurers spent including both their own expenses and amounts they reimbursed defendants under various policies and excluding any contribution by other insurers under a reinsurance policy.

Claim

The typical asbestos lawsuit includes a number of claimants and names several dozen defendants. Commentaries on asbestos litigation sometimes use the word *claim* to refer to a lawsuit, regardless of the numbers of claimants and defendants included in the lawsuit. The word claim also is sometimes used to refer to a claimant regardless of whether that claimant’s lawsuit also includes other claimants. Finally, the word claim is sometimes used to refer to an assertion by an individual claimant against an individual defendant. Most of our analyses focus on individual claimants, whether or not their claim was included in a lawsuit with other claims and independent of the number of defendants named by the claimant. Accordingly, in the subsequent discussion, we generally use the word “claim” to refer to an individual claimant. Thus, when we say a large fraction of the claims was filed by a small number of plaintiff law firms, we mean that a small number of plaintiff law firms filed claims on behalf of a large fraction of the individuals who brought claims against one or more defendants. Similarly, when we say defendants have spent X thousand dollars resolving claims for mesothelioma, we mean that the amounts of money paid to claimants who brought claims for mesothelioma and the legal fees and expenses incurred in the course of paying those claims added up to X thousand dollars.

Unimpaired

One of the most hotly debated issues in asbestos litigation concerns whether unimpaired asbestos claimants ought to be compensated. The term itself often introduces confusion because impairment can be taken to mean either an injury or a decrease in the ability to function in everyday activities. The American Medical Association’s (AMA’s) definition of impairment is synonymous with injury: *Impairment* is defined as “a loss, loss of use, or derangement of any body part, organ system, or organ function” (American Medical Association, 2001, p. 2). A scar on the lungs, in this sense, is impairment. *Impairment ratings*, however, as defined by the AMA, measure the functional limitations caused by an injury: Impairment ratings reflect “an individual’s

ability to perform common activities of daily living, excluding work” (American Medical Association, 2001, p. 4). “For example, an anatomic change such as a circumscribed pleural plaque would be an impairment based on an abnormality in anatomic structure. However, if there were no abnormality in lung function and no decrease in the ability to perform activities of daily living, the individual would be assigned a 0% impairment rating” (American Medical Association, 2001, p. 88). Under the AMA guidelines,

- a person may be injured, but not functionally impaired, and
- a person may be functionally impaired, while still being able to hold down a job.

In this report, we use the term *unimpaired* to refer to someone who experiences no decrease in the ability to perform the activities of daily life, even if he or she has evidence of an injury. In other words, the individual would be assigned a 0% impairment rating according to the AMA definition. It is important to note that claimants who are unimpaired in this sense when they file a claim may manifest more critical symptoms after an extended latency period. In most jurisdictions, those who are injured but not (yet) impaired by their exposure to asbestos have legally cognizable claims.

Injury/Disease

The term used to refer to a claimant’s asserted condition is also a source of controversy. The word *disease*, as defined in Webster’s *Collegiate Dictionary*, is “a condition of the living animal or plant body or of one of its parts that impairs normal functioning.” Accordingly, some commentators object to the use of the word “disease” in referring to the entire population of asbestos claimants because it implies, in their view, a judgment that all claimants are impaired. In this report, when discussing all claimants taken together, we usually use the more neutral term: *injury*. Thus, when we say, the next chapter reviews the kinds of injuries associated with asbestos, we do not imply any judgment as to the severity of the various types of injuries and diseases asserted by claimants.

Organization of This Report

Chapter Two describes the kinds of injuries associated with exposure to asbestos and reviews the epidemiological studies that have estimated how many people are likely to eventually incur asbestos-related injuries. Chapter Three examines important aspects of the evolution of the litigation over the past two decades, including trends in jury verdicts. Chapter Four describes the numbers and types of claimants and defen-

dants and shows how they have changed over time. Chapter Five describes costs of the litigation and compensation to plaintiffs, including distribution of total compensation amounts by type of injury. Chapter Six examines the economic effects of the litigation, focusing on the numbers of bankruptcies, characteristics of bankrupt defendants, and performance of personal injury bankruptcy trusts. Finally, Chapter Seven considers how well the tort system has performed and discusses recent efforts to devise alternatives to the current system for resolving asbestos injury claims.

