

A SURVEY OF ASBESTOS LITIGATION— NATIONALLY AND IN INDIANA

Jason L. Kennedy
Jill M. Felkins*

I. THE MAGIC MINERAL

Before its rapid fall from grace, asbestos was considered a “magic mineral” that could be used in countless products to provide protection and comfort to all mankind.¹ Immune to destruction by fire, water, and chemicals, it was thought that it would be “a slow and unsafe world if, suddenly, all asbestos were taken away from homes, from industries, and from transportation.”²

The first modern asbestos mine was opened in Lombardy, Italy, in 1866 and the first Canadian mine in approximately 1877.³ According to some sources, asbestos was used for heat insulation as early as 1866.⁴

Johns-Manville was founded in 1858 by Henry Ward Johns who patented inventions for roofing and insulation products.⁵ According to most sources, from the 1920s until the 1970s Johns-Manville was both the largest manufacturer of asbestos-containing products and the largest supplier of asbestos in the United States.⁶

The rapid expansion in the use of steam power at higher and higher temperatures in the 1870s greatly increased the need for efficient insulation

* Mr. Kennedy is a shareholder with Segal McCambridge Singer & Mahoney and is a member of the Defense Trial Counsel of Indiana. He is a 1992 graduate of the Indiana University Kelley School of Business, a 1996 graduate of the Indiana University School of Law-Bloomington and a member of the DTCL. Ms. Felkins is an associate with Segal McCambridge Singer & Mahoney. She is a 2004 graduate of the Indiana University School of Journalism and a 2007 graduate of the Indiana University School of Law-Bloomington.

¹ LILIAN HOMES STRACK, *ASBESTOS: A MAGIC MINERAL* 54 (Harper & Brothers 1941).

² *Id.*

³ See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 735-36, (E.D.N.Y. 1991), *rev'd on other grounds* (citing Selikoff & Seidman, *Asbestos-Associated Deaths among Asbestos Insulation Workers*, presented at “The Third Wave of Asbestos Disease Exposure to Asbestos in Place” (conference in New York, June 7-9, 1990) (citing Jones, *Asbestos and Asbestic: With Some Account of the Recent Discovery of the Latter at Danville, in Lower Canada*, 45 J. Soc. Arts 3-15 (1897))).

⁴ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 735-36 (citing H. BERGER, *ASBESTOS FUNDAMENTALS, ORIGIN, PROPERTIES, MINING, PROCESSING, UTILIZATION* (1963)).

⁵ See *In re Joint E. & S. Dist. Asbestos Litig.*, at 742-43.

⁶ *Id.*; see also PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 3-5 (Pantheon, 1985).

materials.⁷ Seeking to take advantage of its fire retardant qualities, Dr. Richard Mattison decided to replace shredded hemp, which deteriorated rapidly, with asbestos fibers in reinforcing insulation materials, molded-pipe coverings, block insulation, and magnesium cement.⁸ “[T]hus was born ‘85% magnesia’ insulation, destined to become the standard high temperature thermal insulation for many years.”⁹ Thereafter, Mattison along with Henry G. Keasbey became leading manufacturers of asbestos products.¹⁰

At approximately the same time, Henry Ward Johns was granted an 1890 patent for a process to create a superior insulating product by blending previously unusable short asbestos fibers with magnesia and started an empire.¹¹ Thomas F. Manville took control of the newly merged Johns-Manville Company in 1901.¹² Under Manville, the firm reached more than \$40 million in annual sales before the Depression and \$60 million by 1937.¹³ Lewis H. Brown led the company out of the Depression; its unstoppable growth drew the notice of *Time* magazine, which placed Brown on its April 3, 1939, cover.¹⁴

II. EARLY LITIGATION

The first widespread recognition of the potential dangers associated with asbestos-containing products occurred when Dr. Irving Selikoff published the results of his study on the effects of asbestos on members of the International Association of Heat, Frost and Asbestos Workers Union.¹⁵ Dr. Selikoff established a link between exposure to asbestos and the high cancer and asbestosis rates among insulators.¹⁶ Shortly after this development, on December 21, 1962, insulator Claude Tomplait filed the first asbestos lawsuit in Texas and was eventually awarded a total of \$75,000 split among seven defendants.¹⁷ Mr. Tomplait received \$37,500 of that award.¹⁸

Shortly after *Tomplait*, on October 20, 1969, Clarence Borel, a Texas insulator, filed suit against eleven defendants, testing for the first time the

⁷ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 735-36.

⁸ *Id.* (citing Bettes, *The History of Asbestos in the Textile Industry in the United States*, 52 *ASBESTOS* 2-12 (1971)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See David Kotelchick, *Asbestos: “The Funeral Dress of Kings”—and Others*, in *DYING FOR WORK* 192, 193 (Gerald Markowitz ed., 1989).

¹² *Id.* at 194.

¹³ *Id.*

¹⁴ *Id.* at 198.

¹⁵ John M. Wylie II, *A Report on the Asbestos Litigation Industry*, 2008 *CENTER FOR LEGAL POL’Y AT THE MANHATTAN INST.* 8-11 (“Wylie II”), at 5.

¹⁶ *Id.*

¹⁷ *BRODEUR*, *supra* note 6, 24-26

¹⁸ *Wylie II*, 8-11.

applicability of Restatement section 402A's strict liability theory to asbestos insulation products.¹⁹ Mr. Borel died before trial but not before giving a deposition that described his career as an insulator and his work with asbestos insulation materials.²⁰ The trial began on September 21, 1971, against Fibreboard, Johns-Manville, Pittsburgh Corning, Philip Carey, Ruberoid, and Armstrong.²¹ The jury returned a verdict against Johns-Manville, Fibreboard, Ruberoid, and Philip Carey on the basis of strict liability and the total amount of the verdict was \$79,436.24.²²

An appeal of that verdict followed, and on September 10, 1973, the U.S. Court of Appeals for the Fifth Circuit held that manufacturers of asbestos-containing products are strictly liable for failure to warn of the dangers associated with their products.²³ As the *Borel* case illustrates, the initial focus of asbestos litigation was on asbestos producers and manufacturers of asbestos-containing insulation products who allegedly knew of the dangers associated with asbestos exposure long before the hazards became public knowledge, but who nevertheless placed asbestos-containing products in the stream of commerce without any warning of the danger.

Neither Mr. Tomplait nor Mr. Borel could have known that their lawsuits would spawn "the longest running mass tort in U.S. history"²⁴ or that "[i]n the history of our legal system, no other type of litigation has been so profuse, long-standing, and difficult to resolve."²⁵ In fact, the RAND 2002 and 2005 Reports estimate that "[o]ver 730,000 people have filed claims" and those claims are, "typically against dozens of defendants, for asbestos-related personal injuries through the end of 2000."²⁶ Further, "[o]ver 6,000 companies have been named as defendants" and "[a] total of \$54 billion has already been spent on asbestos litigation."²⁷

¹⁹ BRODEUR, *supra* note 6, at 39-41 (Of the 11 defendants originally sued in the *Borel* case were Fibreboard, Johns-Manville, Pittsburgh Corning, Owens Corning, UNARCO, Combustion Engineering, Eagle Picher, Philip Carey, Armstrong Contracting & Supply, Ruberoid Company, Standard Asbestos Manufacturing & Insulating Company, all are now bankrupt.).

²⁰ *Id.* at 41-42.

²¹ *Id.* at 43-64 (before trial, Owens Corning and Standard Asbestos settled for \$3000 each, UNARCO and Eagle Picher for \$5000 each).

²² *Id.* at 61-64.

²³ See *Borel v. Fibreboard Corp.*, 493 F.2d 1076 (5th Cir. 1973).

²⁴ Stephen J. Carroll, *et al.*, *Asbestos Litigation Costs and Compensation: An Interim Report*, 2002 RAND INST. FOR CIV. JUST. v (hereinafter "RAND 2002 REPORT")

²⁵ Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 2002 NAT'L LEGAL CENTER FOR THE PUB. INT. 2. Judge Bell is a former judge of the United States Court of Appeals for the Fifth Circuit and a former attorney general of the United States.

²⁶ RAND 2002 REPORT, *supra* note 24, at vi; see also Stephen J. Carroll, *et al.*, *Asbestos Litigation Costs and Compensation*, 2005 RAND INST. FOR CIV. JUST. (hereinafter "RAND 2005 REPORT"); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821, 119 S. Ct. 2295, 2302 (1999) (referring to "the elephantine mass of asbestos cases").

²⁷ RAND 2002 REPORT, *supra* note 24, at vi-vii.

A little more than 40 years after Johns-Manville's CEO appeared on the cover of *Time*, on August 26, 1982, Johns-Manville, the world's largest asbestos company filed for bankruptcy.²⁸ Johns-Manville was ranked 181st on the Fortune 500 list of leading industrial corporations and had assets of more than \$2 billion dollars.²⁹ In addition, at the time that Johns-Manville filed for bankruptcy, approximately 500 lawsuits were being filed against it every month (an average of 16 to 17 per day) and approximately 16,500 lawsuits were pending against it.³⁰ At the time of its bankruptcy, half of the pending lawsuits filed against Johns-Manville were on behalf of plaintiffs who had been shipyard workers involved in ship construction and maintenance during World War II.³¹

Since the time of the Johns-Manville bankruptcy, the litigation continued and the number of claims mounted, and other manufacturers followed Johns-Manville's demise.³² In 2000, Owens Corning Fiberglas Corporation, also one of the largest "traditional" asbestos manufacturer defendants, "was forced to file for bankruptcy because claimants continued to bring more claims seeking larger and larger settlements."³³ Today, "[v]irtually all of the original, 'traditional' asbestos manufacturers are bankrupt."³⁴ As a result, "the bankruptcies associated with asbestos liabilities have had a marked deleterious effect on workers in those firms."³⁵

III. THE NEW DEFENDANTS

Because of this development (and the subsequent halt of payments by the traditional defendants), "the litigation has moved on to a wide variety of new defendants."³⁶ These new defendants include:

²⁸ See BRODEUR, *supra* note 6, at 3-5; see also Mariana S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 L. & Contemp. Probs. 27, 29 (1990)

²⁹ See BRODEUR, *supra* note 6, at 3-5.

³⁰ *Id.*

³¹ *Id.*; see also Smith, *supra* note 28, at 27, 29.

³² Jennifer L. Biggs, Statement of Jennifer L. Biggs, FCAS, MAAA, Chairperson, Mass Torts Subcommittee, American Academy of Actuaries, to the United States Senate Committee on the Judiciary 1 (Am. Acad. of Actuaries, Sept. 25, 2002) note 12, at 18 (partial list of "Asbestos Defendants Declaring Bankruptcy"); RAND 2002 REPORT, *supra* note 24, at 31 ("As filings surged, many of the product manufacturers that plaintiff attorneys had traditionally targeted as lead defendants filed for bankruptcy").

³³ Paul F. Rothstein, *What Courts Can Do In the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 4 n.18 (2001).

³⁴ Bell, *supra* note 25, at 24. See also Biggs, *supra* note 32, at 5 ("As a result of asbestos litigation, many companies, including nearly all of the major asbestos manufacturers, have declared bankruptcy").

³⁵ *Overview of Asbestos Claims Issues and Trends*, 2007 AM. ACAD. OF ACTUARIES' MASS TORTS SUBCOMMITTEE 8 (finding that workers suffered from job, wage, and pension losses).

³⁶ RAND 2002 REPORT, *supra* note 24, at 49. See also Rothstein, *supra* note 33, at 6 ("As the primary asbestos defendants have declared bankruptcy, the list of defendants has been expanded to include companies with little more than a remote connection to asbestos.").

businesses that had asbestos-containing products in their buildings, automobile manufacturers, telephone companies, computer makers, manufacturers of electrical wire and welding rods, consumer product retailers and even food and wine makers. Most of these defendants never manufactured asbestos; yet they are forced to reallocate funds to asbestos claims and away from job growth, research and development, and other economic investments.³⁷

Although the premises owners and other peripheral defendants “generally have attenuated connection to asbestos,”³⁸ . . . “Plaintiffs seek compensation from these peripheral defendants to make up for the loss of funds from larger, more culpable companies that have gone into bankruptcy.”³⁹

This new wave of asbestos litigation “has spread to touch firms in industries engaged in almost every form of economic activity that takes place in the American economy.”⁴⁰ The initial RAND study of asbestos costs and compensation published in 1983 “found the list of defendants named on asbestos claims included approximately 300 firms.”⁴¹ By contrast, the RAND 2002 Report “identified over 6,000 entirely independent entities that have been named as defendants on an asbestos personal injury claim.”⁴² Indeed, “[t]he list of defendants now ranges across 75 out of the 83 different types of industries in the U.S.” and “span[s] the full range of American business.”⁴³ Many of today’s asbestos litigation defendants “are large corporations with thousands of employees and billions in revenues,” but “[o]thers are firms with as few as 20 employees and just a few million dollars in annual revenue.”⁴⁴ In the current environment, “[a]ny company . . . that had a small amount of asbestos on its premises in one or two isolated locations . . . is a

³⁷ Bell, *supra* note 25, at 24-25. See also Rothstein, *supra* note 33, at 6 (“The new defendants are diverse, ranging from oil companies, to automobile manufacturers, to hospitals and colleges.”).

³⁸ Bell, *supra* note 25, at 24-25.

³⁹ *Id.* at 3. See also Biggs, *supra* note 32, at 1 (“As the initial targets in the litigation have become unable to pay their share of damages, plaintiffs attorneys have named additional peripheral defendants (who did not manufacture asbestos and thus contend that they were generally less likely to have known of its dangers to human health) in the lawsuits”); Bell, *supra* note 25, at 26 (“Claims have surged as companies file for bankruptcy and plaintiff attorneys feel the pressure to accelerate the filing of claims against newly identified, solvent defendants”).

⁴⁰ RAND 2002 REPORT, *supra* note 24, at 50.

⁴¹ *Id.* at 49 (citing RAND 1983 study).

⁴² *Id.*

⁴³ *Id.* at vii, 49. The U.S. Department of Commerce uses the Standard Industrial Classification (“SIC”) system to categorize economic activity for statistical purposes. *Id.* at 49. The SIC system divides the entire U.S. economy into 83 industries (at the two-digit level), and every business in the United States is assigned an SIC code. *Id.* at 50. The RAND 2002 Report found that the list of asbestos defendants today covers “75 different SIC categories at the two-digit level.” *Id.*

⁴⁴ *Id.*

potential target in this litigation.”⁴⁵ The central issue in asbestos litigation as this seemingly never-ending crisis enters its fourth decade is “not *whether* asbestos victims should be able to receive compensation from some entity, but rather *what entity* should fairly be called upon to shoulder the financial burden.”⁴⁶

IV. THE STATE-OF-THE-ART DEFENSE REVISITED

As asbestos litigation has moved forward with the passage of time and the use of asbestos in products decreased, the average citizen’s knowledge of asbestos and its past use as a “magic mineral” is in doubt. It would likely surprise most people, and potential jurors, that it has been estimated by the EPA that friable asbestos-containing materials can be found in an estimated 733,000 public and commercial buildings (representing 20 percent of the 3.6 million buildings examined in the U.S.).⁴⁷ It would also probably surprise most people that, as of this writing, the use of asbestos in products is not subject to an absolute ban.⁴⁸ Indeed, there are many asbestos-containing products that are not banned today and can still be manufactured, sold, bought, and installed in the United States.

As we move further into the twenty-first century, the ability to convince future jurors of certain defenses in asbestos litigation may diminish. The defense in almost every asbestos case, especially those involving premises owners, relies in whole or in part on the concept of the “state-of-the-art,” that is, what was known or what was not known at any given point in time relating to the dangers of asbestos. The success of this defense relies on jurors accepting that asbestos was considered safe and beneficial to man at one time. When the litigation started in the 1970s, a 50-year-old juror at that time would have remembered how asbestos was considered “the magic mineral” and not always considered a hazardous substance. These jurors would have recalled how asbestos was used in everything from ironing board pads to oven mitts. Many of those individuals will recall how asbestos was a strategic material used in World War II, especially on naval vessels. The simple passage of time has affected the state-of-the-art defense, because those jurors, who were 50 years old in the 1970s are now in their 70s and 80s and are unlikely to be on a jury.

In fact, since the first emergency OSHA regulation relating to asbestos became effective in 1971, most jurors know only what that standard assumes asbestos to be, specifically, a hazardous substance that can cause

⁴⁵ Bell, *supra* note 25, at 24.

⁴⁶ RAND 2002 REPORT, *supra* note 24, at 87 (emphasis original).

⁴⁷ See EPA Study of Asbestos Containing Materials in Public Buildings: A Report to Congress. U.S. Environmental Protection Agency, Washington D.C. (Feb. 1988).

⁴⁸ See Asbestos. Manufacture, Importation, Processing and Distribution Prohibitions, 58 Fed. Reg. 58,964, 58,966-58,968 (Vol. 58, No. 213, Nov. 5, 1993).

injury.⁴⁹ As a result, for the past thirty-seven years, asbestos has been portrayed in the OSHA standards as a hazard and has been both heavily regulated and actively litigated. Individuals have never heard anything good about asbestos and in the 1980s probably heard the horror stories of asbestos in schools. Any juror younger than fifty-five carries this knowledge as a starting point in any asbestos case and will be evaluating the case with the belief that everyone knew asbestos was a bad and injurious substance.

The challenge for the defense bar in current and future asbestos cases is to educate jurors on the history of asbestos litigation. This involves not only educating the jurors on the past utility of asbestos in products and at facilities, but also making sure that juries evaluate the case along the lines of who knew what, when did they know it, and what did they do about it. This becomes vitally important for most premises defendants since they are the rising new targets in asbestos litigation. Most asbestos plaintiffs will claim that the dangers of asbestos at a facility or premises were reasonably foreseeable to the property owner as early as the 1930s. However, this argument conveniently glosses over the past litigation history demonstrated by the same plaintiffs' bar, namely that the manufacturers of asbestos thermal insulation engaged in a deliberate cover-up of asbestos dangers when selling their products to the users and consumers (*i.e.*, today's defendants—the property owners).⁵⁰ This course of conduct by the manufacturers of thermal asbestos insulation from the 1930s through the early 1970s casts significant doubt on plaintiffs' claims on "reasonable foreseeability" with respect to cases involving knowledge of the dangers of asbestos and the user of those products, the property owner. It is critical to demonstrate that fact to jurors in asbestos cases.

V. ASBESTOS AND SILICA SCREENINGS—NATIONWIDE AND IN INDIANA

In the past few years, media scrutiny and legal challenges have surrounded doctors and screening companies that traveled around the country, including in Indiana, providing "medical screenings" to individuals. The ostensible purpose of these screenings was to determine if a person had some form of occupational lung disease (either asbestosis or silicosis). However, the practical reality of these screenings is detailed in a 2005 federal court opinion from Judge Janis Jacks out of the Southern District of Texas.⁵¹ Specifically, beginning in the mid-1990s, these screenings were initially done nationwide by various screening companies, such as Respiratory Testing Services, ("RTS"), to meet law firm demand for asbestos cases.⁵² But some-

⁴⁹ See 36 Fed. Reg. 234, 23239-23243 (Dec. 7, 1971)

⁵⁰ See, *e.g.*, *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242 (Fla. App. 1984); see also *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710 (E.D.N.Y. 1991).

⁵¹ See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

⁵² *Id.* at 596-97

time in the late 1990s and early 2000s, law firms throughout the country, including in Indiana, began to ask for screenings for silicosis.⁵³ After these screenings were completed, many of these individuals ended up filing a lawsuit either for asbestosis, silicosis, or both.⁵⁴

These statistics are borne out in the number and dates of asbestosis cases filed in Indiana and specifically in Marion County. Beginning in approximately November 1998 and continuing through September 1999, a pronounced increase in the filing of asbestosis cases began in Marion County.⁵⁵ The rate and volume at which the cases came into the Marion County court system required the presiding court to issue an order that stayed most of the activity in all of these cases.⁵⁶ In June 2003, the first of approximately forty silica and “mixed dust” cases were filed in Marion County. All of these cases appeared to have been generated as the result of screenings conducted by RTS. At the time of this writing, the status of these screened cases, especially the silica and “mixed dust” cases remains the subject of ongoing discovery and litigation in the Marion County courts.

VI. AN UPDATE ON THE ASBESTOS BANKRUPTCY TRUSTS

As detailed in this article, numerous companies have sought the protections of the United States Bankruptcy Code, 11 U.S.C.A. § 524(g) (“524(g) trusts”).⁵⁷ Under 524(g), a company seeking permanent relief from its current and future asbestos liability can file a petition in bankruptcy court, propose a plan of reorganization that defines the rights of, *inter alia*, the asbestos claimants, nonasbestos creditors, certain other parties in interest, and of course, the debtor (the formerly solvent company) thereby charting a course for the company to emerge from bankruptcy reorganized and free and clear of its former asbestos liability. In other words, like a butterfly emerging from a cocoon, these 524(g) trusts are designed to address and remove a bankrupt company’s asbestos tort liabilities. However, unlike a corporation or other viable entity who gets sued in asbestos litigation, trusts do not “defend” themselves in this litigation in the traditional sense. Rather, these entities make payments to individuals (“claimants” or “bene-

⁵³ *Id.*

⁵⁴ *Id.* at 603. Judge Jacks stated that “a golfer is more likely to hit a hole-in-one,” than an occupational medicine specialist is to find a single case of both silicosis and asbestosis in the same plaintiff.

⁵⁵ The approximate start date for the influx of the screened cases begins with the *Alford* case (Cause Number 95-384) filed on September 15, 2000, until the *Stahl* case (Cause Number 96-710) filed on November 14, 2001. Other screened cases are undoubtedly on the docket, filed before and after these dates and cause numbers.

⁵⁶ See, e.g., In Re Marion County Asbestos Litig., 49D02-9501-MI-001 Order of Dec. 17, 2001 (this order initially applied to approximately 897 asbestos cases filed in Marion County).

⁵⁷ See William P. Shelley, Jacob C. Cohn, & Joseph A. Arnold, *The Need for Transparency between the Tort System and Section 524(g) Asbestos Trusts*, 17(2) J. BANKR. L. & PRAC. 257 (Apr. 2008); see also Victor E. Schwartz, Mark A. Behrens, & Phil S. Goldberg, *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC. 1 Art. 2 (2005).

ficiaries”) who have demonstrated threshold criteria of exposure and on behalf of whom the trust is designed to issue payments. This threshold exposure criteria are usually demonstrated by the claimant’s submitting an affidavit of exposure (e.g., “I was exposed to Johns-Manville asbestos cement from 1960 to 1970 at location X”) along with medical records that detail the nature of the alleged asbestos injury.

The “good news” for those individuals who have been legitimately injured by asbestos is that these 524(g) trusts, with assets exceeding \$30 billion have begun (or will soon begin) receiving, evaluating, and paying claims. Individuals who suffer from mesothelioma will receive as much as \$1 million dollars from these trusts. The “bad news” is the potential for abuse of these trusts with respect to the currently pending and future cases. There is a danger that valuable exposure information submitted by a claimant (who is also an asbestos plaintiff) will not be disclosed in this same individual’s tort case. There is also the potential danger of the lack of disclosure surrounding settlement monies received from these 524(g) trusts by plaintiffs with active cases in the tort system⁵⁸.

It is critical for a company who has been sued for alleged asbestos liability to discover this information. In Indiana, courts have determined that defendants are entitled to discover whether plaintiffs have submitted claims to 524(g) trusts and to use the evidence submitted to the trust that demonstrates exposure to the trust’s responsible entity as admissible for purposes of nonparty comparative fault. As demonstrated in the *Bowers, Parks, and Roberts Jr.* cases (discussed below) the allocation of fault among nonparties in Indiana asbestos is critical for a company facing a possible verdict in an asbestos case.

VII. AN EXECUTIVE SUMMARY OF INDIANA’S ASBESTOS LITIGATION HISTORY

The first asbestos cases in Indiana were filed in federal court in the late 1970s and early 1980s.⁵⁹ It was not until the mid-1990s that Indiana began to see an influx of asbestos causes of action in state court. Most of the cases were being filed in Marion, Lake, Vigo, and Allen counties, with Marion County being the preferred county for filing these causes of action. Faced with the an increasing number of asbestos cases, Marion County, Indiana, adopted the first standing order specifically designed to deal with asbestos

⁵⁸ See Shelley, Cohn, & Arnold, *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. BANKR. L. & PRAC. 257, 258 (“The asbestos plaintiffs’ bar has gone to significant lengths to try to prevent defendants in the tort system from obtaining information concerning both the claims that plaintiffs are making against the trusts and the details of those trust claims, as well as the amounts that these plaintiffs have received or will receive from the trusts. A clear goal of such efforts is to hamper the ability of defendants in the tort system to obtain judgment reductions, credits, and/or offsets that they should in all fairness receive in light of the relative culpability of the bankrupt entities and the payments being made to victims by their trusts.”)

⁵⁹ See, e.g., *Pitts v. Unarco*, 712 F.2d 276 (7th Cir. (Ind.) 1983)

cases on October 4, 1996. Since 1999, Marion County has had almost all of Indiana's asbestos cases filed in its court, usually without regard to the county of the plaintiff's residence since at least one Marion County resident defendant is named in the complaint. In addition and as the result of mass screenings of individuals between 1999 and 2002, the number of individual asbestos cases in Marion County increased from a few dozen active cases to almost 2000 cases, most of which are for an alleged and unspecified "asbestos injury."⁶⁰

Since 1997, there have been six state asbestos cases taken to verdict.⁶¹ The first case, *Cobb v. Owens Corning Fiberglas*, was tried in Marion County in November 1997 against a sole defendant, Owens Corning Fiberglas. A jury found Owens Corning, a manufacturer of asbestos insulation materials, liable and assessed compensatory damages in the amount of \$689,782 and punitive damages of \$15,000,000.⁶² During the appeal of the jury verdict, Owens Corning, like almost all of the "traditional" asbestos defendants, declared bankruptcy on October 5, 2000.

The next major trial in Indiana asbestos litigation took place in 2002 in the case of *PSI v. Roberts Jr.*,⁶³ where after a ten-week jury trial, a Marion County jury found one defendant, a property owner, 13 percent liable for causing the plaintiff's peritoneal mesothelioma.⁶⁴ In accordance with the Indiana Comparative Fault Act, the jury also apportioned fault to a variety of entities, including 12 percent to the plaintiff himself and 36 percent to plaintiff's employer, the now-bankrupt "traditional" asbestos defendant, Armstrong Contracting & Supply.

On appeal, the Indiana Supreme Court upheld the verdict on procedural grounds but went on to hold that in Indiana, the property owner is not vicariously liable for the negligence of its independent contractor and, more generally, that a landowner harboring a potentially dangerous condition is not liable to an independent contractor or its employees for injuries sustained by reason of the condition the contractor is employed to address.^{65,66}

⁶⁰ The approximate start date for the increased number of cases begins in September 2000 until approximately November 2004, with the majority of cases filed between 1999 and 2001.

⁶¹ Five of the six cases have taken place in Marion County. The other case, *William Parks v. Uniroyal*, was tried in Lake County, Indiana. In the *Parks* case, tried to verdict in March 2003, the total verdict was \$1 million with the plaintiff getting assigned 50% fault and the only defendant at verdict assessed 2.5% liability for a net verdict of \$25,000.

⁶² *Owens Corning Fiberglas v. Cobb*, 754 N.E.2d 905, 907-908 (Ind. 2001).

⁶³ See, e.g., *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, *aff'd on reh'g*, 834 N.E.2d 665 (Ind. 2005).

⁶⁴ Of note, although the plaintiffs began the *Roberts Jr.* trial against more than 30 companies, at the time of verdict, only four remained. See *PSI v. Roberts Jr.*, 829 N.E.2d at 949-50. The only other entity, besides the plaintiff, the specific defendant, and the plaintiff's employer, to whom the *Roberts Jr.* jury assessed double-digit fault was Johns-Manville (14%).

⁶⁵ *Roberts Jr.*, 829 N.E.2d at 948.

⁶⁶ Three additional trials were held in Marion County between 2002 and 2007. In 2003, a plaintiff's verdict for \$3,040,000 compensatory and \$12 million punitive was reached against a sole defendant in the case of *Bobby Bowers v. Industrial Contractors*. In *Bowers*, the plaintiff was found to be five percent

Since the *Roberts* trial, Indiana appellate courts have issued several significant rulings. Before the *Roberts* case described above, the Indiana Supreme Court on March 25, 2003, held that asbestos causes of action against product manufacturers are governed by the Indiana Product Liability Act's Statute of Repose, Indiana Code § 34-20-3-1.⁶⁷ The supreme court held that the statute of repose requires that an action against a manufacturer of asbestos-containing products be brought within ten years of delivery of the product to the initial user or consumer, unless the action is brought between eight and ten years after delivery, in which case the plaintiffs are entitled to two years from that time to file suit.⁶⁸ The practical effect of this decision was to provide manufacturers of asbestos-containing products the same benefits enjoyed by other product manufacturers under the IPLA's statute of repose. Another impact of this ruling was to raise the litigation profile of nonproduct defendants in asbestos cases, such as premises owners.

In addition, in 2003 the Indiana Court of Appeals issued its ruling in *J.M. Foster v. Spriggs*,⁶⁹ where it reversed the denial of various motions for summary judgment. In the motions and on appeal, the defendants argued, *inter alia*, that there was no factual issue that they proximately caused the plaintiff's injuries and that the plaintiff's claims are barred by the construction statute of repose.⁷⁰ On appeal, the Indiana Court of Appeals held that the plaintiff's cause of action was barred by ten-year construction statute of repose. At the time of the ruling, the construction statute of repose specifically exempted property owners from its protections.

In 2005, about the time of the *Roberts* decision, the Indiana construction statute of repose was amended by the Indiana Assembly and now protects premises owners in addition to contractors and architects. As amended, the construction statute of repose requires an action to be brought against a "possessor" within the earlier of ten years after the date of substantial completion of the improvement or twelve years after the completion and submission of plans and specifications to the owner if the action is for a deficiency in the design of the improvement.⁷¹ As a consequence, the owner

at fault with no fault be attributed to nonparty, Triangle Insulation. After the punitive damages were reduced in accordance with the statutory cap, to \$9,120,000, the total damage award was \$12,160,000. In 2005, a defense verdict was reached on behalf of several automotive defendants in the case of *Petruzzi v. Borg Warner*. In 2007, a defense verdict was reached on behalf of the sole defendant, a premises owner, in *Kadivnik v. Eli Lilly*. All three cases, *Bowers*, *Petruzzi*, and *Kadivnik* involved mesothelioma claims.

⁶⁷ *Allied Signal, Inc. v. Ott*, 785 N.E.2d 1068 (Ind. 2003).

⁶⁸ *Id.*; IND. CODE § 34-20-3-1.

⁶⁹ 789 N.E.2d 526 (Ind. Ct. App. 2003).

⁷⁰ Formerly IND. CODE § 32-15-1-2, now IND. CODE § 32-30-1-5.

⁷¹ IND. CODE § 32-30-1-5.

of the facility is now a “possessor” within the meaning of this statute and is entitled to the protections of the statute of repose.⁷²

Since the *Ott*, *Spriggs*, and *Roberts* decisions and despite the amendment to the construction statute of repose, cases have continued to be filed in Indiana and as indicated, some cases have also been tried to verdict. Recently, given the amendment to Indiana Code § 32-30-1-5, the Marion County Superior Court granted various motions for summary judgment filed by property owners in a case called *Elbrink*. The plaintiffs are now appealing the grants of summary judgment and two amicus curiae counsel have submitted briefs in support of the appellees.⁷³

One of the many issues on appeal in the *Elbrink* appeal is the amendment to the construction statute of repose. As argued in the accompanying amicus brief, the plaintiffs are also asking courts to stretch the boundaries of the existing law to impose new duties and standards upon defendants that not only run contrary to long-established principles of tort law and recent pronouncements of Indiana Supreme Court and Indiana Court of Appeals, but also defy logic and common sense. In addition, in the *Elbrink* appeal, the plaintiff attempts to impute historical knowledge of asbestos hazards on the defendants in order to impose a duty upon them, despite the evidence detailing how knowledge was withheld from entities, such as the property owners in *Elbrink*.

As the amicus brief illustrates, in analyzing the alleged ignorance of a plaintiff, like Mr. Elbrink, it is critical to evaluate the facts in light of the known “state of the art.”

Finally, the last critical element that is addressed in the amicus brief deals with causation. It is well settled that in order to impose toxic tort liability on a defendant, the plaintiff must come forward with expert evidence that the defendant’s conduct or product was both the actual and proximate cause of the plaintiff’s alleged disease. At a minimum, the plaintiff must establish that but for the defendant’s conduct, the harm would not have occurred. In lung cancer cases such as in the *Elbrink* appeal, the amicus brief argues that Indiana law should protect defendants from paying for a harm that they did not cause by requiring specific medical causation evidence linking the alleged harm to the defendant.

⁷² IND. CODE § 32-30-1-5(b).

⁷³ The amicus brief of the Indiana Manufacturers Association can be found on page 000 *infra* in this REVIEW.