

Settlement of a Lifetime

The grand finale to a 3-decade court battle against Owens Corning reaped \$5.2 billion for asbestos victims. Local attorney Matthew Bergman was a top negotiator.

By Bob Geballe



PHOTOGRAPHY BY DANIEL SHEEHAN

Matthew Bergman takes his clients' asbestos cases personally.

The first asbestos victim Matthew Bergman really bonded with was a man named Jewell Glass. He arrived in Seattle in 1948, after World War II ended, looking for work—which he found as a shipscaler.

“He worked in the only union that used African-Americans,” recalls Bergman, sitting in his law office on the sixth floor of the Howard Building in Pioneer Square. “He was in the holds of ships, cleaning up the debris from repair work. It was hard, terrible work. He made probably five to six thousand dollars a year.”

Glass worked in an environment filled with asbestos. It floated down from stripped insulation. It pooled and eddied in lethal clouds as he swept the holds of the destroyers, mine-layers, and troop carriers, wafting in the still air, and

eventually lodging in the tissues in Glass' lungs. He spent two decades working at both the Todd and the Lockheed shipyards.

In 1996, after he was diagnosed with mesothelioma, he was referred to Bergman. “Mr. Glass was a very dignified man,” Bergman says, “a very spiritual guy. He wasn't really angry. He had such equanimity. He had every reason in the world to be pissed off, but he wasn't.”

The experience had a profound effect on Bergman, founder of Bergman & Frockt, who has spent the last 16 years working with hundreds of asbestos victims, mainly in King and Kitsap counties, which have the highest per-capita rates of asbestos-related deaths in the country.

The Environmental Working Group estimates that in Kitsap County alone, more than 600 people have died from asbestos-related illness.

A 30-YEAR WAR

Last year, Bergman helped bring to an end a staggering legal wrestling match with Owens Corning that had stretched over three decades. It ended in an equally staggering \$5.2 billion settlement.

The finale to the litigation with the insulation maker was a battle royale between dozens of creditors and claimants, prompting the removal of a judge and leaving some badly battered egos.

“It was six years of a no-holds-barred bankruptcy litigation and negotiation,” says Bergman. He was a member of the Owens Corning Creditors Committee, a group of 11 lawyers that negotiated the settlement.

The corporation agreed in May 2006 to set up a trust fund for the people made ill over a 50-year period due to exposure to Owens Corning-manufactured asbestos. It includes funds for future claims. The agreement enabled the corporation to emerge from bankruptcy with no further asbestos liability.

In a December 2006 press release, Owens Corning CEO Glen Hiner said of the settlement, “It dramatically reduces the high cost of legal defense and the risk of excessive verdicts against Owens Corning, makes more predictable the costs of our asbestos liability going forward, and enables the company to focus on capital-efficient growth.”

FACES BEHIND THE STATS

As amazing as the figures are in the Owens Corning settlement, they pale next to the human toll of asbestos. Owens Corning is just the latest and largest in a suite of asbestos-related Chapter 11 agreements that includes USG Corporation, Johns Manville, and Dresser/Halliburton Corporation. More than 60 U.S. public companies have sought bankruptcy protection to deal with asbestos liability, with as much

as \$150 billion in claims at stake, according to the federal Congressional Budget Office. There are estimates of 40 million people exposed to asbestos and upward of 200,000 potential claimants.

Bergman says he becomes a willing ear and confidant for each asbestos victim he represents. "I found that I can't connect with my clients unless I open up to them. Because you're on such a short journey together, you feel comfortable opening up and engaging."

It's a journey that Bergman has taken many times in the last decade. Sadly, Washington state, with its shipbuilding, aluminum smelting and timber-products industries, has the second-greatest number of asbestos claimants per capita in the nation. "Travis Baldwin, he was just 34 years old," Bergman says. "He got mesothelioma from working as a security guard at a paper mill in Oregon. The typical case is . . . a person retires and is struck

Simpson paper mill in Shelton. "He was a teacher at Washington State University. He underwent a radical experimental treatment at the University of Washington. He underwent massive radiation treatment, and his lungs, pericardium, and diaphragm were removed." Harvey recovered. "He started advocating for special protection for asbestos victims, and spoke in front of Congress," Bergman says. "He knew the treatment was temporary, and he decided to make the most of his time." Harvey died in 2005, six years after his diagnosis.

LOCAL LITIGATION

Bergman is one of several local attorneys who have represented asbestos plaintiffs. Janet Rice, with Schroeter Goldmark & Bender, won the biggest jury verdict ever in Kitsap (\$1.3 million) for a pipefitter's relatives. William Bailey, with Fury Bailey, was involved in a groundbreaking case, *Lockwood v. AC & S*, that ended up in front of the state

Phil Talmadge, of Talmadge Law Group, handles asbestos cases on appeal. He has a case waiting review before the state Supreme Court, involving a plaintiff who worked with asbestos in the 1960s and '70s. "There still are a lot of Washington state cases," Talmadge says. Because it typically takes many years for asbestos-related disease to set in, the cases begin long after the exposure.

front of Congress, and into contentious meetings with lawyers who he says reminded him of John Grisham characters. "At many of those meetings, I was one of the only lawyers who flew on a commercial plane—everyone else had their private jets."

IN THE BEGINNING

Asbestos litigation really got going in Washington in the late 1970s, after two things became

Sadly, Washington state, with its shipbuilding, aluminum smelting and timber-products industries, is disproportionately represented (in asbestos cases), having the second-greatest number of asbestos claimants per capita in the nation.

down. But someone this young . . ." Bergman pauses, then begins again. "He was big—the Western states' arm-wrestling champion. He had children just the age of my children."

Bergman recalls another client, Brian Harvey, who was exposed to asbestos when he was young, while working at a

Supreme Court in 1987. "It was the first case which established the rules for contact exposure," Bailey says. "The precedential value of that case was very high." The plaintiff had been exposed to asbestos dust by working in shipyards where asbestos was used, though he did not work with those products directly.



Phil Talmadge says it's time for the government to step up to the plate on asbestos claims.

Riding the settlements through to completion is not easy. The agreements are peculiar dances between company and creditors, complicated by nasty struggles between creditors to divide up the spoils.

Bergman has been involved in major negotiations with Dresser/Halliburton and Owens Corning. His legal efforts have taken him across the country many times, in

clear. One was that exposure to asbestos was highly damaging, and that its consequences often took decades to manifest. The second was that companies had long known this was the case. "Knowledge of asbestos hazards was known from the 1930s on," says Bergman. "Many companies conducted their own research. But industry swept it under the rug."

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—Matthew Bergman, *Bergman & Frockt*

Notes Talmadge: “The earliest cases were the shipyard workers from World War II. Ships would come in to be refurbished, and workers would pull asbestos out of the holds—there was lots of exposure.” Talmadge believes the federal government made an informed decision at the time to allow the risk to be taken. However, he remains more circumspect than judgmental. “Is hindsight fair? It really isn’t, in some respects,” he reflects. “At that time, they thought the need to win the war was so important, and that people were dying in Europe and Asia, so that risk had to be shared. What you hope is that the federal government recognizes they have some responsibility.”

When former workers started becoming ill and filing claims in the '70s, companies first claimed no responsibility. But the weight of thousands of pending cases began to affect company stock prices. In the early 1990s, Congress created a special bankruptcy provision that limited companies’ liability in compensating asbestos victims, and reduced the potential payout to victims. Many companies sought bankruptcy court protection. Dresser/Halliburton is an example, says Bergman.

In 2002, Halliburton officials got in touch with attorneys including Bergman who represented dozens of claimants against the company. “They said they wanted to work out an arrangement,” Bergman says. “We listened to

what they had to say. The only way a company can get out of asbestos liabilities is to go through bankruptcy, set up a trust fund, and reemerge.” So Halliburton settled its pending cases for \$2.7 billion and set up a trust fund with another \$1.6 billion.

“It was expensive,” Bergman says, “but Halliburton’s share price immediately jumped.”

The process with Owens Corning was more protracted. However, once Owens Corning came to terms with the idea of a settlement, the real drama began. Says Bergman, “Bankruptcy is all about getting a deal done.”

ALL-STAR LEGAL LEAGUE

As a member of the creditor committee charged with finding an equitable way to allocate the Owens Corning trust fund, Bergman says he had a front row seat as an all-star team of plaintiff lawyers went through the highly charged negotiations.

“I was in there with some of the biggest names in plaintiff law,” he says. “They weren’t on law review in school, and didn’t go to elite law schools, but most of these guys have extremely good communication skills, and are very willing to think outside the box.”

In the bankruptcy hearings for Owens Corning, things got very sticky. Bergman says a number of “vulture funds,” which buy up the debt of companies in litigation trouble when the price is low, gobbled up Owens Corning bonds.

They complicated the hearings, and eventually objected when the judge tried to work out a deal to compensate the asbestos victims.

The battle among competing interests ended up getting U.S. District Judge Alfred Wolin removed in 2004 by request of the competing creditors.

Bergman says Wolin wanted to be able to communicate frankly with all sides, but adds, "I think the judge was too eager to get a consensual agreement. I think he tried to be judge and mediator. He was motivated by noble purposes, but the problem was, in trying so hard, he gave the appearance of lack of dispassion and judicial detachment."

The protracted legal wranglings are in stark contrast with the short, tragic arc of the lives of people who develop asbestos-related cancer. Some types, especially mesothelioma, become apparent only shortly before they prove fatal. Bergman represents claimants attempting to secure a financial settlement before they die.

"I meet most of my clients shortly after they've been diagnosed with a terminal disease," he says. "These are really good people who worked for their country and played by

the rules. Typically, at diagnosis, the doctor says, 'Get your things in order, 'cause you're going to be dead in six months.'" His clients have ranged from World War II-era shipyard workers in their 80s to much younger paper mill employees.

"We win some cases and we lose some. We know that mesothelioma is caused by asbestos, but we don't know what product was responsible," Bergman explains.

BOILING IT ALL DOWN

He says there are essentially three issues: which product was used,

how broad is the liability, and was the client exposed to the defendant's products. "How do you prove that?" asks Bergman. "Can a client testify to that, 30 or 40 years ago?



COURTESY FURY BAILEY

William Bailey's landmark 1987 asbestos case paved the way for many to come.

Recollections can be hazy." Bergman turns and pulls out a 3-by-2-foot enlargement of a black-and-white photograph taken at the Puget Sound Naval Shipyard in the 1960s.

He points to a stack of cartons in the photo. In the enlargement, two things are clear. One is the symbol for asbestos. The other is the manufacturer's name: 'Owens Corning.' "This photo was used in the settlement negotiations."

Jewell Glass died within a year of hiring Bergman. "He couldn't read," Bergman

recalls. "When I wrote his will for him, he had me read it to him. He told me he only had a second-grade education, yet he had this strength." L&P