

# Relief for Companies the Benzene Lawsuit

“**T**he business of America is business.” So said President Calvin Coolidge on January 17, 1925, to the Society of American Newspaper Editors. Indeed, industry has been the backbone of the U.S. economy, growing over 50 percent during the period from the Second World War until 1992, alone.<sup>2</sup> Yet, between 1992 and 2002, the number of the nation’s industrial establishments dwindled by seven percent.<sup>3</sup> In 1960, the U.S. exported goods valued at more than \$3.5 billion than it imported.<sup>4</sup> By 2006, the U.S. was importing \$765 billion more than it exported and had amassed a trade deficit of \$1.46 trillion, the largest of any country.<sup>5</sup> Yet, although the number of industrial establishments has declined, the number of lawyers has risen over 30 percent!<sup>6</sup> And these lawyers aren’t just sitting on their hands. Many lawyers in the field of personal injury are filing what are known as toxic tort lawsuits against American industry. The typical toxic tort suit alleges injury from exposure to a product containing a hazardous substance. Currently a plethora of such lawsuits alleging benzene exposure has so traumatized American companies that they often are failing to take advantage of the insurance protection that they previously purchased. However, certain attorneys who specialize in representing policyholders can provide these businesses the protection to which they are entitled.

## Toxic Tort Impact

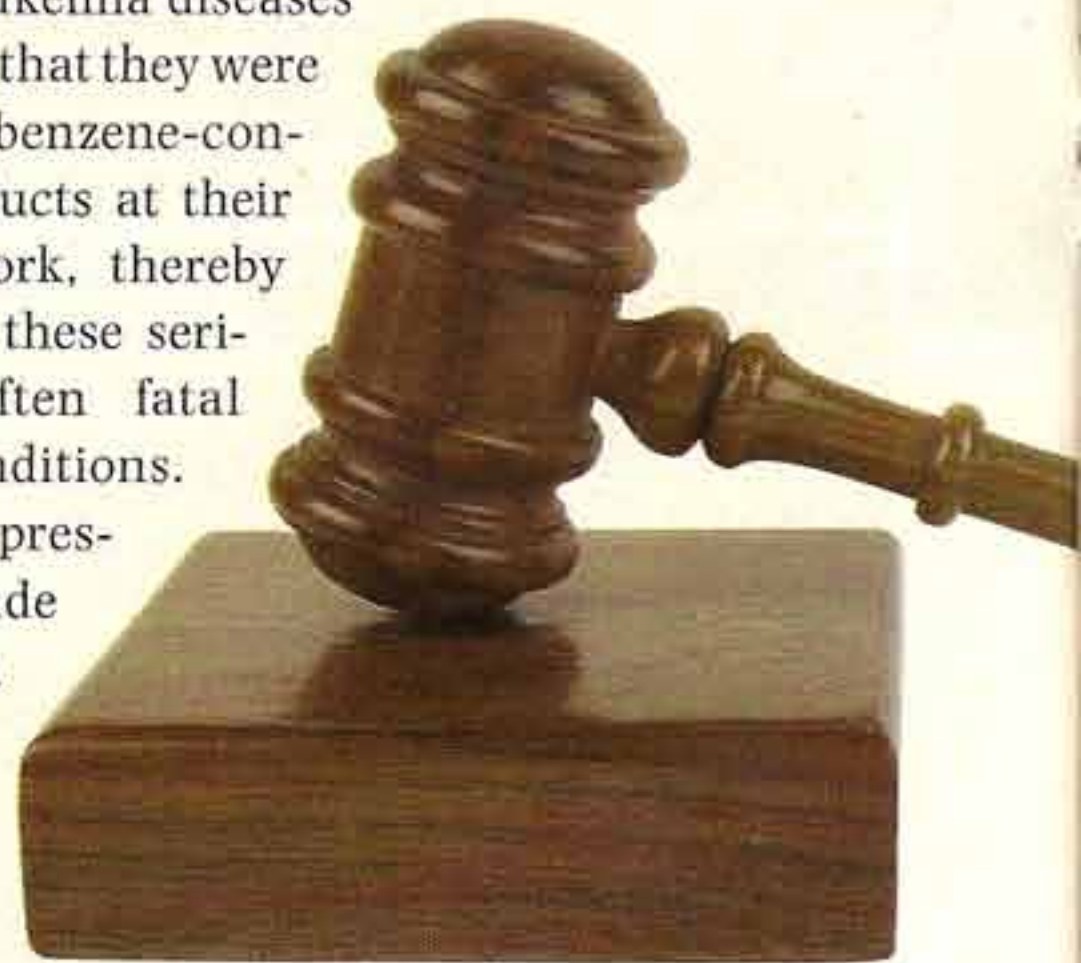
Asbestos lawsuits provide a case study of the impact of toxic tort litigation on U.S. industry. Most people are under the impression that the asbestos lawsuits that clogged U.S. courts and caused numerous corporate bankruptcies in the 1980s are a thing of the past. Yet, according to the *Wall Street Journal*, “desperately ill plaintiffs have been eclipsed by a huge and growing number of relatively healthy people seeking awards for possible future illnesses.”<sup>7</sup> Since January 2000, personal injury lawyers representing these individuals have “pushed at least 20 companies that sold or used asbestos products into bankruptcy pro-

tection...on top of 40 other asbestos-related corporate bankruptcies since the mid-seventies.”<sup>8</sup> Now, “the sickest asbestos victims are...collecting far less than comparable victims did in the 1990s.”<sup>9</sup>

## Benzene Litigation

And while industry laments the advent of these “greedy [asbestos] lawsuits [that] dishonor the legitimately injured...and take limited restitution money away from the truly deserving workers and their families,”<sup>10</sup> the new “soup de jour” of the plaintiffs’ bar is so-called benzene litigation. Individuals suffering from acute myelogenous leukemia (AML) and other leukemia diseases are claiming that they were exposed to benzene-containing products at their places of work, thereby resulting in these serious and often fatal medical conditions. Benzene is present in crude oil, and is a component of gasoline fuels, typically less than 3%.<sup>11</sup>

Benzene is classified as a Group 1 human carcinogen by the International Agency for Research on Cancer, and there is general agreement that benzene can cause leukemia in highly exposed individuals.<sup>12</sup> About 11,930 new cases of AML are diagnosed each year in the United States.<sup>13</sup> AML results from acquired genetic damage to the DNA of developing cells in the bone marrow.<sup>14</sup> The effects are the uncontrolled, exaggerated growth and accumulation of cells called “leukemic blasts” which fail to function as normal blood cells, and the blockade of the production of normal marrow cells, leading to a deficiency of red cells and platelets and normal white cells in the blood.<sup>15</sup>

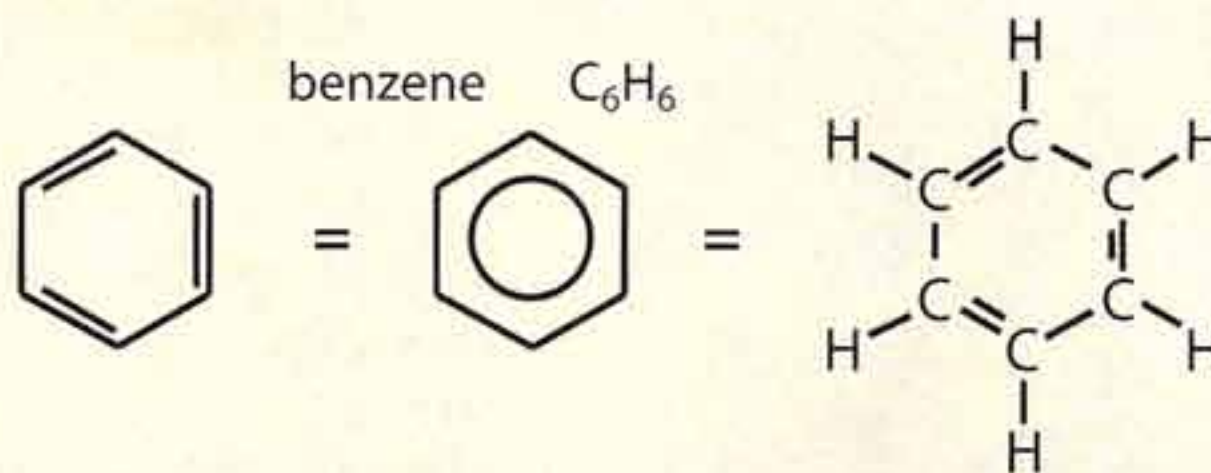


# Caught in Onslaught

While workplace exposure to benzene is a recognized cause of AML,<sup>16</sup> many of these so-called benzene exposure cases do not involve benzene at all. Rather, while the lawsuits' allegations claim benzene exposure, the defendants being sued often never manufactured products known to contain benzene. Rather, their products may contain xylene, toluene, paint thinner, kerosene and similar chemicals that may contain trace amounts of benzene, sometimes resulting from the fractional distillation process used at oil refineries.<sup>17</sup> The amounts of benzene in these products are denominated as "trace" because they are present, if at all, in concentrations of less than 0.1 percent, and are not listed as an ingredient on applicable material data safety sheets.<sup>18</sup> In contrast to benzene, "there is no direct epidemiological evidence concerning the carcinogenicity of toluene and xylenes, and only limited evidence from animal studies."<sup>19</sup> It is accepted that epidemiological studies are the most informative in evaluating a purported causal link between a chemical agent and a particular disease.<sup>20</sup> Yet, even

in the absence of such causal links, many companies that safely made products containing toluene and xylenes are being caught in a tangled web of such lawsuits. In the legal vernacular, these suits are known as "trace benzene" cases.<sup>21</sup>

Once a particular company's name appears on a list of defendants in one such case, it is a virtual certainty that its name will be included by plaintiffs' lawyers in dozens of unrelated cases. These claims are being filed in assembly-line fashion by law firms seemingly hell-bent on squeezing the last buck from American industries already reeling from skyrocketing raw materials and transportation costs resulting from the run-up in petroleum prices, pressures from low-wage, low-price competition from overseas markets, and price ceilings imposed by global cut-rate retailers. This feeding frenzy on the carcass of U.S. manufacturing has led to a new American growth industry: a recent Web search of the term "benzene personal injury lawyers" yielded a staggering 427,000 hits!



Ironically, benzene barratry has seemingly replaced manufacturing as America's business. Are there really enough benzene exposure cases to justify all this interest from personal injury lawyers? Given the advent of the "trace benzene" case, every Tom, Dick or Harry who ever wielded a paintbrush has now become fodder for the benzene plaintiffs' bar. This phenomenon led one industry executive recently served with such a suit to refer to the experience as a "corporate stick-up."

## Insurance Coverage

Many such corporate executives caught in the grip of this tidal wave of lawsuits do not realize that they need not face this onslaught alone. Businesses facing these new types of suits will likely have insurance designed to cover their losses. Trace benzene and other toxic tort suits involve products to which exposure is alleged to have occurred over the entire working career of the plaintiff, i.e., a period of decades. Companies who manufactured such products over that time period are very likely to have purchased comprehensive general liability insurance covering such liabilities. Given that the occurrences alleged in these lawsuits arose from exposure throughout such extended time period, the insurance that the companies purchased during this period remains viable to cover them now.

This principle was established by such groundbreaking cases as *Zurich Insurance Company v. Raymark Industries, Inc.*, 118 Ill.2d 23 (1987), where the Illinois Supreme Court held that insurance coverage is triggered both at the time of the alleged exposure to the hazardous substance as well as at the time of manifestation of the sickness or disease. Yet, despite that the existence of such coverage is widely known in the legal community, its availability to deal with the spate of recent toxic tort suits such as those of the trace benzene ilk is, surprisingly, not yet widely known. For example, a recent spot search of benzene cases filed in Madison County, IL, resulted in finding that many of the defendants in these suits were not represented and had never filed appearances. Had these parties filed claims with their liability insurance carriers, the carriers would have been obliged to

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defend and indemnify them. In other words, the parties would have had the cost of their defense covered and any judgments or settlements paid by the insurers. The insurers must honor this contractual duty to defend and indemnify even if the lawsuit is frivolous, which is often the situation in the trace benzene cases.

Given that these companies paid the premiums for their insurance coverage, why are they not contacting their insurers? Often, the companies simply do not know and have not been advised that insurance purchased many years ago is still viable and applicable today. They do not consider that policies literally gathering dust in a backroom filing cabinet may be worth hundreds of thousands or even millions of dollars in defense and indemnification costs. Not every corporate lawyer knows the coverage area. However, lawyers who specialize in coverage for the policyholder know how to get the insured the access to the defense and indemnity dollars to which they are entitled. It is time for American industry to get the coverage it deserves. The spate of lawsuits may not be stopped, but the insurers can be required to defend against them, and the business of America will then be business once more. ■

### References

- 1 Kenneth Anspach is a Chicago attorney (Anspach & Associates, 8 South Michigan Avenue, Suite 3400, Chicago, IL 60603; 312-407-7888) concentrating in insurance coverage and environmental litigation. He represents manufacturers, environmental entities and financial institutions. Mr. Anspach is a former Illinois Assistant Attorney General and Hearing Officer for the Illinois Pollution Control Board.
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