



There were many miles of asbestos containing pipe-covering used at West Virginia chemical and other facilities. Workers tell of climbing into pipe racks in the above condition on many occasions.

Image courtesy of author

Asbestos Litigation in West Virginia Today

By William K. Schwartz

Clarence Borel, an insulator who suffered from the asbestos related cancer mesothelioma, sued the manufacturers of asbestos containing products. His lawyers revealed the actions of the asbestos industry in court. He won a jury verdict, but then the manufacturers appealed. The United States Court of Appeals for the Fifth Circuit rejected the manufacturers' argument that the disease and ultimate death of Mr. Borel was not foreseeable at the time they sold and distributed their products and exposed Borel to the deadly dust. The Fifth Circuit, in a published opinion, noted that asbestosis had been recognized as a disease for more than fifty years by the time of the decision in Borel's case. The industry's major corporations, such as the defendants, had information and studies urging precautionary measures and eliminating hazardous exposures from at least the 1930s—yet Mr. Borel had no warnings. The Fifth Circuit upheld the verdict. The year was 1973.

Asbestos is a rock or mineral mined from the ground and combined with other products to add strength as well as for heat and chemical resistance. The ancient Greeks gave the material its name, which means "inextinguishable." Both the Greeks and Romans observed the "sickness of the lungs" in the slaves who wove the asbestos fibers into cloth. While its use declined in the middle ages

it began to grow again in the 18th century and exploded during the Industrial Revolution. Asbestos cement was introduced about 1870. Asbestos insulation material has been produced commercially since at least 1874. Its use in the United States and West Virginia expanded greatly from World War II forward.

As a federal court noted, asbestos is a natural fibrous mineral with organic heat resistant and fire retardant properties which has a number of applications, including insulation around cold or hot air, liquid conductors or boilers; noise absorption in wall insulation and acoustical tile ceiling; as well as the covering of structural steelwork of buildings to guard against fire. "The massive use of asbestos in industrial, commercial and household contexts has exposed millions of people to its insidious dangers" (Joint E&S Dist. Asbestos Litig. 129 B.R. 710, 743-736 (E&SDNY 1991) modified 993 F2d 7 (2nd Cir.) 1993).

This is particularly true in states like West Virginia with its high concentration of chemical, glass and steel industries. The National Institute for Occupational Safety and Health has determined that more than one million American workers face significant asbestos exposure on the job. According to OSHA's 2004 Worker Health Chartbook, West Virginia tied Delaware for the state with the highest

asbestos mortality rate in the country based on the causes of death reported on death certificates.

Asbestos containing insulation in both pipe and block form was used extensively in chemical and other industries in West Virginia. The sawing, chopping and dropping of material during maintenance or construction created clouds of dust that workers have described in court as “snowstorms.” Although no longer used in new insulation, it is still present at many facilities in old material. It should be clearly marked and its removal handled by well trained “abatement” workers clad in “space suit” outfits in special enclosures. This was not the procedure in the 1950s, 60s and 70s. One insulator testified that “when insulation hit the floor dust would spread” in describing the “chop and drop” methods of the time. While some may have used a handkerchief or some other temporary measure in such a choking snowstorm, workers who knew it as no more than nuisance dust did little. Tragically, many of these workers took their contaminated clothes home, repeatedly exposing themselves and their families to the toxic material.

Since Mr. Borel’s favorable verdict in 1973, many injured workers have sought compensation. The asbestos fibers, when released by cutting or other manipulation, cause various diseases. Exposure to asbestos containing dust can cause asbestosis or scarring of the alveoli, which are the tiny air sacs in the lungs necessary for breathing. Symptoms of asbestosis include shortness of breath and a dry crackling sound in the lungs while inhaling. The exposure also causes lung cancer and an incurable cancer found in the thin lining (membrane) of the lung, chest, abdomen and heart called mesothelioma. Mesothelioma is a marker disease indicative of asbestos exposure. In fact, asbestos is the only medically established cause of mesothelioma in patients in the United States who have not received radiotherapy at the site of the tumor. These diseases may not show up for years or even decades after exposure. This is known as latency, with each subsequent exposure contributing to the disease.

The first modern reported cases of asbestosis were among textile workers. In 1924, Cooke in England discovered a case of asbestosis in a person who had spent twenty years weaving asbestos textile products. In the next decade, numerous similar cases were observed and discussed in medical journals. An investigation of the problem among textile factory workers was undertaken in Great Britain in 1928 and 1929. In the United States, the first official claim for compensation associated with asbestos was in 1927. As the Fifth Circuit published in 1973, “By the mid-1930s, the hazard of asbestos as a pneumoconiotic dust was universally accepted.”

The Borel case may have been a watershed decision but it only touched upon the conduct of certain corporations. In 1933, the Johns Manville Company settled with an attorney on behalf of 11 of the company’s former employees.

The attorney received \$30,000 for the victims in exchange for a written promise that he would not bring new action against the corporation either directly or indirectly—an agreement that did not come to light for more than four decades. Meanwhile, the corporation continued to expose workers (Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial*). In another example, a Bendix Corporation executive wrote to another industry executive in 1966, “If you have enjoyed a good life working with asbestos products why not die from it?”

In the early 1960s Dr. Irving Selikoff published and emphasized the dangers of asbestos to workers and even their wives. Several corporations formed the Asbestos Information Association or AIA in 1970. In their meetings they noted, “In Dr. Selikoff’s defense, the insulation workers he has been studying for more than a decade, were and still are dying from asbestos-related disease at an appalling rate.” But then the AIA further states, “The good news is, despite all the negative articles on asbestos health that have appeared in the press over the past half dozen years, very few people have been paying attention.” In 1973 the AIA stated, “The struggle is far from over. We must not only continue but, indeed, expand our activities in various areas which produce concern if we are to assure the future well being of the asbestos industry of the United States.”

Some have argued that the conduct of the asbestos industry was a result of the emergence of silicosis in the 1930s. Workers with silicosis brought millions in lawsuits against employers. The difference from asbestos was that the disease silicosis does not have the same latency. It develops sometimes soon after heavy exposure. Indeed, many of the Hawks Nest Tunnel workers who died of silicosis died within a year of exposure. Several companies formed the Air Hygiene Foundation (later the IHF) in 1935. In their meetings they noted that they were concerned with the “menace” of “ambulance chasing lawyers and unscrupulous doctors.” Further, they knew only two forms of dust, namely free silica and asbestos, are definitely known to produce disabling fibrosis of the lung.” Thus, they needed “concerted action” to deal with the problem. Also, they wanted to set up “authoritative and approved standards for the control of industrial dust, which if complied with by the industries, will act as a defense against personal injury suits.” There were isolated cases of asbestos-related claims from older workers. Unlike silicosis, however, the full tragedy—and resulting bill—from asbestos would not be revealed for decades in the future due to the latency of asbestos diseases. Corporations continued to use asbestos in manufacturing and construction. It is also important to note that the focus of asbestos suits is not that asbestos wasn’t useful, but rather that the workers were not given a “sane appreciation” of the risk inherent in the dust, as studies available to the companies recommended.

Industrial asbestos exposure in West Virginia led to, at

first, hundreds and ultimately thousands of claims being filed in the 1980s and 1990s. The result was several consolidated or mass trials. Some defendants argued that mass trials violated the constitutional rights of defendants. Other defendants proved no defect in certain products and were dismissed from thousands of cases. The West Virginia Supreme Court of Appeals created a Mass Litigation Panel (“MLP”) through the enactment of Trial Court Rule 26.01. The Supreme Court has given the MLP the responsibility for development and implementation of “case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice.” [Trial Ct. R. 26.01(b)(1) (Michie 2004)]. This culminated in a Case Management Order (“CMO”) regarding all asbestos cases filed in West Virginia.

As certain defendants have stated, “The existing CMO was an exhaustive, joint effort by the vast majority of defendants and plaintiffs to develop a comprehensive system to address the large number of asbestos cases filed in West Virginia.” On August 7, 2003, the Chief Justice of the West Virginia Supreme Court of Appeals entered an Administrative Order identifying all asbestos cases filed after September 6, 2001, as cases included in Kanawha County Civil Action No. 03-C-9600 and transferring all of those cases to the Mass Litigation Panel. Through an Administrative Order, Chief Justice Starcher noted his review and approval of the CMO for the 03-C-9600 cases. As a result of the Administrative Order, all asbestos cases filed after September 6, 2001 are 03-C-9600 cases that are governed by the CMO.

The CMO states that “trial groups of twenty (20) have been established after due consideration of the position of all the attorneys who chose to address this issue.” Once a trial group is designated a Scheduling Order setting forth trial group deadlines applies. Each plaintiff must complete a Plaintiff’s Fact Sheet, including all the questions asked, the list of medical providers and other sources of information, the request for the production of documents and the request for authorizations. It provides for a bankruptcy proceeding affidavit, employment information and authorization, as well as exposure information. In addition a defendant may provide to plaintiff’s counsel a “No Evidence Letter” requesting dismissal from the action based on the required disclosures. There is a procedure as to how a plaintiff may properly object to dismissal or agree to dismiss at an early stage in the litigation.

The CMO sets up a system to prioritize cases. Living mesothelioma cases receive priority followed by living lung cancer, deceased mesothelioma and so on. Any plaintiff who has been diagnosed with a malignant mesothelioma or asbestos-related lung cancer by a board-certified pathologist and who is living at the time a trial group is designated, is a Category I Case and is considered as first

priority in any trial group. This is the exigent docket. It provides a schedule for discovery on each individual case prior to trial, including expert reports, co-worker depositions and document productions. Every few months attorneys for the plaintiffs cooperate through court assigned liaison to designate 20 cases for trial. Each case is subject to the disclosure and discovery rules of the CMO as well as motions regarding exposure to a specific product and other substantive and procedural points any party may raise regarding a specific plaintiff or a specific defendant. All parties are served documents that have been electronically submitted through the Lexis/Nexis File and Serve system. The CMO has been revised from time to time to address the concerns of the court or any party. Sixty to eighty cases, involving the most seriously injured, are resolved each year this way. Railroad claims, which are brought under the Federal Employer Liability Act or FELA, are handled in a separate court using different procedures.

Several hundred seriously injured and dying claimants have been compensated as a result of the CMO over the last seven years and numerous defendants have received individual discovery on each claimant resulting in settlement or dismissal. Certain West Virginia workers such as the Local 80 Insulators have suffered large percentages of their members dying from mesothelioma. Entire families of brothers have died from the asbestos-related cancer. Typically a worker finds out he will die from the terrible cancer in his mid 60s just as he is retiring. Housewives of workers are also dying from the cancer years after washing their husbands contaminated clothing. The workers’ children, many of whom are now in their 40s also suffer from the dust brought home on clothes. Recently, a 49-year-old man was able to resolve his case and get care for his wife and teenage children before succumbing to the cancer himself.

The number of people who die each year from mesothelioma has risen over the years. Three thousand people now die each year from mesothelioma in this country and some sources predict that this number will continue to increase and peak around 2016, while other sources predict it will stay about the same. Many thousands more die from the other asbestos related diseases each year. West Virginia is suffering more than its share from these deadly diseases.

When some plaintiffs have objected to the CMO, certain defendants have responded “the current CMO does not deprive any plaintiff of their right to be heard or any potential recovery that a plaintiff may have. The current CMO simply attempts to balance the procedural and due process rights of the parties, as directed by the Supreme Court of Appeals.” These defendants state “the trial format established by the CMO is working well to resolve cases in a fair and equitable manner.”

The MLP and CMO resulted from the courts dealing with large numbers of cases in several venues. The current system was indeed an exhaustive effort to address compli-

cated issues. There is abundant evidence that many defendants knowingly exposed their workers and customers who bought their products, but there is also a need to prioritize the sickest workers having their day in court while also balancing the due process rights of all parties. The courts in West Virginia have struggled with that balance. Some in the business community point to the thousands of cases resolved in the 1990s as evidence of a litigation explosion in asbestos lawsuits, but the Kanawha County Clerk notes that 123 cases were filed in 2005, 103 in 2006, 72 in 2007, 92 in 2009 and 104 in 2010. The one exception is 2008 when 991 cases were filed, but about 900 of those involve previously dismissed FELA claims that have been refiled and are subject to dispute. Furthermore, while a railroad company unsuccessfully attacked the actions of an out-of-state firm for cases on a FELA docket, no case among the hundreds selected for trial under the West Virginia CMO's exigent docket has been dismissed as invalid or medically insufficient to sustain a claim.

More recently, several parties on both sides of the litigation negotiated yet another modification of the CMO to provide defendants with more disclosure regarding bankruptcy payments to claimants. Some defendants are concerned that victims will receive substantial compensation from trusts set up by companies given bankruptcy protection. They note that the dozens of trusts may begin making payment over the next several years. These defendants, if they have to pay a verdict, would be entitled to a credit for any payments made by these trusts as well as any settling co-defendant. However, some claimants may qualify for several trusts and others only a few or none based on criteria such as work history, years of exposure and geographic location set up by the trusts. In fact, many trusts do not apply to a person who worked his career in West Virginia. The new modification attempts to address the concerns of

all parties. It provides a statement of any and all existing claims and claims that may exist against asbestos trusts. The defendant "will be entitled to set-offs or credits of paid liquidated value of the trust claims against any judgment rendered against them in the asbestos action and the Court shall provide a hearing for this purpose. The Court can require each claimant to disclose the total amount received or reasonably expected to be received from the bankruptcy proceedings, or any defendant."

While no side is entirely happy with all provisions of the CMO, it must be noted that no appeal has been filed. The panel has provided hearings to concerned parties resulting in the modifications. However, many plaintiffs who do not fit into a category providing for immediate trial sit inactive and some defendants object to any consolidation of cases regardless of judicial economy and duplication of certain evidence. Some argue that the actions of certain companies are too egregious to limit the litigation, while others contend that only the sickest should get their day in court without any consolidation and too many cases have been filed in the past. The CMO is a serious attempt by the courts and the most experienced asbestos attorneys trying these cases on both sides to establish a system to resolve the cases of some very sick people in a "fair and equitable manner."

Clarence Borel had his day in court decades ago. The current CMO is an attempt to make sure the sickest victims in West Virginia today can still receive their day in court while providing the accused defendants their due process rights. Certain defendants contend that the CMO is successful and improves with each modification. Many families who lost loved ones and had cases resolved would agree. ❖

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