

Asbestos Fraud

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Every law school should offer a course in legal ethics called "How Lawyers Abuse the Law." The first case study would be asbestos litigation, which shows how the thirst for profits has led a small group of trial lawyers to erode the rights of legitimate victims while driving dozens of companies into bankruptcy and -- worst of all -- corrupting the court system. If Congress does not fix this problem, shame on it.

Trial lawyers once did heroic work on asbestos. They forced old-line asbestos companies, which hadn't protected workers against known dangers, to compensate legitimate victims. Because asbestos had been widely used as insulation in shipbuilding (for hot pipes) and in construction, some companies couldn't survive. Johns Manville, the leading producer, went bankrupt in 1982. But litigation was expected to decline because asbestos use dropped sharply. In 2001 it was only 3 percent of its 1973 peak.

Instead, new claims have exploded. By 2000, they totaled 600,000 and were rising by about 50,000 a year, says the Rand Institute for Civil Justice, a think tank. Contrast these numbers with the Manville experience. After bankruptcy, it proposed a trust (to be funded by non-asbestos businesses) to pay victims. At the time, experts said the trust would receive from 83,000 to 100,000 claims. It's already six times that level.

What happened? The answer is that claims are paid to people who aren't sick. Asbestos litigation has become less about justice and more about business. Trial lawyers have -- by shopping for the right state courts and exploiting permissive liability laws -- turned asbestos into a cash cow. Already, asbestos claims have cost \$54 billion, estimates Rand. Less than half has gone to actual victims. In the 1990s, they got only 43 percent. The rest went mainly to trial lawyers (who brought the cases) and defense lawyers (who fought them).

Projections of the ultimate costs now range from \$200 billion to \$275 billion. The final number of claimants is projected from 1 million to 3 million. These estimates could be low, because all estimates so far have

been low. As costs and claimants have grown, more companies have been sued; the total now is about 6,000. Many simply used some asbestos product.

When the costs become overwhelming, companies go bankrupt. More than 50 have already done so, a third in the past two years. Once in bankruptcy, companies suspend payments to asbestos claimants but continue normal operations. Ultimately a company may emerge from bankruptcy with a "trust," which owns most of its stock and resumes partial payments to claimants. There's a transfer of wealth from today's shareholders -- pension funds, mutual funds, retirees, workers -- to lawyers and victims.

The situation has become so absurd that even a few trial lawyers denounce it. Steven Kazan, who has represented cancer victims since 1974, testified recently before the Senate Judiciary Committee that the scorched-earth tactics of other trial lawyers have made it harder for genuine victims to recover. Payments to lots of undeserving claimants take away from people who actually die, or their families.

The most serious asbestos-related disease is mesothelioma, a cancer of the lining of the chest and abdomen. It usually kills in one to two years; asbestos is the only known cause. The number of annual cases is estimated from 2,000 to 2,500. Including lung cancer, all cancer cases account for about 10 percent of new claims, says Rand. There are some serious cases of asbestosis, a damaging of the lungs that can cause breathing difficulties.

But most people who sue suffer no "impairment" from asbestos, even if X-rays show some slight scarring of lung tissue, says Rand. In plain language, their health isn't affected. Trial lawyers actively recruit claimants who didn't know they were "sick." There are mass X-ray screenings and ads. Said one Internet ad: "Find out if YOU have MILLION DOLLAR LUNGS."

"We've gone from a medical model in which a doctor diagnoses an illness and the patient then hires a lawyer, to an entrepreneurial model in which clients are recruited by lawyers who then file suit even when there is no real illness," Kazan testified. "They are not patients. They are plaintiffs recruited for profit."

In theory, judges should prevent abuses. In practice, trial lawyers depend on a few states, whose expansive liability laws, procedural rules or well-known anti-corporate biases shift the odds in their favor. The Association of

Trial Lawyers of America reports that 85 percent of cases are filed in 10 states. Mississippi, Texas and West Virginia are leaders. Facing hostile judges and juries, companies often settle -- even if the evidence is on their side.

Among ordinary people, there is a word for this: fraud. This is a legalized fraud. A fraud is a calculated deceit. The deceit here is that the legal system is being used primarily to compensate legitimate victims when something else is occurring. Many people suffering no sickness are paid small sums so that a few trial lawyers can be paid large sums. Fred Baron, a leading trial attorney and spokesman for the trial lawyers' association, estimates that about 700 trial lawyers are engaged in asbestos litigation.

Congress could end this lavish welfare program for lawyers. It could preempt state law on asbestos; it could set strict medical standards for damages; it could put a cap on lawyers' fees. It could channel more money to deserving victims and reduce the total costs of asbestos settlements. It could limit this economic scourge and restore some self-respect to the law, which ought to be an instrument for social good and not lawyer enrichment.