Recent Developments in Asbestos Litigation

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Do You Know This Man?
Dickie Scruggs: Mississippi Asbestos Lawyer
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• Asbestos litigation is the “endless search for the next solvent bystander.”

• Accused and convicted of attempting to influence or secure judicial misconduct.

• Judge Glen H. Davidson imposed his sentence and quoted the Scottish philosopher William Barclay: “The Romans had a proverb that money was like seawater. The more you drink the thirstier you become.”

• In December 2012, a federal judge granted Scruggs' motion to be released from prison on bail pending his appeal of the 2009 conviction.
Tort Reform

- Tort reform in some states has improved the asbestos litigation climate and reduced the caseload.

- “Inactive dockets” preclude litigation of cases unless true asbestos-related illness is shown.

- Has resulted in dismissal or abatement of millions of alleged “asbestosis” cases nationally.

- Also resulted in a relative increase in filings of cases involving malignancies, such as lung cancer and mesothelioma.
Tort Reform

• Ohio H.B. 380 – Effective March, 2013
  - requires plaintiffs to disclose and account for settlements with asbestos bankruptcy trusts before trial.
  - creates presumption that materials disclosed are admissible evidence.
  - trial courts can order plaintiffs to file claims with trusts that were not filed previously.
National Trends: Migration of Dockets

• As the laws changed, and as the judiciaries in some states became more conservative, cases moved to other states.

• Texas, once home to one of the largest concentrations of cases, now has an extremely reduced docket.

• Federal asbestos litigation similarly reduced through “inactive docket” orders and consolidation in multi-district proceedings.

• States that did not approve comprehensive asbestos litigation reform attracted more filings by “forum shoppers” – e.g., New Jersey, New York, California, West Virginia, Delaware, etc.
National Trends: Lung Cancer

• The bulk of asbestos cases will continue to focus on malignancy claims. Non-malignancy cases will continue to decline.

• Increasing number of lung cancer claims. Alternative causes (e.g., smoking) are no longer deterring filing.

• Not all states bar recovery when alternative claims are not “ruled out.” Many reduce recovery for smokers on the basis of contributory negligence.

• For the defense, scientific advances in genetic testing can distinguish non-smoking and smoking lung cancers, but defendants must be prepared for motions to exclude the testimony as unreliable.
National Trends: Alternative Causes of Mesothelioma

• 10-20% of mesothelioma cases are not caused by asbestos exposure – but other causes have been difficult to identify.

• Possible alternatives include genetics, carbon nanotubes, radiation, talc, vermiculite contaminated with eronite.

• Eronite is major focus. Known human carcinogen. Deposits in various states and more than 200 times more potent than asbestos.

• Tissue testing essential – if available – in cases pending in Western states like California, Arizona, Oregon.
National Trends: Alternative Diagnosis

- High-volume expert witnesses are being more closely examined by counsel who are allowed to spend the time to review their publications and clinical/pathological findings.

- Because of high verdict risks and potential exhaustion of insurance coverage, many companies are pressuring insurers to do more detailed discovery and more thorough research into medical records and experts.

- Asbestos pathologists, even the most experienced, make mistakes and may even miss diagnostic markers that rule out mesothelioma.

- Samuel Hammer, noted pathologist and regular plaintiffs’ causation witness, recently rejected by jury when he admitted that he misread diagnostic tests.

- Opinions actually contradicted his own textbook.
National Trends: Secondary Exposure

• Texas courts of appeal reverse verdicts for household exposure when risk was unknown to defendant at time of exposure.

  *Alcoa. Inc. v. Behringer* (Tex. App. – Dallas 2008);


• California appellate court reverses judgment because manufacturer had “no duty” to protect family members. *Campbell v. Ford Motor Co.* (2012).
National Trends:
Recent Decisions

- Pennsylvania Supreme Court:
National Trends: Recent Decisions

- California Supreme Court:
  - Rejects arguments that a valve manufacturer can be held liable for replacement parts containing asbestos that it did not manufacture or supply. *O’Neill v. Crane Co.*, 53 Cal. 4th 335, 266 P. 2d (2012).
  - Shifts responsibility from manufacturers to component parts suppliers – but not all states agree.
National Trends Summary: Good News

• Less total cases – but more serious ones.

• Caseloads are migrating to more “friendly” states.

• More emphasis on medical issues in mesothelioma cases to challenge diagnosis and focus on alternative causes.

• Some progress in defeating secondary exposure claims in some states – but situation remains unsettled in other jurisdictions.

• Major progress in defeating liability for manufacturers in cases where they did not supply or manufacture replacement parts.
National Trends Summary: 
Bad News

“It ain’t over ‘til it’s over!”
-Yogi Berra