

# *Sue First, Discover Later*

New York Case Dockets Reveal the  
High Cost of Over-Naming  
in Asbestos Litigation

Mary Margaret Gay, Esq.



June 2021



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### **ABOUT THE AUTHOR**

**Mary Margaret Gay** is a founding member of Gay Jones & Kuhn PLLC in Jackson, Mississippi. Mary Margaret represents clients locally, regionally, and nationally in product liability and environmental litigation. She served as counsel of record for more than 40 defendants in the Federal Asbestos Multidistrict Litigation (MDL) and assisted the court in the MDL’s management and closure, resulting in the dismissal of thousands of cases. In 2015, she and her partners pioneered technology used to assist asbestos defendants and their counsel nationwide to develop alternative exposures and estimate asbestos bankruptcy trust claims values. Mary Margaret is known for being at the forefront of issues affecting asbestos litigation and for her ability to maximize available data to track and report trends in the litigation. Clients call on Mary Margaret for her creative problem-solving and ability to collaborate with others to identify innovative solutions to litigation challenges old and new. She has undertaken numerous studies, published articles, and routinely speaks on issues affecting the asbestos litigation landscape.

### **ABOUT THIS REPORT**

The data for this report was compiled and analyzed by Gay Jones & Kuhn PLLC using publicly filed documents, information and case dockets that were posted and available in New York asbestos cases as of January 2021. The data may change as remaining defendants resolve or are dismissed without pay from the cases. A defendant’s status in a case as cited in the report is based on the type of final Order of dismissal entered for each defendant on the docket.

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## INTRODUCTION & SUMMARY

After approximately a half-century of asbestos litigation in the U.S., the number of defendants named in asbestos lawsuits continues to climb. It is estimated that 11,000 companies have been named in asbestos lawsuits, and as many as 25 companies each month are named in their first asbestos case. The always-expanding litigation stems from an aggressive effort by asbestos plaintiff attorneys to find solvent defendants to replace bankrupt former asbestos defendants that are now immune.

Many plaintiff firms have adopted a “sue first, discover later” approach. Indiscriminate naming of asbestos defendants has led to countless lawsuits against companies that lack a connection to the plaintiffs suing them. According to consulting firm KCIC, which tracks asbestos case filings, “it is believed that many defendants are named frequently with no proof of exposure.”

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Wrongfully named defendants start to incur legal costs on day one and have almost no way to extricate themselves quickly from litigation in which they do not belong. Eventually, most nonviable claims are dismissed, but not until those defendants have incurred significant legal expense. Over-naming of asbestos defendants also stresses the already-strained court system and wastes taxpayer money.

Asbestos cases filed in the five boroughs of New York are consolidated into the New York City Asbestos Litigation (NYCAL) docket in Manhattan. The NYCAL docket remains one of the largest active asbestos dockets in the country.

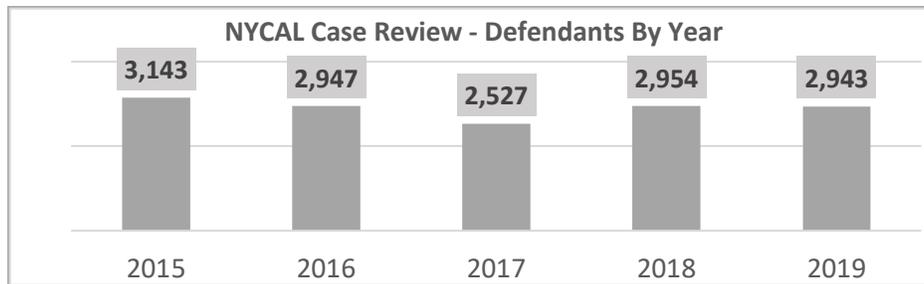
## ANALYSIS

The following data and analysis include a review of **488 cases** filed on the NYCAL docket from 2015-2020—approximately 20% of the cases filed in NYCAL during that period. The cases reviewed include complaints filed by 20 different law firms, although most NYCAL cases are filed by a handful of asbestos plaintiff law firms. More than half of the plaintiffs in the cases reviewed alleged mesothelioma with the remaining plaintiffs alleged lung cancer or other asbestos-related cancers.

### Over-Naming of Defendants on New York Complaints

The widespread over-naming of companies in NYCAL is reflected in the excessive number of defendants named on complaints. The cases in the sample named a total of **14,514** defendants—and these cases cover just a fraction of the filings in the 5-year period that was studied. The extensive list of named defendants includes companies of all sizes that provide a variety of services or products.

The list does not include the more than 125 former asbestos defendants that have filed bankruptcy and are the most likely cause of asbestos-related illness. Bankrupt former asbestos defendants, including the “big dusties” that made up the asbestos industry, are immune from suit today. Nevertheless, large numbers of defendants continue to be named in NYCAL cases.



Companies are rarely sued just once for asbestos. Rather, defendant company names are repeated across high volumes of asbestos cases. Company defendants have recounted being named in large influxes of asbestos cases within months of their first asbestos lawsuit. One company was named in 403 of the 488 complaints in the sample. 70 of the defendants in the sample were named in over 100 different NYCAL complaints.

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*The average asbestos case filed on the NYCAL docket named 30-40 defendants.*

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An analysis of the 14,514 defendants named on the NYCAL docket over the past 5 years revealed 1,302 different named companies. Some companies were named in their first asbestos case, while others were named in hundreds of NYCAL complaints.

In 2018 alone, more than 540 companies were named as defendants in the NYCAL cases reviewed.

The average NYCAL case in the sample named 30-40 defendants. Some cases included many more:

- The *Richard Hundertmark* case filed in August 2016 named **96** defendants.
- The *Salvatore Raciti* case filed in July 2017 named **90** defendants.
- The *Robert Booth* case filed in January 2019 named **74** defendants.

The large number of defendants named on NYCAL complaints continued in 2020.

- The *Kenneth Hansen* case filed in 2020, amid the COVID-19 pandemic, named **106** defendants.

### **High Dismissal Rates Confirm the Over-Naming Problem**

High dismissal rates confirm the over-naming problem. 249 companies were dismissed from every NYCAL case in the sample of cases from 2015-2020 that was reviewed.

More than 400 companies were dismissed in over 50% of the cases in which they were named.

Nearly every company named as a defendant on complaints on the NYCAL docket could expect to be dismissed from a large percentage of the cases without paying the plaintiff any compensation.

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*249 companies were dismissed from **every** NYCAL case in which they were named.*

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A highly accurate reflection of the high dismissal rate of NYCAL defendants is found in cases filed in 2015, as those cases have been able to proceed through litigation and fully resolve.

Less than 10% of the 3,143 defendants named in sampled NYCAL complaints filed in 2015 reflect a settlement payment on the court docket. In the 2015 cases reviewed, over 2,700 defendants named on complaints show no payment for liability or settlement on the case docket. E.G.,

- The *Guillermo Pina* case filed in 2015 named 47 defendants; 39 of those companies (83%) have been dismissed to date with no pay.

Dismissal rates for cases filed in other years appear to follow the same pattern.

- The *John Fox* case filed in 2016 named 69 defendants; 51 of those companies (74%) have been dismissed to date with no pay.

## **WRONGFULLY SUED: The High Cost of Unfounded Asbestos Lawsuits**

It can take years for a NYCAL case to reach final resolution. Litigation costs for an over-named defendant start on day one and may continue for years until the company is dismissed with no fault.

Over-named defendants incur high costs. A defendant could easily spend “\$20,000 to defend the case in which they should never have been named in the first place.”<sup>1</sup> These costs are amplified by the “repetitious filing of claim after claim without any factual basis.”<sup>2</sup>

Bloated asbestos complaints with nonviable defendants complicate case management and slow resolution of cases, wasting court resources and delaying payments to claimants.

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Further, the cost of defending unsubstantiated claims has contributed to corporate bankruptcies. For example, in the 2020 bankruptcy filing of ON Marine Services LLC, the company notes that a whopping 95% of the over 182,000 asbestos claims filed against it since 1983 were dismissed without payment to the plaintiff.<sup>3</sup>

## **A SOLUTION: MORE DISCLOSURE/DOCUMENTATION**

The epidemic of over-naming is not unique to NYCAL. It is happening in other jurisdictions too. And other jurisdictions are beginning to solve the problem.<sup>4</sup>

In 2020, Iowa enacted a pioneering law to focus asbestos litigation in that state on viable claims, curbing over-naming that unnecessarily drives up legal costs for innocent defendants while providing no compensation benefit to plaintiffs. The Iowa law requires asbestos plaintiffs to provide a sworn information form with the initial complaint that details the evidentiary basis for each claim against each defendant and requires supporting documentation. A trial court shall dismiss an action without prejudice as to any defendant whose product or premises is not identified in the sworn information form.

So far in 2021, West Virginia, Tennessee, and North Dakota have enacted substantially similar laws. Over-naming has been particularly rampant in West Virginia asbestos cases.

New York could accomplish similar improvements through legislation or case management order. Such reforms are consistent with a lawyer's ethical duty to bring claims that have "a basis in law and fact" and to be informed about "the facts of their clients' cases."<sup>5</sup>

## CONCLUSION

Over-naming in NYCAL is a serious issue. Cases filed against asbestos defendants without an evidentiary basis are unnecessarily wasteful and unsound. They drive up litigation costs for innocent defendants, contribute to corporate bankruptcies, congest court dockets, and slow case resolutions for plaintiffs. Nobody benefits from "sue first, discover later." Other states are beginning to solve this problem. New York should join them.

## REFERENCES

<sup>1,2</sup>James Lowery, *The Scourge of Over-Naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice*, MEALEY'S LITIG. REP.: ASBESTOS (Jan. 19, 2018).

<sup>3</sup>Declaration of Kevin J. Whyte in Support of Chapter 11 Petition of Marine Service Co. LLC, *In re* ON Marine Servs. Co. LLC, No. 20- 20007, at 5 (Bankr. W.D. Pa. Jan. 2, 2020).

<sup>4</sup> Iowa Code § 686B.3; W.Va. H.B. 2495 (2021); Tenn. S.B. 873 (2021); N.D. H.B. 1207 (2021).

<sup>5</sup>N.Y. R. Prof. Conduct 3.1 & cmt. 2.