

Why are Mesothelioma Cases in New Jersey Still on the Rise?

by Christopher M. Placitella

From the late 1970s through the 1990s, nonmalignant asbestos-related claims dominated the New Jersey asbestos docket. Thousands of these cases were filed and resolved. The management of the asbestos docket served as the model for the development of how New Jersey would handle other mass tort cases in the future. Cases were consolidated and resolved with global settlement values predicated on worksite and disease information, and the overwhelming majority of plaintiffs lived beyond the resolution of their cases.

Over the last five years, the complexion of the New Jersey asbestos litigation has changed. The majority of new case filings involve malignancies, most of which are mesotheliomas, a cancer of the lining of the lung and abdomen primarily caused by exposure to asbestos. These cases are rarely consolidated, causing the plaintiffs to compete for the limited resources of the court.¹ As a result, mesothelioma cases are aggressively litigated in a manner similar to medical malpractice cases, with as many as 10 to 20 defendants in a single case. Mesothelioma plaintiffs must wait in line for trial dates, hoping their cases will be heard before they die.

A recent article published in the *Journal of Occupational & Environmental Hygiene* predicts that the asbestos-related death rate in the United States will rise from 3,500 annually to 5,000 annually over the course of the next 10 years.² It is expected that New Jersey will bear more than its fair share of these deaths, since historically

the state's incidence of mesothelioma is much higher than in most other states.³

The number of new mesothelioma cases in New Jersey continues to increase despite the fact that asbestos has been removed from industrial and consumer products for many years.⁴ More troubling, the last five years have witnessed a dramatic increase in mesothelioma diagnosed in nonindustrial-exposed asbestos victims, such as doctors, lawyers and teachers, who had no direct exposure to asbestos through their employment.⁵

The New Jersey Supreme Court has been compassionate to the plight of plaintiffs, and is in the forefront of allowing family members the right to pursue compensation.⁶ During the last two years, mesothelioma cases that have settled or been tried in New Jersey's superior courts included a teacher, an appliance repairman, a telephone worker, the daughter of a boiler maker, the daughter of a laboratory scientist, a jewelry maker, a college student, a warehouseman, the wife of an oil refinery worker and numerous factory and construction workers.⁷

Why is this happening, and can any-

thing be done about it? The short answer is that asbestos exposure still continues today. The National Institute for Occupational Safety and Health (NIOSH) reports that "many asbestos products remain in use and new asbestos-containing products continue to be manufactured in or imported into the United States."⁸ Despite all of the publicity surrounding the dangers of asbestos, most of the public is unaware of the many potential sources of exposure that still exist, even in their own homes.

It is generally accepted that the primary cause of mesothelioma is asbestos. When someone is diagnosed with mesothelioma, the doctor will invariably ask, "Do you have any idea how you were exposed to asbestos?" Asbestos exposure today can result in mesothelioma developing and being diagnosed 15 to 40 years from now. While sustained exposure to asbestos is necessary to cause asbestosis or lung cancer, most respected medical, toxicology and industrial hygiene authorities believe that brief, intermittent and low-level exposure to asbestos can cause mesothelioma. Generally, the lower the

exposure the longer the latency period in developing and manifesting the disease.⁹

In the early 20th century, cases of mesothelioma were virtually nonexistent. As asbestos began to be incorporated into more and more industrial, construction and consumer products, the number of mesothelioma cases began to increase. Asbestos exposure that occurred in the 1930s and 1940s produced numerous mesothelioma cases in the 1960s.¹⁰

By the 1960s, asbestos use was ubiquitous, since the mineral was incorporated into thousands of products even though published medical literature had been sounding the alarm about the dangers associated with inhaling asbestos since at least the 1930s. Corporate records in numerous and various industries are rife with discussions about the health dangers and risks associated with using or being exposed to asbestos.¹¹

From the 1930s through the 1950s, asbestos cases were litigated in relative obscurity in workers' compensation courts, with no jury and little fanfare.¹² In 1957, Frederick Legrande brought the first modern day asbestos case against Johns Manville in New Jersey Federal Court. Halfway through the trial, the case was settled with a confidentiality agreement. The official record, by agreement, thus never reflected the fact that Legrande died from asbestos poisoning.¹³

Beginning in the mid-1960s, a handful of asbestos cases were filed in trial courts around the country, again with very little public awareness. By the late 1960s, accounts of asbestos poisoning and cancer involving uncontrolled industrial or workplace exposure began appearing in the popular press, including *The New York Times*.¹⁴ Leadership in certain unions became concerned with the issue as they learned of the dire health consequences of asbestos exposure, although the general membership continued to remain largely uninformed of the risks and dangers. By the late 1960s, however, worker health and

safety in general became a hot button political issue that led to the establishment of the Occupational Safety and Health Administration (OSHA) in 1970.

The creation of OSHA and its investigation and regulation of asbestos in the United States were pivotal events in beginning to bring to public awareness the tremendous health risks of asbestos exposure, which for decades business corporations and their industry advocacy groups had been aware of and concealed. Its ultimate regulation of asbestos in the workplace, however, arguably stands as an object lesson on how federal agencies, despite good intentions, can be co-opted and rendered ineffective in protecting the public by the regulated industries' lobbyists and advocacy groups.¹⁵

In 1971, OSHA asbestos regulations were enacted with many planned changes through 1976.¹⁶ These regulations addressed the use of asbestos in the workplace, and were the product of intense debate and negotiation with industry.

The final OSHA regulations represented a watered down version from those originally proposed. They omitted references to cancer, and did not address proper warnings related to the sale of asbestos-containing products. The asbestos industry and its advocacy groups applauded their accomplishments and what they thought would be the continued ability to sell asbestos to consumers and industrial concerns. At one meeting in 1973, the head of the industry lobbying group, the Asbestos Information Association, reassured its members that, "despite all the negative publicity about the dangers of asbestos and the projections of the number of people that would die," very few people have been paying attention.¹⁷

Although the asbestos mining and products industry was reassured that it would be able to continue to sell asbestos, some of the more sophisticated industrial customers using asbestos began to disfavor it because of the

restrictions and requirements imposed by even the minimal OSHA regulations that had been enacted. As a result, insulation products containing asbestos were generally discontinued in the early to mid-1970s. The Environmental Protection Agency (EPA) eventually banned molded insulation products such as pipe covering and block for sale.¹⁸

Even though asbestos was removed from most insulation products by the mid-1970s, decades of asbestos installed in factories, offices, schools and homes remained in place, providing further opportunity for exposure. In addition, many other industrial products continued to contain asbestos, including gaskets, lab equipment, talc products, and friction products, which liberated asbestos fibers during installation or repair.¹⁹ Often the presence of asbestos, let alone its health risks, was not recognized by the user of the products or anyone working in proximity to them.

The responses by those companies that decided to continue to sell asbestos after OSHA was enacted varied from passive to aggressive. Some companies went so far as to use OSHA offensively in the marketing of asbestos-containing products, telling customers its products were "OSHA approved" or "OSHA compliant." In a recent deposition taken in 2011, the former safety director of one company admitted that company literature claiming its products were OSHA approved was a "lie."²⁰

In reality, OSHA never 'approved' any asbestos products; instead, its regulations left open the ability to sell asbestos-containing products if the manufacturer's testing could prove the asbestos was "locked in" and would not be released through normal use.²¹ Many savvy asbestos product producers used this regulation loophole to justify selling asbestos products with no warning whatsoever.²²

Manufacturers justified selling their asbestos products because the new off-the-shelf products were allegedly "not

friable" and did not release any dust visible to the naked eye.²³ The problem was that installation or use of these products often required cutting and abrasion capable of releasing asbestos fibers in excess of OSHA limits.²⁴ Even worse, the removal of the products required destruction and scraping, which would similarly release large quantities of asbestos fibers.

Tests of these exposures were rarely if ever conducted, and workers and consumers were scarcely ever warned about the exposure that would occur from what looked like a new encapsulated product.

In some instances, inquires from consumers regarding asbestos were sidestepped or responded to by manufacturers or sellers with false information. In 1977, a father undertaking a home renovation job wrote to one large multinational company that made spackle (joint compound) containing asbestos and asked if it was safe to use in his house. "I have small children who were living in our home while I was remodeling and I am concerned about their welfare," he wrote.²⁵ A company representative wrote back assuring him there was no risk whatsoever, stating: "I assure you that you need not concern yourself over the possibility of harm due to the asbestos fiber content of the joint cement product you recently used."²⁶

In 1978, a group of seventh graders wrote another company and asked if it was safe to use its asbestos products in their science lab? Discovery in a New Jersey asbestos case in 2010 uncovered that after a number of high-level meetings, the company wrote back to the children referring to OSHA regulations and sidestepped the question.²⁷ In the same year, another manufacturing company was made aware that a product similar to the one it sold had caused a dentist who was using asbestos for making molds for crowns to develop mesothelioma.

The company made the decision to sell off all its inventories of asbestos-con-

taining product rather than recall the products. Discovery in asbestos cases in New Jersey in 2009 revealed that this inventory sell off was made to universities for use by students, and to dentists for use in making crowns and fillings.²⁸ Taking into account 30- to 40-year latency for this kind of exposure, one may expect many mesothelioma cases occurring in family members, students and dentists exposed to these products being diagnosed well into the next decade.

Even after OSHA regulations were enacted, industrial exposures continued. For the first two decades after it was created, OSHA proved to be a toothless tiger with the best intentions and limited resources. A recent interview conducted with the former regional director of OSHA illustrated OSHA's past limitations.²⁹ During the interview, the former director explained that in the 1970s he had a total of just two industrial hygienists and a handful of safety engineers available to police industry sites located throughout five states. These individuals were not just charged with handling asbestos matters, but were responsible for all hazards under the purview of OSHA. Systematic enforcement inspections were impossible given the available resources.

Limited resources meant that OSHA inspections were generally a function of reacting to complaints. Where there were no complaints, there were no inspections. Consequently, OSHA compliance was largely left to the safety culture of individual companies. Accordingly, significant occupational exposures continued well into the 1980s, and perhaps beyond.

According to recent OSHA estimates, 1.3 million U.S. workers continue to be exposed to asbestos on an annual basis.³⁰ These exposures, in turn, could produce mesotheliomas for at least another three decades.

While enforcing compliance with OSHA regulations was an ongoing problem, there were some regulations that governed the workplace, and later on expo-

sure related to schools. Exposures inside homes, on the other hand, is an entirely different story. At the home level, asbestos exposures are probably happening even today. In individual residences, there is no threat of OSHA inspections and fines.

Compounding the problem, the vast majority of the public is unaware that asbestos is present in their houses and apartments. These exposures come from numerous sources. Many homes and apartments were contaminated from work-related exposures for decades. Workers would wear their clothing home to be laundered by family members, and this asbestos-laden clothing contaminated entire households, giving rise to asbestos-related mesotheliomas in occupants with no industrial exposure. Unless properly abated, those homes remain contaminated at some level for years. It is impossible to predict the legacy of disease this kind of exposure could cause.³¹

Perhaps the most significant source of residence-based exposure today occurs through the renovation of older homes. In the past, most attention has been focused on asbestos on piping and boiler components. This material is easily identified and tested. A much more dangerous and insidious source of asbestos exposure, however, results from demolishing or altering the drywall board panels that are ubiquitous throughout the United States.

From the early 1960s through 1977, a large percentage of walls and ceilings constructed in homes and offices used asbestos-containing joint compound to fill the seams or joints between wall-board panels. In 1977, the Consumer Product Safety Commission (CPSC) outlawed the use of asbestos in spackle and joint compound. According to the CPSC "inhalable asbestos in the household from consumer patching compounds...presents a great risk due to the presence in the household of persons, such as children, who may be particularly vulnerable to carcinogens."³²

Even after the ban on asbestos-containing joint compound was announced, some companies manufacturing the material sold the entire remaining product rather than recall it from the shelves of retailers and safely dispose of it.³³ Additionally, no effort was made to address exposures that would occur as a result of asbestos already installed.

The amount of asbestos in homes built with drywall jointed with asbestos-containing spackle or joint compound during these two decades is incalculable, but its legacy is not. Every time a wall is demolished or altered, asbestos fibers released from the activity can contaminate the home. One asbestos supplier predicted that millions of people would be exposed to asbestos from joint compound alone, explaining that the fibers used in joint compound "are so tiny that if all the fibrils in one gram of asbestos were put end to end, they would circle the earth at the equator 40 times."³⁴ This contamination will likely produce numerous mesotheliomas well into this century.

In 1978, the CPSC ordered a study of asbestos products that were used in or could be encountered in the home.³⁵ The study revealed that the potential for asbestos exposure existed in numerous consumer products, including ceiling tiles, appliance wiring, barbecue bricks, blackboards, Christmas decoration snow, potholders, ovens, toasters, floor tile, hair dryers, fireplace accessories, lamp mantles, lamp sockets, home safe linings, pianos, pond liners, home hobby kilns, and electrical equipment. Even Kent cigarette filters once contained asbestos.³⁶

A troublesome debate is currently raging in the courts about whether talc used in numerous products contains asbestos.³⁷ Potential asbestos-containing talc was used in a wide variety of industrial and nonindustrial applications. It was even used as a dusting agent in children's balloons to prevent them from sticking together. New York cases are

currently exploring whether a certain brand of talcum powder routinely used by women contained asbestos.³⁸

As is evident from the forgoing, asbestos exposure is possible from a variety of sources. When a client with mesothelioma seeks medical and legal assistance, the inquiry no longer stops with "How do you believe you were exposed to asbestos and what did you do for a living?" The investigation now just as importantly focuses on questions such as: "What did other family members do for a living? Where did they work? Where do you and did you live? Did you do any home renovations? Did you or any family member ever change brakes or clutches? Did you ever open or repair the furnace? What buildings did you work in? What schools did you go to? What products were in your house that involved heat? Did you use routinely use talcum powder?"

This information must then be matched with national databases that catalog the use of asbestos in industrial facilities, schools, buildings and consumer products.

Unfortunately, there is no clear answer for when mesothelioma cases will peak and begin to decrease. As recent cases have indicated, asbestos exposure is ongoing, and the latency period for mesothelioma is 30 to 40 years. Thus, there seems to be no end in sight to the massive number of asbestos cases. ❧

Endnotes

1. See *Asbestos*, New Jersey Courts, <http://www.judiciary.state.nj.us/ma ss-tort/asbestos/index.htm> (last visited June 28, 2011).
2. See *Asbestos Is Still With Us: Repeat Call*, *J. Occupat'l & Env'tl. Hyg.* (August 2010).
3. Michael Berry, N.J. Dept. Health & Senior Servs., *Mesothelioma Incidence and Community Asbestos Exposure*, *Env'tl. Res.* 75, pp. 34-40 (1997). See generally Ki Moon Bang, et al., *Malignant Mesothelioma*

Mortality in the United States, 1999-2001, 12 *Int'l. J. Occupational & Env'tl. Health*, no. 1 (Jan./Mar. 2006), available at www.ijoh.com.

4. Bang, *supra* note 3.
5. See Dept. Health & Human Servs., Ctrs. for Disease Control & Prevention & Nat'l Inst. for Occupat'l Safety & Health *Asbestos Fibers and Other Elongate Mineral Particles: State of the Science and Roadmap for Research*, *Current Intelligence Bulletin* 62 (April 2011).
6. See *Olivo v. Owens-Ill., Inc.*, 186 N.J. 394 (2006).
7. See *Wood v. Grobet USA, et al.*, No. MID L-1774-06 AS (N.J. Super. Ct. Law Div. filed March 27, 2006) (jewelry maker); *Horvath v. Chevron USA, Inc., et al.*, No. MID L-2068-06 AS (N.J. Super. Law Div. filed March 6, 2006) (wife of refinery worker); *Savarese v. ABB Lummus Crest, Inc., et al.*, No. MID L-4527-09 AS (N.J. Super. Law Div. filed May 19, 2009) (daughter of boilermaker); *Degnan v. Alcatel-Lucent, et al.*, No. MID L-5469-07 AS (N.J. Super. Law Div. filed June 19, 2007) (telephone company worker); *Johnson v. 3M Co., et al.*, No. MID L-2994-09 AS (N.J. Super. Law Div. filed April 6, 2009) (construction worker); *Paduano v. Ace Sci. Supply Co., et al.*, No. MID L-2976-09 AS (N.J. Super. Law Div. filed April 1, 2009) (daughter of lab scientist).
8. See *Asbestos Fibers and Other Elongated Mineral Particles*, *supra* note 5.
9. *Id.*
10. See *Biological Effects of Asbestos*, 32 *Annals N.Y. Acad. Sci.* no. 1, Dec. 31, 1965.
11. See Barry I. Castleman, contribution by Stephen L. Berger, *Asbestos: Medical and Legal Aspects* (5th ed. 1986).
12. In 1924, 33-year-old Nelly Kershaw, dies with the dubious distinction of being the first person to make a claim for compensation as a result of asbestos poisoning. See Nelly Kershaw

- Death Certif., April 2, 1924, *produced in, In Re Middlesex County, N.J. Asbestos Litigation*, No. L-20097-85 (N.J. Super. Ct. Law Div. filed 1985). In 1929, Samuel Greenstone of Newark files the first lawsuit against Johns Manville on behalf of Anna Pirkowski in Newark Federal Court. Greenstone files another ten cases shortly thereafter. *See, e.g., Pirkowski vs. Johns-Manville Corp.*, (D.N.J. filed May 28, 1929, and dismissed June 13, 1934).
13. *See* W. Russell Mem. Re: *Frederick LeGrande v. J-M Products*, Nov. 3, 1982, *produced in, LeGrande v. Johns-Manville Prods. Corp.*, No. 741-57 (D.N.J. filed 1957).
 14. *See* Aaron Brody, Asbestos Dust Called a Hazard to at Least One Fourth of the US, *N.Y. Times*, March 2, 1966.
 15. *See* Mathew Sweetonic, Exec. Dir., Asbestos Info. Ass'n, Presentation before the Asbestos Textile Inst. (Aug. 3, 1973).
 16. *See* 29 C.F.R. §§ 1910.1001, *et. seq.* (1972).
 17. *See* Mathew Sweetonic, Exec. Dir., Asbestos Info. Ass'n, Presentation before the Asbestos Textile Inst., Arlington, V.A. (June 7, 1973).
 18. *See* 54 Fed. Reg. 132 (proposed July 12, 1984) (codified at 43 C.F.R. § 763).
 19. Bang, *supra* note 3.
 20. *See Zakanych v. Thermo Fisher Sci., Inc.*, No. L-001052-10 (N.J. Super. Ct. Law Div. filed Sept. 14, 2009), John Reilly Dep. 327:16-327:18, March 1, 2011.
 21. *See* 37 Fed. Reg. (June 7, 1972) (codified at 29 C.F.R §§ 1910 *et seq.*)
 22. *See* Reilly Dep., *supra* note 20, at 326:22-327:18.
 23. *See generally Johnson v. 3M Co., et al.*, No. MID L-2994-09 AS (N.J. Super. Law Div. filed April 6, 2009), Lloyd Ambler Dep., Aug. 27, 2009.
 24. *See* Gypsum Ass'n, "Evaluation of Exposure to Asbestos During Mixing & Sanding of Joint Compounds" (Nov. 19, 1973), *produced in, DeMayo v. 3M Corp., et al.*, No. L-8044-06 (N.J. Super. Law Div. filed Sept. 15, 2006).
 25. *See* Letter from Craig Burningham, Jan. 14, 1977, *produced in, DeMayo v. 3M Corp., et al.*, No. L-8044-06 (N.J. Super. Law Div. filed Sept. 15, 2006).
 26. *See* Letter from Burch to Burningham, Jan. 21, 1977, *produced in, DeMayo v. 3M Corp., et al.*, No. L-8044-06 (N.J. Super. Law Div. filed Sept. 15, 2006).
 27. *See* Reilly Dep., *supra* note 20.
 28. *See* Wood, No. MID L-1774-06 AS, *supra*, note 7.
 29. Interview with Lee Rohn, Former OSHA Reg'l Dir., in W. Palm Beach, FL (Jan. 19, 2011).
 30. Bang, *supra* note 6.
 31. *See* Henry A. Anderson, et al., Household-Contract Asbestos Neoplastic Risk, 271 *Annals N.Y. Acad. Sci.*, pp. 311-323 (May 1976).
 32. *See* 42 Fed. Reg. 146 (July 29, 1977).
 33. *See DeMayo v. 3M Corp., et al.*, No. L-8044-06 (N.J. Super. Law Div. filed Sept. 15, 2006), Howard Schutte Deps. vol. 1, March 27, 2007 and vol. 2, May 15, 2007.
 34. *See supra*, note 33, Schutte Dep. vol. 2, 313:16-22, May 15, 2007.
 35. *See* A.T. Kearney, *Review of Asbestos Use in Consumer Products*, Report of the Consumer Prod. Safety Comm'n (1978).
 36. *Id.*
 37. *See Paduano*, No. MID-L-2976-09 AS; *Hirsch v. R.T. Vanderbilt*, No. MID-L-2706-03AS (N.J. Super. Ct. Law Div. filed 2003).
 38. *See Tedrick v. Colgate-Palmolive Co.*, No. 08-190078 (N.Y. Sup. Ct. filed 2008); *Bernard v. Colgate Palmolive Co.*, No. 08-107211 (N.Y. Sup. Ct. filed 2008).
- Christopher M. Placitella** is a partner in and chairs the mass tort department of Cohen, Placitella & Roth, P.C. in Red Bank.

He concentrates his practice in class actions and mass torts, and is the former president of New Jersey Trial Lawyers and currently serves as a member of its board of governors.