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ALM

*Angleton, Texas, was supposed to be the first outpost in a new frontier for asbestos litigation.*

## SHOWDOWN in a Small Town

*But the jurors had a different idea.*

*Last October*, in a small-town courtroom, Union Carbide Corporation faced a harrowing moment of truth. The company, a subsidiary of Midland, Michigan-based Dow Chemical Company, had been dragged into court in East Texas. After a grueling six-week asbestos trial, a jury was asked to decide whether Carbide should pay billions of dollars in damages to Kelly-Moore Paint Company, Inc., which had purchased asbestos from Carbide.

The plaintiffs attorney in the case was Houston's Mark Lanier, a feared trial advocate who had won over \$100 million in verdicts in Angleton, Texas, the site of the trial ["Lone Star Rising," March 2004]. In short, it was the sort of situation that corporate executives usually avoid through settlement, arbitration, or some other legal maneuver.

But a strange thing happened in *Kelly-Moore Paint Company, Inc. v. Dow Chemical Company*. After two hours of deliberation, the jury decided on October 22 that Carbide did not have to pay a penny. It was a stunning end to what had promised to be a brave and lucrative new front in the long-running asbestos litigation war. Lanier had devised a strategy that he hoped would allow companies with asbestos liability—like Kelly-Moore—to recover gargantuan sums from their asbestos suppliers.

The crusade has not turned out exactly as Lanier would have hoped. As he struggles with his loss, he now must contend with questions about the peculiar circumstances in which he came to be involved in the Kelly-Moore suit.

Because the case was his idea, Lanier faces more scrutiny than the normal losing lawyer. Typically, aggrieved companies come to a lawyer

when they want to file suit. In this instance, Lanier approached KM and pitched the idea of blaming Carbide for its asbestos problems.

For KM, Lanier was an unlikely champion. The young lawyer started his career at Houston's Fulbright & Jaworski, but he has made his name representing plaintiffs, from asbestos victims to Vioxx users. Lanier now commands a 17-lawyer firm—The Lanier Law Firm—and earns millions annually. In fact, at the time he approached KM, Lanier was representing Charles Latham, a construction worker suing the paint company. Lanier claimed that Latham had contracted mesothelioma, a type of lung cancer, after using an asbestos-containing joint compound sold by KM. The company defended itself, as it did in other asbestos cases, by arguing that the compound was not dangerous.

In a November 2001 deposition in the Latham case, Douglas Merrill, KM's vice president of manufacturing, said that the company's asbestos suppliers, including Carbide, had convinced KM that it was trafficking in safe levels of asbestos. During his cross-examination of Merrill, Lanier ridiculed the idea that KM would trust its suppliers. "Would you go to a heroin dealer to find out information on whether or not heroin is addictive?" Lanier asked Merrill.

Nonetheless, Lanier later claimed to have been persuaded by Merrill's testimony. So, shortly after the Merrill deposition, Lanier traveled to San Francisco, near KM's headquarters in San Carlos, California, to meet with company chairman Joseph Cristiano. Lanier told Cristiano that Carbide knew more about the dangers of asbestos than it had shared with KM.

Lanier says he was not trying to drum up business. "My basic view

BY NATHAN KOPPEL

was, Here [is the information],” Lanier says of his meeting with Cristiano. “I said, ‘There are a number of lawyers who can pursue this for you. I can give you a list of names. If you choose not to do it, that’s fine, but you need to know about it.’” Cristiano later testified in a deposition in the Carbide suit that he was dubious of Lanier’s motives when they first met. “In my book, [Lanier] was the enemy,” Cristiano said in the deposition, “and now the enemy was coming to us with information that told us that we’d been deceived.”

By early 2002 KM had set aside its doubts about Lanier and hired him to sue Carbide. Before the former adversaries could join hands, though, KM had to settle Lanier’s pending cases against the company, including Latham’s. Lanier says that he had more than a dozen cases pending against KM and that each settled for a six-figure sum.

After navigating those potential conflicts, KM filed suit against Carbide in May 2002 in Angleton. Lanier chose that venue, a blue-collar town about 30 miles from Houston, in part because of its pro-plaintiff reputation. In 1998 the attorney won a \$115 million asbestos verdict there against The Carborundum Company. The Kelly-Moore case promised even larger rewards. KM sought \$1.4 billion in actual damages and more than \$4 billion in punitive damages. The suit would be watched closely—asbestos attorneys from across the country attended the trial—because it represented a new, potentially lucrative avenue of recovery for asbestos vendors.

For Kelly-Moore, the suit represented an abrupt about-face. For 25 years it had proclaimed that its joint-compound products were safe. But now it was openly recognizing the dangers. The genesis of the transformation was remarkable. A 2,000-employee company, with more than 150 stores, KM had purportedly achieved its eureka moment thanks to the work of a Houston plaintiffs lawyer—despite the fact that countless doctors and media outlets had written about asbestos’s dangers since the sixties. Even before the trial, Lanier recognized that the suit was a reach and that jurors might be hard-pressed to work up sympathy for a longtime asbestos defendant-turned-crusader.

The suit was not only a stretch, but a financially risky one at that. The paint

company currently faces thousands of personal injury asbestos suits. It has already paid \$240 million in damages, and it asserted in the Carbide trial that it would have to pay \$1.37 billion to resolve future asbestos claims. If KM recovered billions from Carbide, it would provide a nice buffer against future personal injury suits. But if the company lost, it would have to face the plaintiffs bar with its hands partially tied. As asbestos plaintiffs lawyer Mark Iola of Dallas explains: “This [Carbide suit] has taken away the ability of Kelly-Moore to tell juries that Chrysotile [asbestos, which was the sort used in KM products] doesn’t cause mesothelioma. . . . This has made [cases] against Kelly-Moore easier.”

Why did Kelly-Moore take the risk? The company declined comment. But Lanier concedes that mounting asbestos losses forced KM to at least try to seek cover. “This [Carbide suit] was their best chance to stay alive,” he says, although he declined to say whether KM will file for bankruptcy.

Still, the question remains: Why would Lanier, who can pick and choose his cases, get involved in a far-fetched suit, let alone serve as the catalyst for it? Lanier has risked professional scorn in doing so. Even before trial, other asbestos plaintiffs lawyers said, proudly, that they would not have touched the Carbide case. “We represent sick people, and that’s all,” says Oakland asbestos lawyer Steven Kazan. “*Kelly-Moore v. Carbide* may not be Hitler versus Stalin,” he says. “Maybe it is closer to Idi Amin versus Stalin. But still, these are not the people that I want to be seen with.”

One obvious explanation is money: By convincing KM to hire him, Lanier could induce KM to settle all of his personal injury suits against the company. Lanier denies that this was his strategy. He says that he never had trouble winning cases against KM in court. He further points out that he took the Carbide case on contingency and personally fronted the first \$1 million in expenses. If he had filed the suit to strike it rich, Lanier says, “I [would be] a stupid businessman.”

On paper, Carbide may have had the upper hand in the case. But the company still approached the Angleton trial with trepidation. “This was a \$6 billion case in Lanier’s backyard. . . . [and] Lanier is very feared,” says Carbide’s lead lawyer, Peter Bicks, a

partner in the New York office of Orrick, Herrington & Sutcliffe.

THE TRIAL BEGAN ON Monday, September 13. Lanier tried the case with his usual gusto. In court, he typically adopts a manner of plainspoken outrage as he attempts to beatify his client and demonize the defendant. It’s a style that is more suited to personal injury trials than corporate slugfests, yet Lanier made no attempt to tone down his rhetoric. In his opening he painted a loving and exaggerated portrait of Kelly-Moore as a mom-and-pop outfit, started by William Moore after he returned from World War II. “He was a lieutenant [in the Navy]. Came back a war hero,” Lanier said. In contrast, Lanier portrayed Carbide as megalithic and craven. He argued that in the sixties, Carbide knew about the dangers of asbestos, yet decided to “make hay while the sun shines.” Lanier even took aim at his opposing counsel, seemingly never missing an opportunity to point out that Peter Bicks was from New York.

Bicks and his cocounsel, Scott Lassetter, the managing partner of Weil, Gotshal & Manges’s Houston office, adopted a more subdued approach. “[Lanier’s opening] would make a good episode of *Geraldo*,” Lassetter said in his opening. “But it doesn’t have anything to do with what happened between Union Carbide and Kelly-Moore.” Lassetter argued that Carbide had been candid about the dangers of asbestos and that KM, in any event, was sophisticated enough to find out about the hazards on its own. “Mr. Moore was a chemical engineer,” said Lassetter. “He employed highly skilled chemists to work for him.”

Over the course of the six-week trial, Lanier did his best to place Carbide in a negative light. He introduced incendiary evidence, portraying Carbide as callous and manipulative. But he was far less successful at portraying his client as a hapless victim. KM was not able to offer any direct evidence to indicate that the company had relied on Carbide’s representations about asbestos. Company founder William Moore was too

sick to testify (he died shortly after the trial ended). His wife, Desiree Moore, did get on the witness stand, but the jury paid little attention to her. "She was just a grandmother who couldn't remember anything," says Gregory Wilson, the jury foreman. Carbide, meanwhile, did a good job of challenging the notion that it was KM's sole source of information about asbestos by asserting that it supplied only 8 percent of KM's supply of asbestos. (The 8 percent figure would later weigh heavily in the jury's decision.)

Although he had a difficult case, Lanier impressed most of the jurors. Even when the other attorneys were talking, says Wilson, Lanier would flash incredulous looks or scribble on a notepad so furiously that the jury could not help but stay riveted on him. "He was very entertaining," says Wilson. Adds another juror, Michael Lassman: "He did the best job, hands down. He instantly established a rapport with the jury." Yet one juror, Glenn Rogers, thought Lanier was too theatrical. In questioning Carbide's experts, Rogers says, Lanier would affect an air of exaggerated doubt: "You're not really a doctor, are you?" says Rogers, mimicking Lanier. "It got to the point where I'd wince every time [Lanier] opened his mouth."

Carbide's lawyers drew mixed reviews. In the third week of trial, Lassetter bungled a cross-examination of KM's damages expert, which destroyed Lassetter's credibility with the jury. "Lassetter just bombed," says juror Art DeKenipp. Bicks fared much better. "He was not dynamic, not flashy," says Wilson. "But he was extremely effective." Jurors gave Bicks especially high marks for his closing, where Bicks hammered KM's inconsistency

in asserting, in other asbestos cases, that its products were not dangerous. "You can't tell juries two different, opposite things," Bicks asserted. "You can't be believed if you do that."

**I**N THE END, THE VERDICT WAS more about substance than attorney style. The jurors decided 11 to 1 that Carbide did not defraud KM. To find fraud, jurors needed to conclude that Carbide misrepresented the dangers of asbestos and that KM relied on those misrepresentations. According to interviews with six jurors, the jury overwhelmingly believed that Carbide committed misrepresentation. Yet, all but one juror believed that KM did not prove reliance. There was so much information in the news media about the dangers of asbestos, that it was implausible to think that KM relied solely on Carbide to educate it about asbestos, says juror Rogers: "KM was not in a box." Another juror, speaking on background, questioned whether KM would truly rely on such a minor supplier: "Carbide sold only 8 percent of the total asbestos that Kelly-Moore bought," she says. "But [KM] was holding Carbide responsible for all of it."

Lanier still has an opportunity to redeem his loss. He filed a motion for new trial, which was denied in early January. But he has also filed a similar suit in Los Angeles on behalf of another asbestos vendor, Hamilton Materials, Inc. The maker of construction products claims that Carbide, its asbestos supplier, hid the dangers of asbestos from it. Like KM, Hamilton is trying to force Carbide to pay for

all of Hamilton's future asbestos damages. Bicks is defending Carbide, setting up a possible rematch between the Angleton lawyers.

Lanier's confidence should be shaken heading into Round Two. Whatever favorable evidence that he uncovers in the Hamilton case, the attorney has learned how hard it is to get a jury to rally to the side of an asbestos vendor. The jurors in *Kelly-Moore*, after all, believed that Carbide was a bad actor—"Union Carbide was no rose, more like the thorn of a rose," says juror Cindy Romeo—but they chalked up the company's wrongdoing to the rough-and-tumble mores of the business world. "A lot of us felt that there were misrepresentations [by Carbide]," says juror Lassman. "But the feeling was that is just business. . . . [Carbide] was just doing that to sell more asbestos."

Bicks believes that the result in Angleton should chill future vendor-versus-supplier litigation. "The [Kelly-Moore] case was brought in what is viewed to be one of the most plaintiff-friendly jurisdictions in the country by a lawyer whose reputation was that he was invincible in that jurisdiction," says Bicks. "If this lawyer in this venue couldn't prevail, it suggests it is a tough case."

Lanier, though, is not deterred. "The first [personal injury] asbestos case was lost by the plaintiffs," he points out. "I just believe in these cases. I'm not backing off." At least no one can claim that Lanier is trying to bolster his reputation by picking easy cases to try.

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