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From: Bob Best
Office: Corporate Safety
Date: May 6, 1983

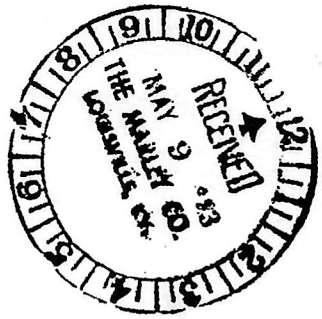
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# Suits over other products won't match asbestos crisis

Will future toxic tort litigation reach the magnitude of asbestos litigation?

Most defense and plaintiffs' attorneys answer that question with a qualified "No."

Probably no one substance will create as much litigation as asbestos, they say, but medical and legal uncertainties make it impossible to be sure.

Even if litigation over one chemical or substance doesn't produce the volume of lawsuits generated by asbestos injuries, some say that cumulative toxic tort litigation will keep companies and insurers in court for years.

"I don't anticipate another asbestos on the horizon," says defense attorney O.J. Weber, with the Beaumont, Texas, firm of Mehaffy, Weber, Keith & Gonsoulin. "But the cumulative effect of it (toxic tort litigation) poses a very real and serious danger to manufacturers and suppliers of products."

"My personal feeling is that asbestos is probably the worst of the toxic torts we are going to see," adds Leslie A. Miller, a defense attorney with the Philadelphia firm of LaBrum & Doak. "I don't foresee other substances that will equal it," with the exception perhaps of toxic chemicals, she says.

"The evidence so far suggests that toxic tort litigation will not be as extensive or expensive," as asbestos litigation, adds Leslie Cheek III, vp for Crum & Forster.

Attorneys cite several reasons that future toxic tort litigation may not match asbestos litigation.

They include that many of the chemicals and substances in question are not as widely used as asbestos; the medical evidence linking them with various diseases is not as strong; and current safety standards on the use of the products have improved considerably, resulting in workplaces that are generally safer than they were decades ago.

Some say petrochemicals could be a great source of future lawsuits, but the litigation they prompt won't be anywhere as large as that prompted by asbestos, says a counsel for Exxon Co.

"I don't think it will be anything like asbestos," said Edward Lowenberg. "There is less of a pool of potentially exposed people."

Another reason there should be fewer suits with other substances than with asbestos is that asbestos was used for so long before it was realized that it was causing disease.

"We had a long period of time when many people used it without being aware of the potential problem," Mr. Weber says.

However, some people dispute that the companies that manufactured or used asbestos did not know that it was dangerous.

But the long-latency period that exists between exposure to asbestos and manifestation of the disease does not exist for many of the diseases triggered by other toxic substances. Therefore, the danger of using them is realized sooner, decreasing the number of suits.

Another reason asbestos has prompted so many lawsuits is that a direct link has been made between exposure to it and certain diseases. This is not the case with the other substances.

Asbestos is different because no one doubts it causes such diseases as asbestosis or mesothelioma, adds plaintiffs' attorney Stanley J. Levy of the New York firm of Kreindler & Kreindler. "Those really aren't questions anymore." Mesothelioma is cancer of the lining of the lung.

But with other substances there may not be the causal link to certain diseases.

"I don't think there will be the same type of volume (of future lawsuits)," Mr. Levy says. "I doubt we will get 20,000 cases from a particular substance."

Safer workplaces also will decrease the number of lawsuits. "If you look at the strides in workplace safety and knowledge of the chemical industry, there is in place in most industries very significant preventive programs," says Les Cheek, vp-federal affairs for Crum & Forster.

Mr. Cheek also points to studies that indicate occupational cancer has been on the decline since the 1930s.

But, one thing that could lead to more litigation, according to Mr. Cheek, is if federal legislation shifts to defendants the burden of proving that their product does not hurt plaintiffs rather than making plaintiffs prove they were hurt.

"A set of unlikely circumstances occurred with asbestos," adds Tom Brown, a policy analyst for the U.S. Labor Department. "It's not likely to happen again."

Mr. Brown points to research by Dr. Irving Selikoff of the Mount Sinai School of Medicine linking asbestos with particular diseases and the culpability of particular defendants in asbestos litigation.

According to Dr. Selikoff, a number of criteria must be present for the asbestos litigation crisis to be repeated, substituting another substance.

The criteria include widespread exposure to the public of the product or substance. Also, the substance or product must have been in existence for many years. There must be a long-latency period for the disease. It must be demonstrated that it causes cancer in humans. And it must be shown that there is more than a minimal incidence of cancer.

If these criteria are fulfilled, then insurers and manufacturers have cause for concern, Dr. Selikoff concerns. ■

# Toxic substances will haunt U.S. companies in the future

By STEPHEN TARNOFF

Asbestos litigation, already a life-threatening reality for some U.S. companies, may be only the first wave of the flood to come.

Attorneys are predicting that litigation over toxic substances will be the coming trend. And while the lawsuits generated by other toxic substances may not be as overwhelming as the number generated by asbestos, they will continue to harass and endanger businesses for many years.

"It's clear that toxic tort litigation will continue to dominate the tort system through the 1980s," says Leslie A. Miller, an attorney with the Philadelphia firm of LaBrum & Doak who has been involved in toxic tort litigation.




"I think asbestos has set a precedent for toxic tort litigation. It's opened up the floodgates."

"This is the new litigation," says Michael Sommerville, manager of the special claims unit of Commercial Union Insurance Co. "This is the litigation that will be very destructive to the insurance industry."

In 1978, the National Institute of Occupational Safety and Health listed 2,400 substances as suspected carcinogens, or cancer-causing agents.

Aside from asbestos, the product causing the most litigation now is Agent Orange.

Used during the Vietman War as a defoliant, the substance contains dioxin, which has been linked to a number of ailments including skin disorders, liver diseases and many forms of cancer.

More than 2.4 million servicemen were believed to be exposed to Agent Orange.

The first suits were filed in the late 1970s, and now there are more than 10,000 plaintiffs in the U.S. District Court in New York.

A class action has been certified in the litigation, but the potential number of class members is unknown because it could include the fathers, mothers, wives and children of servicemen exposed to the substance.

Plaintiffs' attorneys are estimating that about 20,000 claims will be filed in the near future, but they add that more could follow.

"Agent Orange is bigger than asbestos, but nobody can say how big it is," says plaintiffs' attorney Steve Schlegel of the Chicago firm of Schlegel and Trafelet Ltd.

"As a single piece of litigation, it is the most legally complex and the biggest high-stakes litigation ever filed in the history of products liability litigation."

About 14 manufacturers of Agent Orange have so far been named as defendants in the suits. A trial is set for later this year to determine if the companies can escape liability because they manufactured Agent Orange according to government specifications.

Based on research conducted by Commercial Union and Liberty Mutual, other substances and products that either have triggered litigation or could in the future include:

- Formaldehyde. This industrial chemical, the use of which is probably increasing despite its toxicity, could be the next biggest source of lawsuits, according to Mr. Sommerville.

About 700 formaldehyde lawsuits had been filed as of

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# Toxic tort litigation expected to increase

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January. Commercial Union reported that it was on the risk for about 233 cases, about the same as the number of asbestos suits the insurer faced in 1978.

The suits are being filed at an increasing rate, Mr. Sommerville says, with settlements ranging from $400 to $50,000. The average case is settled for about $5,000.

As of January, eight cases had been tried with four defense victories and four plaintiffs' verdicts. Three of the judgments exceeded $500,000, he said.

Hazards associated with formaldehyde include irritation of the respiratory tract, eyes and skin. Acute irritation to the respiratory tract has caused death.

Typical defendants include chemical companies, manufacturers of urea formaldehyde foam insulations, resin and adhesive manufacturers and morticians' supply companies.

• Benzene. According to one estimate, more than 7 million workers have been exposed to this substance. "For this reason, this could be the next big one," Mr. Sommerville says.

In high doses, benzene exposure can lead to blood disorders including aplastic anemia and leukemia. Chromosomal damage is also alleged.

Potential defendants include large petroleum companies, chemical companies, shipyards and tire manufacturers.

• Vinyl chloride. A sweet-smelling, colorless gas, vinyl chloride is easily ignited and found in a variety of plastic materials. It is a suspected carcinogen as well as a cause of many other disorders.

In 1974, NIOSH concluded that a new occupational cancer, angiosarcoma, had been discovered and linked it to vinyl chloride. Vinyl chloride may also cause headaches, dizziness, anemia and skin problems. Its use is strictly regulated.

As of January, there were approximately 1,000 vinyl chloride lawsuits pending, including 10 to 15 occupational exposure cases. Typical defendants include plastic manufacturers, often subsidiaries of rubber companies.

• Polychlorinated Biphenyls (PCBs). A toxic environmental contaminant that is linked to cancer, PCBs are prohibited from use by law except under limited circumstances. Defendants in such cases include manufacturers of industrial electrical transformers and businesses involved in basic metal prodution like steel mills and die-casting, electric utilities, electrical equipment repair firms, food and feed processing companies, metal salvage and mining companies and railroads.

Several large property damage judgments have been awarded in PCB spills.

• Kepone. A suspected carcinogen, Kepone is a pesticide that has severely restricted applications in the workplace.

It is also alleged to cause complications in the central nervous system with symptoms like visual disturbances, weight loss, nervousness and insomnia.

Probably fewer than 50 companies process or formulate pesticides using Kepone and perhaps 600 workers were exposed to it, according to NIOSH. No U.S. companies are believed to presently manufacture it; the last known U.S. plant was closed in 1975.

Few Kepone lawsuits are pending, according to Mr. Sommerville. Defendants include one small and several large chemical manufacturing companies.

• Lead. A widely used material, lead can be found in piping, paint, battery cells, cosmetics, construction, glass manufacturing, printing and fuel blending.

Most of the health hazards posed by lead poisoning have been eliminated, controlled or monitored, but use of the mineral will continue to be a problem for "small shops" and in the construction trades, according to Christopher Mansfield, assistant vp and counsel at Liberty Mutual Insurance Co.

There was a million-dollar verdict in a lead suit last year in Massachusetts, but widespread litigation is not anticipated.

• Radiation. No one disputes that a high level of radiation is dangerous and much of the litigation, already some 300 suits, pivots on defining an acceptable level. "But what about low-level, long-term effects?" Mr. Mansfield asks.

There are hundreds of thousands of people who are potential targets for radiation exposure, including dental technicians and pathologists.

"Because of the numbers, we view this as a major problem of the insurance industry," Mr. Mansfield adds.

• Coffee. This popular substance is linked to pancreatic cancer, which kills more than 20,000 persons annually and is the fourth leading cause of cancer deaths.

It is uncertain whether coffee or a decaffeinating chemical is the dangerous agent. But as researchers watch the effects more closely, they are finding an increasing association between coffee and cancer of the pancreas.

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"But association does not mean cause and effect," Mr. Mansfield emphasizes.

Currently, no suits are pending over injuries from coffee, but some insurers are concerned, he says. "The universe of exposed people is larger than (that of) asbestos. It's a very frightening thing to look at."

● Cadmium. Used as a protective coating in the electroplating, wire and battery industries, and as pigment in the glass and paint industry, cadmium has been related to systemic poisoning and lung disease.

Litigation is currently confined to workers compensation claims, but there is concern that product liability cases will follow.

"Insurance companies are getting ready for this as a possibility," Mr. Mansfield says, although no one is sure if and when exposure will result in widespread litigation.

● Trichloroethylene (TCE). Widely used as an industrial solvent, TCE can be encountered by humans through inhalation of vapors and possibly contaminated drinking water. Exposure can result in central nervous system depression, visual disturbances, mental confusion and fatigue. It is also a suspected carcinogen, though it has spurred little personal injury litigation so far.

● Toluene Di-Isocynate (TDI). This substance is used in the manufacture of polyurethane foam rubber, plastic coating for wire, adhesives, leather processing, paints, varnishes and lacquers. The heat of a fire causes its release from building materials. It is a suspected carcinogen.

There are currently pending several hundred personal injury cases relating to exposure primarily from occupations involved in the manufacture of polyurethane foam.

● Diethylstilbestrol (DES). A synthetic estrogen that came on the market in 1947 for use in troubled pregnancies, a possible association between its administration to pregnant women and medical problems in female and male offspring was found in 1971.

Some predict DES will cause thousands of lawsuits; there are now more than 400 cases filed representing thousands of plaintiffs.

● Tampons. These products are alleged to cause toxic shock syndrome, an acute illness whose symptoms include fever, rash and hypertension. More than 1,000 cases have been filed, and six cased have already been decided. Both defendants and plaintiffs have won victories.

● Intrauterine devices (IUDs). These products are made of plastic and designed to fit in the uterine cavity to prevent conception. Most of the litigation has centered on the Dalkon Shield made by A.H. Robins Co., which is no longer on the market. There are currently more than 2,500 cases pending, and defendants have won more often than plaintiffs.

Plaintiffs allege the devices cause infections of the uterus. Also, a spontaneous abortion can result if a woman becomes pregnant while an IUD is in place.

● Benedictin. A product designed to ameliorate the nausea of pregnancy, it has been taken by hundreds of thousands of pregnant woman for many years. It has been alleged to cause birth defects in children whose mothers took it. There are approximately 220 cases pending.

Other substances that have brought large numbers of suits, or could in the future, include silicosis, chemicals known as PBNAs, BNAs, petroleum coke, welding rods, nitrous oxide, chromium, Agent White and various printers' inks. ■

# Medical advances, changes in law prompt litigation

What's behind the dramatic increase in toxic tort litigation?

Mainly, the advances made in medical science over the last few decades and changes in product liability law.

Now, science can link exposure to various substances with the diseases they cause. And, if the plaintiff can point a finger at a particular group of manufacturers and has scientific proof to back his case, a lawsuit is almost inevitable.

According to Christopher Mansfield, assistant vp and counsel at Liberty Mutual Insurance Co. in Boston, it is neither greedy plaintiffs nor their attorneys that are causing the wave of toxic litigation.

"The fact is, science has caught up with technology," he says.

For example, epidemiological studies that link exposure with diseases have lagged behind technological applications of the substances and their entrance into commerce and the workplace, Mr. Mansfield explains.

"Now it (science) is catching up with the technology."

While much of the future litigation hinges on this link between exposure and the disease, others point to changes in product liability law and growing consumer awareness as reasons for the increase in lawsuits.

Attorneys say changes in statutes of limitations, the broadening of discovery proceedings and the shifting of burden of proof to defendants are the culprits.

Defense attorney Leslie A. Miller of the firm of LaBrum & Doak in Philadelphia says plaintiffs' attorneys are developing new theories to get around traditional product liability theories. In some cases, plaintiffs are able to shift the burden of proof to manufacturers in various situations even where the responsible manufacturer can't be identified, she says.

**A spokesman** for another company cites the doctrine of collateral estoppel as another example of how the balance is tipping in favor of the plaintiffs. Under collateral estoppel, a plaintiff can ask that a prior court ruling be applied to his case without having to litigate the issue again.

"If you try a case as a manufacturer and win, you can't use it (in future litigation)," said Paul J. Gallo, insurance administrator for ACF dustries in New York, about the law in s states.

"If you try it and lose it, however, it automatically be used against you. We sl the fear (about toxic torts) that everyone is pressing."

**Ms. Miller** predicts there also will be n toxic tort suits for emotional distress to r tives and others not directly injured by e sure to a toxic substance.

Other factors contributing to the increas litigation, according to Ms. Miller, are creased awareness on the part of the pu lawyer advertising, exchanges of evid among lawyers and plaintiffs' lawyers in ing more time in a case because of a gre potential for recovery.

"As far as I'm concerned, the disease is contingent fee," says James Hanes, counse Dow Chemical Co. in Midland, Mich., of system which allows attorneys to collect third to one-half of the plaintiffs' award. " get-rich-quick scheme for plaintiffs' a neys."