

Asbestos

Evolution Of The Asbestos Plaintiff Exposure Profile

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Commentary

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[Editor's Note: Sarah Beth Jones, Malea Higdon, and Mary Margaret Gay are attorneys at Gay Jones & Kuhn PLLC. Gay Jones & Kuhn offers a broad spectrum of legal services for clients in Mississippi, Alabama, and Arkansas, including mass tort defense, asbestos bankruptcy trust transparency, and strategic counsel services. Gay Jones & Kuhn has been at the forefront of alternative exposure issues and asbestos bankruptcy trust transparency working with counsel and clients nationwide. Any commentary or opinions do not reflect the opinions of Gay Jones & Kuhn PLLC or LexisNexis®, Mealey Publications™. Copyright © 2023 by Sarah Beth Jones, Malea Higdon and Mary Margaret Gay. Responses are welcome.]

Asbestos litigation continues to evolve as plaintiffs' exposure profiles change and shift further away from the traditional exposure allegations more characteristic of the litigation at its onset. Considering the changes that have occurred in asbestos litigation over the span of more than four decades, the shift is not surprising. The traditional plaintiff in asbestos litigation typically alleged direct, extended industrial exposure to asbestos thermal insulation. In the litigation today, plaintiffs with this traditional exposure profile have largely vanished, and new exposure profiles have emerged to support allegations of disease due to asbestos exposure. Defendants and their counsel are challenged to revisit existing strategies and adapt to innovative best practices to fully develop a plaintiff's exposure profile. Comprehensive development of a plaintiff's exposure profile not only provides experts with indispensable exposure information essential to trial defense and the development of overall defense

strategy but is also crucial for accurate risk and value assessments of any case.

Tracking The Shift In Plaintiff Exposures

Understanding the shift in the plaintiff exposure profile provides the backdrop to the current stage of asbestos litigation. When asbestos litigation increased in volume in the early 1980's, the typical plaintiff profile was a male in his sixties who had documented industrial exposures and a diagnosis of mesothelioma or lung cancer.¹ At that time, asbestos cases were filed against a handful of defendants alleging exposure in a few industries. Many of those original defendants later filed for bankruptcy and established bankruptcy trusts to compensate for asbestos-related injuries,² and exposure allegations shifted to solvent companies with named defendants expanding beyond thermal insulation manufacturers to manufacturers of other products, resulting in an overall shift in the litigation.

While the asbestos plaintiff profile continued to be primarily male industrial workers, it quickly evolved to include indirect exposures with the defendant net cast wider and wider to include defendants not previously involved in the litigation and a greater variety of defendant companies across more industries.³ The asbestos defendant naming phenomenon that is the "endless search for a solvent bystander"⁴ is well documented, and the evolution of the plaintiff exposure profile is reflective of the growing list of companies named in the litigation. The naming of thousands of companies in litigation coupled with the explosion

of non-malignant plaintiffs entering the litigation correspondingly impacted the exposure profile of plaintiffs in the litigation. As asbestos litigation has evolved over the decades, it is evident that the plaintiff profile has moved further away from and beyond the traditional direct, industrial exposure.

2020 And Beyond – Asbestos Plaintiff Exposure Profiles

As a combination of secondary exposure allegations and non-occupational exposures has given rise to more unique plaintiff exposure profiles and an increasing variety in plaintiff demographics, the evolution of asbestos plaintiff exposure profiles continues. While most plaintiffs in the early years of asbestos litigation were primarily exposed to asbestos through their work directly with asbestos-containing products in industrial settings, such as manufacturing plants, utilities industries, etc., or other labor-intensive fields of work, like construction,⁵ plaintiffs today may include professionals such as dentists and accountants, as well as entertainment industry workers like camera operators, stagehands, lighting operators, and even magicians. Indeed, in the last few years, the litigation has undoubtedly seen an increase in plaintiffs who do not have traditional industrial exposures to asbestos.

With the ongoing evolution of asbestos plaintiff exposure profiles and the movement away from traditional direct exposures, it is more critical than ever before to develop complete exposure profiles of plaintiffs to include alternative exposures and reveal the entire picture of exposure. At first glance of a complaint today, one may be left to wonder where the plaintiff encountered asbestos with any substantial frequency and regularity. Defense counsel is challenged to dig deep through research and education to find exposures for plaintiffs who list their occupation on a complaint as lawyers, nurses, accountants, dentists, and caretakers in the home. Where and how were they potentially exposed to asbestos? It is not as simple as focusing discovery on a single or even a handful of jobsites and asking product related questions.

Shift In Work Industries, Occupations, And Jobsites

Though today's plaintiffs may not have traditional jobsites known for utilizing asbestos-containing

products, they may nonetheless have encountered asbestos at less obvious workplaces. In fact, many of the asbestos bankruptcy trusts (set up as a result of target defendants from earlier in the litigation filing bankruptcy) publish approved site lists that are available to the public on their websites and updated regularly. These lists, although not definitive, provide a starting place for analysis of potential exposure sites. For most of these trusts, the required proof of exposure for a claimant seeking compensation for asbestos injuries is as easy as confirming plaintiff's presence at an "approved site."⁶ For instance, according to the DII Industries, LLC Asbestos Personal Injury Trust's distribution procedures, "[w]orking at a Documented Site . . . shall constitute *presumptive* evidence of Company Exposure," and "[a] 'documented site' means an exposure location identified to the Asbestos PI Trust where there is *clear and convincing evidence* that asbestos or asbestos-containing products supplied, specified used, installed, or manufactured by a Halliburton Entity or a Harbison-Walker Entity or their predecessors, successors, and assigns were present at the time of the alleged exposure."⁷ Bankruptcy trusts' approved site lists contain thousands of sites, many of which are not factories or industrial sites and are often surprising. According to a recent review conducted by Gay Jones & Kuhn in July 2023, there are more than 160,000 sites that are approved sites for bankruptcy trusts where exposure is presumed for specific time periods.

These approved sites extend well beyond the traditional industrial exposure sites and can provide links to other sites which may color the non-traditional plaintiff profile. The site lists often include non-traditional locations for exposure that may have been previously overlooked or seen as irrelevant when developing discovery in a traditional asbestos case. Consider a plaintiff who alleges exposure to asbestos through his work in movie studios in Hollywood and filming locations or who works as a stagehand for bands. Where might alternative exposures be found in the entertainment industry? Plaintiffs' job site locations might be auditoriums, studios, theaters, other major performance venues, hotels, or convention centers. While these job sites are not typical industrial sites in asbestos litigation, one might be surprised to learn that these types of sites are recognized by bankruptcy trusts as presumed exposure sites. Even a preliminary search of site lists

can uncover entertainment worksites and venues such as Warner Bros. Hollywood Studios, Disney Studios, the St. Louis Arena, Radio City Music Hall, Carnegie Music Hall, Madison Square Garden, and Caesars Palace, to name a few.

Many plaintiffs today never worked an industrial job, nor did anyone in their households. During discovery and depositions, defense counsel should endeavor to establish an exposure profile that includes all potential locations where the plaintiff has been from childhood to date. Where did the plaintiff attend school? Did the plaintiff go to college or attend night classes? Diving into these possibilities and establishing locations could reveal the plaintiff attended a school where he may have been exposed to asbestos. There are more than 4,300 schools throughout the country that are approved exposure sites for asbestos bankruptcy trusts. Maybe the plaintiff attended one of them? What about other locations where the plaintiff was present in childhood? Where did the plaintiff work during summers in high school? Upon thorough questioning, defense counsel might learn that during high school summers, the plaintiff worked at a facility or site known for potential asbestos exposure.

Explore a plaintiff's education and training, where they attended college, and where they studied and trained for their professional degrees. Many major colleges and universities appear on approved site lists of bankruptcy trusts. In fact, there are more than 3,000 listings of colleges or universities on bankruptcy trust approved site lists. The plaintiff may have attended one of these during an approved exposure timeframe.

Hospitals and medical facilities may also be potential exposure sites which are not covered in traditional discovery and traditional exposure profiles. A plaintiff may have had a lengthy hospital stay or worked in a profession that was onsite at a hospital. There are more than 4,000 hospitals nationwide that are approved sites for bankruptcy trusts where exposure is presumed. Simply asking plaintiffs whether they have been hospitalized in their lifetimes and where may open the door to new exposures not previously uncovered. If plaintiff worked in hospitals or medical facilities, have plaintiff identify the names and specific locations for those.

Did the plaintiff ever serve in the military? Even if a plaintiff disclaims exposure during military service, the specifics should be explored during discovery and deposition to create an accurate, complete exposure profile. Developing the complete exposure profile may reveal the plaintiff served in the military after college before going back to school to earn a professional degree or that the plaintiff served in the reserves and participated in regular trainings at approved military sites. Did the plaintiff live on military bases as a child? Thousands of military worksites, including bases, stations, recruiting facilities, airfields, shipyards, and ships appear on bankruptcy trusts' approved site lists. Uncovering locations of military sites where plaintiff lived, served, or trained, even for a brief time, will provide essential pieces of a plaintiff's overall exposure profile.

Growing Trend Of Secondary Exposures

The number of plaintiffs alleging secondary exposures continues to rise. Some complaints include allegations of asbestos exposure directly through a spouse or parent. However, other times, potential secondary exposures are less obvious and may only be brought to light after extensive, direct questioning during depositions. Many plaintiffs alleging secondary exposure never worked in or near a factory or industrial site nor do they have military service history. Exposure allegations focus on activities such as riding in the family car, hugs after work, and helping with chores like laundry. Questioning the directly exposed party or any family members or friends, especially older relatives, may develop an exposure profile that can be especially important to rebut claims against defendants. Memories, especially from childhood, often lack the specificity necessary to determine the source of an exposure for a profile. Asking a plaintiff who alleges secondary exposure about details of daily life may assist with the development of information such as residences, schools, and hospitals which confirm exposures to add to a profile, including those related to viable bankruptcy trust sites.

Bankruptcy trust claims have followed the increasing trend of secondary exposure allegations also seen in the litigation. The vast majority of asbestos bankruptcy trusts compensate claimants for secondary exposure. Most claim forms allow claimants to include

work history information for the person through whom the claimant is alleging exposure. The trust distribution procedures for bankruptcy trusts set out requirements for secondary exposure claims, and for those that allow secondary exposure claims, claimants are compensated for their asbestos-related injuries the same as if they were directly exposed.⁸ Developing a complete exposure profile, even a single detail of location, could provide a defendant with information that shifts liability and risk.

Other Household Exposures

In addition to the development of sites for exposure, potential products used around the home should also be explored in discovery. Plaintiffs may have worked on their own personal automobiles or those of their friends or family and potentially encountered asbestos-containing products. Multiple homes during their lifetimes may have required repairs or renovations that could have utilized asbestos products. Plaintiffs may allege exposure to tape, joint compound, flooring, or roofing materials removed or replaced in home repair projects. Though a plaintiff may not recall the brand names of products, the use of photos of asbestos-containing products during a deposition often helps jog memories and identify products the plaintiff worked with or was around. While there is no single, centralized source for product pictures, several resources exist that can prove valuable to defense counsel, including apps specifically designed to easily share pictures and mark exhibits at deposition and which allow for real-time searching of thousands of product photos from product registries.

Conclusion

This shift away from the more traditional asbestos plaintiff exposure profile directly affects the best practices related to discovery, depositions, and overall case strategy for asbestos defendants and their counsel. With asbestos litigation today giving rise to more unique plaintiffs and non-traditional work histories, it is imperative to look beyond traditional strategies and deposition outlines passed down for decades and reframe defense strategies to obtain information necessary to properly value and defend a case in the current asbestos litigation landscape. This information may result in shifting liabilities among defendants, additional exposure evidence for expert testimony, and identification of bankruptcy trust claims not originally sus-

pected prior to an in-depth investigation. History reveals the mature mass tort of asbestos litigation has evolved and will continue to change, and we challenge defense counsel to change as well and create alternative and innovative strategies to fully uncover plaintiffs' exposure profiles and improve defense of the litigation.

Endnotes

1. See Stephen J. Carroll et al., *Asbestos Litigation* at 16 (Rand Corp. 2005).
2. In 2011, approximately one hundred companies had filed for asbestos-related bankruptcy with 60 trusts established with a combined total of over \$36.8 billion in assets. U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* at 2-3 (Sept. 2011).
3. See Mark A. Behrens & Christopher E. Appel, *Over-Naming of Asbestos Defendants: A Pervasive Problem in Need of Reform*, Mealey's Litigation Report: Asbestos at 1 (March 24, 2021) (noting more than 10,000 defendants named in the litigation by 2013 with "[m]any defendants named in asbestos complaints today hav[ing] no connection or liability for plaintiffs' injuries").
4. Richard Scruggs & Victor Schwartz, *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, Mealey's Litig. Rep.: ASBESTOS, at 5-6 (Mar. 1, 2002) (former plaintiff's attorney discussing "endless search for a solvent bystander" and noting "[m]ost of the companies that were culpable in promoting the sale of asbestos-containing products have been held accountable and most of them have gone bankrupt" and that "[a]sbestos litigation has become a cottage industry").
5. See Stephen J. Carroll et al., *Asbestos Litigation* 76-77 (Rand Corp. 2005).
6. See Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. at 1071, 1098 (2014).

7. See DII Industries, LLC Asbestos Personal Injury Trust Distribution Procedures, §5.7(c) at p. 29, *available at* <http://www.diiasbestostrust.org/wp-content/uploads/2018/01/Eighth-Amended-TDP.pdf> (emphasis added) (last accessed August 3, 2023).
8. See *e.g.*, 2002 Trust Distribution Process of Manville Personal Injury Settlement Trust at 7-9, *available at* <https://www.claimsres.com/wp-content/uploads/2016/11/2002-TDP-May-2021-Revision-1.pdf> (last accessed August 3, 2023). ■

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