

## Draft: The Long Tail of Asbestos Personal Injury Litigation

### Summary

The 1971 jury verdict in *Borel v Fiberboard et al.*, the first asbestos personal injury case decided in favor of a plaintiff in the US, initiated what has now been 45 years of mass tort asbestos litigation. Since *Borel*, hundreds of thousands of lawsuits and claims for compensation from trusts<sup>1</sup> have been filed in the US by workers who were exposed to asbestos in their work places and subsequently contracted asbestosis, lung cancer, or mesothelioma, the primary asbestos-associated diseases, or other diseases and abnormalities presumed to be caused by exposure to asbestos. These workers were miners, workers fabricating asbestos-containing products, and workers using asbestos-containing products including, e.g., insulation, gaskets, friction materials, wallboard, sealing compounds, roofing materials, and flooring. Until 1972 when the US Occupational Safety and Health Administration (OSHA) promulgated an occupational exposure limit for asbestos, many of these workers would have experienced extremely high levels of exposure to airborne asbestos in their work places over a period of many years.

Because the risks of asbestos-associated diseases increase with increasing lifetime exposure, after 1972 the incidence of asbestos-associated diseases in the US would have been expected to peak and then decline toward zero. The same pattern over time would have been expected for the number of asbestos personal injury lawsuits. Although both the incidence of disease and the filings of asbestos lawsuits have decreased, the reductions have been much less dramatic than would be expected based on disease latency and aging of the cohort of workers who were historically exposed to high levels of asbestos. Even today, more than 44 years after OSHA's initial exposure limit was promulgated, new lawsuits and new claims for compensation to be paid from settlement trusts are being filed.

Mesothelioma is, and will continue to be, the most significant asbestos-associated disease defining the long tail of asbestos personal injury litigation. Mesothelioma has been referred to as a sentinel disease for asbestos. This characterization of mesothelioma has often been incorrectly interpreted to mean that asbestos is the only cause of mesothelioma. Although there are a few established causal risk factors for mesothelioma other than asbestos, of more importance for assessing causality is the notable background rate of mesothelioma, i.e., mesothelioma cases that occur as a consequence of spontaneous tumor formation that is not associated with asbestos or any other known risk factor.<sup>2</sup>

Background mesothelioma cases are found not only among individuals who have never been exposed to asbestos, but also among individuals who may have experienced one or more low-level exposures to asbestos. Collectively, an individual's low-level exposures to asbestos increase the risk of mesothelioma only negligibly. However, at present, courts often find and

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<sup>1</sup> A number of former manufacturers of asbestos-containing products have filed for bankruptcy under Chapter 11 of the US Bankruptcy Code. As a condition for reorganization approval under the Code, a company must establish a fund referred to as a *Trust* that is designed to pay qualifying asbestos personal injury claims including future claims. See for example: Manville Trust ([mantrust.claimsres.com/](http://mantrust.claimsres.com/)); WR Grace Trust ([www.wrgraceasbestostrust.com/](http://www.wrgraceasbestostrust.com/))

<sup>2</sup> To eliminate any confusion about the term *background* in the context of this article, note that *background* is not an ambient level of asbestos, but refers to cases of mesothelioma where neither asbestos nor any other identifiable risk factor is the cause.

trusts often conclude that any and every asbestos exposure is a *substantial factor in causing* the disease.<sup>3</sup>

Concerning mesothelioma risk, all asbestos exposures are not the same. Differences in asbestos fiber mineral type and the size distribution of airborne asbestos particles, as well as the frequency and duration of exposure, and total cumulative exposure, all matter for assessing mesothelioma risk. Many studies have addressed these differences and provide reliable data for updating the factual basis for determining the risk characteristics of asbestos exposure for mesothelioma. To manage future mesothelioma claims fairly, courts and trusts need to recognize these differences and update the set of scientific data currently being used to determine whether or not a plaintiff's exposure to a particular asbestos-containing product was a substantial factor in causing the plaintiff's disease. The challenge for science, in particular for epidemiology, is to provide guidance to the legal community on considering all relevant facts related to an asbestos exposure in an effort to determine whether the exposure was or was not a substantial contribution to disease causation.

Concerning the "one fiber" and "any and every" exposure causation theories for mesothelioma, which only recently have been discredited in some legal decisions,<sup>4</sup> this report describes how EPA in the 1980s unwittingly promoted these theories and, of more significance, that EPA tried to retract these theories in the 1990s, albeit unsuccessfully. Further, summaries are presented of research that support the existence of background cases of mesothelioma and project the increasing percentage of background cases in the US relative to all US mesothelioma cases. Also data are summarized that show differential potencies for mesothelioma based on asbestos mineral type and morphology. Most of these research results, although known for many years, have not been fully expounded in causal analyses of mesothelioma cases in the courtroom or by the trusts. The facts summarized in this report lead to the conclusion that virtually all future mesothelioma cases in the US will be background cases, which, if acknowledged by courts and trusts, will reduce and then eliminate the long tail of asbestos personal injury litigation.

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<sup>3</sup> *Substantial factor in causing* is a legal phrase of art that applies to an asbestos exposure and assigns liability to a defendant found to be responsible for the exposure. This criterion and other criteria applied in legal proceedings to determine causation are discussed in the full report.

<sup>4</sup> e.g., Rulings of Judge Mark Davidson 11<sup>th</sup> District Court, Houston, Texas 77002 (July 18, 2007) on Motions for Summary Judgement Re: Cause No. 2004-3,964; In re: Asbestos; Cause No. 2006-51,043; Pena v. Bondex, et al; Cause No. 2004-21,092; Shake v. Quigley et al; Cause No. 2006-71,957; Parker v. Alva Laval.