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Debate Rages as Court Gets Plan to Settle Asbestos Cases : Litigation: Claims would be heard quickly but lawsuits barred. Critics assail attorneys, firms that negotiated pact.

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For the past two decades, Philadelphia personal injury lawyer Gene Locks has been battling asbestos companies throughout the United States, becoming a millionaire in the process. Now, Locks says, "the victims have won the war" against 20 surrendering defendants in a \$1.2-billion settlement.

But Fred Baron, a Dallas personal injury lawyer and former Locks ally who also has become a millionaire representing asbestos victims, contends that the proposed settlement is a corrupt, unconstitutional sellout of the injured people it purports to help. The beneficiaries, he asserts, would be companies who maimed the workers and greedy lawyers who were supposed to assist them.

A hearing on the fairness of the massive class-action pact will begin this week in Philadelphia federal court.

The case involves big issues, big egos and big bucks. And whatever happens, it will have a significant impact on many lives.

More than 27 million people were exposed to asbestos on the job between 1940 and 1979, according to studies done by doctors at Mt. Sinai Hospital in New York. About 350,000 of them will develop fatal cancer as a result and more than 1 million will suffer from non-malignant asbestos-related diseases. More than 100,000 have died already.

At stake is how, when and whether tens of thousands of people will be compensated for injuries ranging from minor respiratory problems to mesothelioma, a rare cancer of the lining of the lungs caused only by asbestos exposure.

Instead of the traditional lawsuit system, the agreement would create an administrative procedure for processing injury claims against the 20 companies. Proponents say this would mean more efficient resolution of claims, but opponents say it would deny thousands of people their right to a jury trial.

If the settlement is approved, it will affect thousands currently suffering from asbestos-related diseases. Perhaps more controversial, it would affect the rights of thousands of others around the country who have not yet become ill and may be unaware that they were exposed to asbestos or that their legal rights are at stake.

Anyone who missed a Jan. 24 deadline to opt out of the proposed settlement would be bound by it.

The agreement also could set a precedent for the way other courts handle massive toxic tort cases, such as those involving defective breast implants.

The Philadelphia pact comes at a critical moment in the labyrinthine history of asbestos litigation, which has been described as a "high-rise Bleak House," a contemporary version of Charles Dickens' 19th-Century novel about an English family who become ensnared in a never-ending court case.

Judges around the country have expressed frustration over how to process the more than 100,000 pending asbestos suits. In 1990, Chief Justice William H. Rehnquist of the U.S. Supreme Court formed a special commission on the issue. A year later it released a report saying: "What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively . . . future claimants may lose altogether."

The report called for congressional action, which has not occurred, and for streamlined court procedures. Soon after, 26,000 pending federal suits were transferred to the federal district court in Philadelphia for expedited handling. But the cases got bogged down there too.

Ultimately, a consortium of 20 companies called the Center for Claims Resolution (CCR)--including Armstrong World Industries, Pfizer, Union Carbide and U.S. Gypsum Co.--came to Locks and another leading plaintiffs' lawyer, Ronald L. Motley of Charleston, S.C., and proposed a deal that would resolve thousands of suits and create a mechanism to settle future cases. After months of bargaining, a deal was struck and filed with the court on Jan. 15, 1993.

"The settlement is a responsible, reasonable and fair proposal for resolving a litigation morass that has worked to the disadvantage of all involved--including the courts, the defendants . . . and the victims of asbestos," Motley said.

But the deal came under attack immediately. "It is nothing more than an attempt to make a private agreement between CCR, Locks and

Motley binding on third parties," said Pittsburgh lawyer Thomas Henderson, who also represents asbestos victims. Under the settlement, Locks and Motley were designated as counsel for the class of future victims.

Not only has the settlement created deep divisions among plaintiffs' lawyers, there also are sharply clashing opinions about its merits among labor leaders, occupational medicine specialists and legal ethics professors.

The AFL-CIO, the National Consumer League and the Pennsylvania attorney general have endorsed the agreement. But it has been sharply criticized by consumer advocate Ralph Nader, most of the asbestos victims organizations and Paul Brodeur, author of "Outrageous Misconduct," a 1985 book that chronicled how asbestos industry executives concealed for more than 40 years information about the dangers workers faced in toiling with the so-called magic mineral, renowned for its heat resistant qualities.

At the heart of the Philadelphia settlement is a provision that individuals participating in it will be precluded, other than in exceptional cases, from suing the 20 manufacturers, who are attempting to cap their liability.

Instead, private medical panels would screen the damage claims of workers and their families. The agreement calls for 100,000 claims to be paid out during the next 10 years.

The amount paid for approved claims would vary from a range of \$5,800 to \$7,500 for non-malignant medical conditions to a range of \$37,000-\$60,000 for mesothelioma. Under certain circumstances, a very limited number of victims may apply for more compensation than the stated limits.

People opting out can continue to sue. Court officials could not say how many have filed papers to do so, but Baron said close to 10,000 people contacted by his firm alone had opted out. Oakland attorney Steven Kazan, another leading plaintiffs' lawyer, said more than 5,000 Northern Californians had opted out after being advised to do so by his firm and labor groups.

Kazan said Californians had strong reasons to opt out because state statutes enable particularly sick asbestos victims to get to trial faster than in other states.

Moreover, he filed a brief saying that Californians, on average, receive more than twice as much for typical mesothelioma claims than the settlement calls for. "Based on historical compensation levels in California for mesothelioma claims, the CCR settlement will not adequately compensate" Californians who get this invariably fatal disease. About 12% of all mesothelioma claims nationwide originate in California.

Robert B. Steinberg, one of the leading asbestos lawyers in Los Angeles, also said he had advised many of his clients to opt out, even though he is taking no formal position on the merits of the settlement. "We opted out certain people we felt would not do as well under the proposal as they would in the tort system," Steinberg said.

Despite the huge sums of money and large numbers of litigants, the 20 companies constitute fewer than half of the former asbestos firms involved in personal injury suits. Dozens of other companies are likely to be affected by the settlement and one of them, Owens-Illinois Inc., is formally opposing it. The firm contends that it might be subject to increased liability if the settlement is approved.

But the consortium maintains that it is a fair deal. The settlement "reflects a hard-fought compromise . . . and provides for the first time in this litigation, a promise of rational resolution for asbestos claims," said John D. Aldock, attorney for the 20 companies.

Motley said the deal is a creative alternative to the current legal system where delays of five to 10 years between filing and trial are not unusual. Indeed, many people with debilitating lung diseases die lingering, painful deaths before they get their day in court, he stressed.

In addition, Motley said, the new system would reduce costs "so that the insurance and other assets of the defendants are not dissipated and squandered but rather are available to pay claimants."

Studies by the RAND Corp. show that about 65% of the money spent by companies in asbestos litigation has gone to lawyers on both sides. Moreover, 18 companies seeking to reduce their liability have declared bankruptcy, temporarily halting all the asbestos lawsuits that had been brought against them.

An AFL-CIO brief supporting the settlement said that the growing number of bankruptcies among asbestos companies "has thrown the compensation of future victims into doubt."

Motley said the sickest people would be compensated more rapidly under the new system--"six months, not six years."

Critics complain that the proposed settlement would provide no compensation to claimants with non-malignant conditions, such as lung thickening.

But Motley said those people often receive fairly modest awards now, and waive their rights to sue later if they develop a more serious disease. He stressed that, under the settlement, they would be allowed to seek more money if they grow sicker.

Opponents say the settlement has fundamental flaws.

Robert Wages, president of the Oil, Chemical and Atomic Workers union, said it is patently unfair to bar people, some of whom may be unaware they were exposed to asbestos, from their constitutional right to a future jury trial just because they failed to opt out of a class-action lawsuit they may never have heard of. He predicted that thousands of workers would "not even hear about the settlement until they try to assert claims and discover it is too late to opt out."

Normally, it takes 15 to 35 years after initial exposure for asbestos-related diseases to appear. Authoritative studies estimate that in Los Angeles County about 970 people a year die from these diseases, which also include lung cancer and asbestosis, a severe scarring of the lungs.

The opponents also say that many victims will not be rapidly compensated because the settlement sets yearly limits on the awards--starting at 15,100 the first year and diminishing to 5,855 in the 10th year--that are unrealistically low given the number of valid claims likely to be filed. About 50 new asbestos lawsuits are filed daily in the U.S.

Additionally, opponents contend that the settlement would deny monetary benefits to 40% of those who have historically received such benefits, without providing any adequate substitute.

In particular, people who have developed non-malignant lung thickening known as "pleural plaques" would be ineligible for compensation, even though thousands of people with this condition have received damages in the past.

"Thus . . . a claimant who has endured a lifetime with the knowledge that he has a diagnosed asbestos-related condition, and has legitimately incurred expenses for medical monitoring of his condition, but whose disease has not progressed to the point that it fits the criteria, will never receive any compensation," Baron said. "The unfairness to such claimants, many of whom may be elderly or infirm, cannot be overstated."

At the time that the pleural plaque component of the deal was being negotiated, Motley and his co-counsel Locks were negotiating thousands of settlements for their clients with the condition, according to court documents.

In all, the consortium of companies settled more than 10,000 cases with Motley's firm for \$138 million and nearly 4,000 with Locks' firm for \$77 million, according to court documents. Typically, the lawyers receive one third of the settlement, meaning legal fees of about \$71 million for the two firms on those cases. (Motley's firm often works with other law firms, which would share in the fees.)

Moreover, during negotiations on the settlement, Motley's partner Joseph Rice sent a letter to other plaintiffs' lawyers suggesting that they settle their pending cases before the class action for future victims was filed so that they could take advantage of more favorable terms. As a consequence, CCR companies settled about 100,000 additional cases before Jan. 15.

"That is the height of cynicism," said Bryan Wolfman, a lawyer for Nader's Public Citizen organization, which is challenging the agreement.

Ethics experts are divided on the fairness of the deal and on the propriety of the role played by Locks and Motley, who also stand to make considerably more money in their role as counsel for the class of future victims.

The rights of future victims were unfairly sacrificed to the interests of the current clients of Locks and Motley, according to Cornell University law professor Roger C. Cramton and Boston University law professor Susan Koniak, paid expert witnesses for attorneys Baron and Henderson, who are challenging the settlement.

A report they wrote said Locks and Motley are "burdened by impermissible conflicts of interest" in attempting to balance the interests of their current clients with those of potential future claimants, on whose behalf the settlement was negotiated.

Reaching the same conclusion was Columbia University law professor John C. Coffee Jr., who is scheduled to testify as an expert witness for those objecting to the settlement but has declined to take any money.

But the other side has ethics experts, too. One of them, Yale University law professor Geoffrey C. Hazard (who co-authored an ethics textbook with Cramton and Koniak, and, like them, is being paid for his expertise) found there was no "impermissible conflict of interest" because there was not a fixed sum of money the current clients and future claimants were competing for.

Another paid expert, Samuel Dash, former Senate Watergate committee special counsel who is now a law professor at Georgetown University, filed a declaration saying the settlement was consummated in an aboveboard fashion.

Locks and Motley's negotiation of the settlement "constituted professionally proper and zealous representation" of the future victims, Dash said.

For their part, Locks and Motley strenuously deny that they did anything wrong. They both branded their critics as "ivory tower academics" unfamiliar with the real world of trial law.

"My conscience is clear," said Motley, who added that he is particularly anxious to cross-examine Koniak during the hearing. "She doesn't know asbestos from aspirin," he declared in a telephone interview.

Another key issue in the case is whether potential claimants were given adequate notice of the class action and how they would be affected by it.

Approximately 400,000 packets describing the settlement, including an "opt out" form, were sent to potential victims, according to Lawrence Fitzpatrick, CCR's president. But no one knows for sure how many victims there may be, although Aldock acknowledged that it could be "in the millions." There also was television and newspaper advertising during November and December about the proposal and an 800-number phone line was set up to handle questions.

That, too, precipitated controversy. Baron and some other attorneys who are challenging the settlement surreptitiously taped some telephone conversations of employees giving out incorrect information on the 800 line. The attorneys hoped to discredit the process and persuade U.S. District Judge Lowell Reed to extend the time for potential claimants to opt out.

Reed turned down Baron's request. Moreover, Motley charged that Baron had broken the law by taping the phone calls. Earlier, Motley angrily asserted that Baron was putting out misleading written material in an effort to get more people to opt out of the settlement. Baron denied doing anything wrong.

Among the thousands of people who have opted out is Myles O'Malley, executive director of the White Lung Association of New Jersey, an asbestos victims organization. O'Malley, 50, said he was exposed to asbestos for 12 years as a carpenter in New Orleans and Brooklyn, working on large-scale projects such as the building of the Louisiana Superdome, the refurbishing of oil processing vessels and renovation and demolition of homes.

O'Malley said he suffers from shortness of breath and tightness in his chest, and medical examinations indicate that he has chronic obstructive lung disease. "Since I do not smoke, I attribute these conditions to my exposure to asbestos," he said.

"The settlement stinks," O'Malley said. "It is the most recent in a long list of attempts to deny victims their day in court."

The hearing is expected to last two to three weeks. Thus far, Judge Reed has rejected numerous motions attempting to derail the settlement, including contentions that people who have not yet become sick are being forced to surrender their right to a day in court if they become ill. Both sides say they expect whatever decision he makes will be appealed and the case may wind up in the U.S. Supreme Court.

One likely issue on appeal is the rights of future claimants, legal experts said.

"It's a very hot open question," said UCLA law professor Carrie Menkel-Meadow. "Some of the law may get made in this case. You have a clash between efficiency and mass justice on the one hand and individual justice and due process on the other. It's about as tricky a balancing act as any court will face."

There is little legal precedent on the issue; one case, pending before the U.S. Supreme Court, challenges whether a New York court had the right to bar future suits by absent claimants when it settled a class-action brought by victims of the Vietnam-era defoliant Agent Orange.

The proposed asbestos settlement raises serious questions about "the limits of judicial power," said Cornell professor Cramton. He said that judges may be venturing into legislative territory if they seek to limit future litigants' rights.

Deborah R. Hensler, director of RAND's Institute for Civil Justice, who has studied asbestos litigation in detail and written critically about how the judicial system has coped with it, said the Philadelphia case is very significant.

"This litigation raises a whole host of question about protecting the plaintiffs' interests. . . . It's very important not to lose sight of the fundamental problems," Hensler said.

"The legal system is designed for individual dispute resolution. No one has figured out how to mold the system to deal fairly with these kinds of mass cases."

BACKGROUND

Asbestos was first used in making pottery in Finland 4,500 years ago and, during its 20th Century heyday, had uses ranging from electrical insulation to brake linings. Warning labels were first placed on asbestos materials in 1964 after studies showed vastly higher rates of lung cancer and other lung diseases in people who had worked with asbestos than in the general population. Further studies revealed that people exposed to the mineral for only a month or two have developed asbestos-related diseases. Victims included women whose sole exposure came from washing their husbands' asbestos-laden clothes. The first legal claim for damages by an asbestos worker

in this country was lodged in 1927, but suits began to be filed in large numbers only in the 1970s. The first major precedent came in 1973, when a federal appeals court upheld a \$79,000 jury verdict to an insulation worker who had mesothelioma, ruling that the danger to workers had been foreseeable to manufacturers, who also had a duty to put warning labels on their products. In 1975, the U.S. government banned the use of asbestos in molded insulation. It was banned for most other uses in this country by the end of the decade. In 1978, plaintiffs' lawyers discovered a cache of documents from the 1930s and 1940s revealing that the asbestos industry had suppressed scientific data that would have warned asbestos workers of dangers they faced in handling the material. That revelation and some other court decisions opened the floodgates of litigation.

Companies in Controversy

Attorneys for asbestos victims have worked out a controversial \$1.2-billion settlement with a consortium of 20 companies. They are:

Amchem Products Inc., St. Louis, Mo.

A. P. Green Industries Inc., Mexico, Mo.

Armstrong World Industries Inc., Lancaster, Pa.

CertainTeed Corp., Valley Forge, Pa.

C. E. Thurston and Sons Inc., Norfolk, Va.

Dana Corp., Toledo, Ohio.

Ferodo America Inc., Smithville, Tenn.

Flexitallic Inc., Deer Park, Tex.

GAF Corp., Wayne, N.J.

I. U. North America Inc., Wilmington, De.

Maremont Corp., Brentwood, Tenn.

National Gypsum Co., Charlotte, N.C.

National Services Industries Inc., Atlanta, Ga.

Nosroc Corp., Stamford, Conn.

Pfizer Inc., New York, N.Y.

Quigley Co. Inc., defunct.

Shook & Fletcher, Birmingham, Ala.

T & N PLC, Manchester, United Kingdom.

Union Carbide Chemicals and Plastics Co. Inc., Danbury, Conn.

United States Gypsum Co., Chicago, Ill.