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MANAGING ASBESTOS CLAIMS AND LITIGATION

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MINI-ROUNDTABLE

MANAGING ASBESTOS CLAIMS AND LITIGATION



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Jeffrey A. Healy is a partner at Tucker Ellis LLP. Jeff manages the firm's Ohio offices and is Chair of the firm's Mass Tort & Product Liability Practice Group. He currently serves as National Trial, National Coordinating, regional and local counsel.

CD: How would you describe recent trends in asbestos claims and litigation? Have any specific developments taken shape over the last 12 to 18 months?

Crist: Asbestos litigation is a billion dollar business. Saturation advertising mines the ever-dwindling number of plaintiffs allegedly exposed to a substance not extensively used in over 30 years. To expand these numbers, aggressive creativity that at times defies fact, law, logic and science remains the norm. As the number of mesothelioma claims remains stagnant or drops, plaintiffs' attorneys have redirected their attention to smoking lung cancer patients. As the number of solvent defendants has dwindled, plaintiffs' attorneys have increasingly focused upon entities whose connection with friable products in specific or even asbestos products in general, was once considered too remote or attenuated for legal causation. The results are cases against not only manufacturers of products used by or around the plaintiff, but also against products that the plaintiff never used or was around. In such 'take-home asbestos' cases, the defendants include the employers – or premises owners – of the persons that allegedly transported the dust on their clothes, which in turn exposed others who claimed a resulting disease.

Healy: Because the number of mesothelioma diagnoses in the United States has hovered around 3000 per year, the number of lawsuits from that disease has remained relatively flat. This has resulted in creative efforts by the plaintiffs' bar to find more asbestos-related injury claims. These creative efforts, among them mass aggressive advertising, have resulted in increased filings of lung cancer claims as well as the advancement of non-traditional causation theories, such as 'each and every fibre is a substantial cause' or 'any exposure above background is a substantial cause'. And because some courts and states – Ohio and Wisconsin, for example – are calling for more transparency in the filing of bankruptcy trusts, plaintiffs are now waiting until after their tort claims are resolved to pursue the trusts, or filing cases in jurisdictions which have not adopted trust transparency. The confluence of these efforts, along with large verdicts against non-traditional defendants, are warning signs of yet another crisis.

Behrens: Perhaps the most significant recent development was a 2014 federal bankruptcy court decision involving gasket and packing manufacturer Garlock Sealing Technologies, LLC. The judge found that asbestos lawsuits against Garlock had been "infected by the manipulation of exposure evidence by plaintiffs and their lawyers". The judge documented how plaintiffs' lawyers abuse the lack of transparency between the asbestos bankruptcy

trust and civil court systems to gain an unfair litigation advantage. The decision has fuelled efforts to address this problem. Also, greater scrutiny is being applied to plaintiffs' experts who opine that 'every exposure' to asbestos above background is a legal cause of disease, without regard to assessing dosage. More courts are rejecting such testimony, particularly in the federal court system. Another trend is that most courts are rejecting inventive theories being promoted by some plaintiffs' lawyers to stretch the liability of solvent defendants. Adoption of the 'bare metal' defence is one example; rejection of premises owner liability for 'take home' asbestos exposures involving family members of occupationally exposed workers is another.

Lively: In broad terms, litigation continues to evolve as it has since its inception in the 1970s. But it evolves differently for different defendants involved in the litigation. New defendants who were merely tangentially involved with asbestos are brought into the litigation for the first time. Other defendants see their profile diminish as the period of time when they manufactured asbestos containing products fades farther into the past. Speaking for the majority of defendants, the cases against them continue to be more and more challenging to defend. Opposing counsel has had decades to gather documents and refine a narrative against each defendant so the claim is far more sophisticated than it was in the past. Further complicating things, the pool of solvent

defendants continues to shrink as the original target defendants are now in bankruptcy. Peripheral defendants have become target defendants. Plaintiff firms try to change the paradigm and renegotiate historical settlement values. Companies not named historically are now dragged into the litigation and their status needs to be litigated. Corporate representatives and experts pass on and new witnesses need to be developed. And science continues its march forward. All of these factors must be evaluated to prudently navigate today's asbestos litigation.

CD: Could you outline some of the key underlying causes of asbestos related claims?

Behrens: Not all diseases associated with asbestos exposure are necessarily asbestos-related in a particular case. For instance, the medical literature documents the existence of spontaneous cases of mesothelioma. This may explain mesothelioma in persons who can only speculate that they may have breathed some asbestos because it was in a building somewhere. In other cases, a plaintiff may have been exposed to asbestos from numerous products with widely divergent toxicities. Some asbestos products present a much greater risk of harm than others. It is important for courts to distinguish exposures that were substantial in a causative sense from

those that were inconsequential. For example, in a widely cited 2011 federal appellate court decision, *Moeller v. Garlock Sealing Technologies, LLC*, the court recognized that calling the plaintiff's exposure to the defendant's gaskets a substantial cause of his mesothelioma, in light of his massive exposure to asbestos from other sources, "would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume".

Lively: For decades asbestos was touted as the 'magic mineral' because of its strength, resilience to heat and ability to be woven or integrated into useful materials. Materials made of asbestos became the standard around the world for fireproofing, thermal insulation, fluid sealing, protective clothing and myriad other products. US military required its use in all ships. Local governments mandated its use in building codes. It was in almost everything and everyone living in the US has been exposed to it. Because of the extensive use of asbestos in industrial and construction settings, millions of workers were exposed to asbestos at levels which far exceed today's industrial hygiene standards. Unfortunately, this led to the development of asbestos related disease. Fortunately, only a small percentage of those workers actually develop an asbestos related

disease. Mesothelioma is exceptionally rare with around 2500 new cases being reported a year in the US. The disease asbestosis developed in some of those persons who experienced exceptionally high and prolonged exposure to asbestos dust, but that disease is rarely seen today due to the phasing out

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Tucker Ellis LLP*

of asbestos products and the heightened industrial hygiene standards which were implemented in the 1970s.

Healy: Though the number of individuals exposed to asbestos at levels known to cause disease has decreased dramatically since the 1970s with the advent of OSHA and workplace controls, asbestos claims continue to be filed at unanticipated rates. This is because asbestos litigation is big business – the amount of advertising money spent soliciting clients is breathtaking. And the message in many of

these ads – that there are billions in easy bankruptcy trust dollars just waiting for someone to ask – clearly drives claims. The plaintiffs' bar and its experts have also been able to convince courts and juries to depart from evidence-based causation criteria and conclude that smoking-related cancers are somehow caused by remote asbestos exposure. Finally, the splitting of plaintiffs' law firms continues, creating a larger market drive for a finite number of legitimate claims.

Crist: There are a number of causes for the asbestos litigation crises that the US Supreme Court had described as an 'elephantine mass'. While demonised in mass market advertising today, it was long regarded as a 'miracle mineral' because of its ability to offer chemical and thermal resistance and structural tensile strength. Perceived as a safety device, it was required by codes and specifications and ultimately became used in over 3000 industrial, commercial and residential products. From home to work, from ceiling to floor, and from bathrooms to toasters, it was ubiquitous. Buoyed by public opinion now moulded by mass-market advertising, claims with increasingly lower exposures have been accepted and permitted in many jurisdictions. This has expanded the number of plaintiffs, the number of defendants and the pool of funds available to answer those claims. Plaintiffs continue to push the boundaries of litigation to maximise the numbers of

plaintiffs and defendants, often to the detriment of both.

CD: Have there been any recent, high-profile cases? What can we discern from their outcome?

Healy: The recent cosmetic talc verdict in Los Angeles, two secondary exposure verdicts in Cleveland and large verdicts in the New York City consolidation are disconcerting. Each presented unique facts and damages profiles, while at the same time resulted in all-time verdict highs against non-traditional defendants based on novel or expanded legal theories. When courts depart from evidence-based causation and minimal 'exposure' becomes the norm for liability – coupled with 'bet the company verdicts' – reasonable pre-trial resolution becomes nearly impossible. Defendants must be vigilant in requiring courts to follow traditional evidentiary rules and exclude witnesses whose testimony is not based on real science.

Crist: If past is prologue, then wide variations in verdicts will continue. For instance, in Florida, a jurisdiction long touted as one of the nation's top 'judicial hellholes' by the American Tort Reform Foundation, defence verdicts remain regularly interspaced with the significant plaintiff's verdicts, often against low-dose chrysotile defendants. For instance, in 2014, one plaintiff's firm received a

\$37m verdict for a mechanic, but then lost a similar claim against another friction defendant a year later, which loss was balanced that same month by a \$17m verdict. In Alabama, California, and Georgia, the Supreme Courts are considering the viability of take-home exposure cases, which if permitted, will generate a wellspring of new claims against new defendants with ever more attenuated exposures. As several courts have cautioned, allowing such claims could result in an almost infinite universe of defendants for infinitesimally small exposures resulting from any contact with the clothing of an exposed person.

Lively: The 2014 ruling issued on the Garlock bankruptcy is the most significant decision in many years. For those not familiar with it, the presiding judge agreed with Garlock's approach to quantifying the amounts owed to current and future persons claiming that exposure to Garlock's products caused them an asbestos related disease. This valuation approach differed dramatically from how previous bankruptcy judges valued companies' asbestos liabilities and dramatically lowered the size of the trust fund Garlock must establish to remove itself from the asbestos litigation. The court stated clearly that the rationale for the change in approach was the wide scale fraud (not the court's word) he discovered in how asbestos plaintiffs were manipulating the tort and bankruptcy systems to obtain double compensation. Following the

decision, numerous courts and state legislators began investigating ways to increase transparency around how the existing bankruptcy trusts distribute their funds. These same inquiries aim to coordinate the tort system with the bankruptcy trusts so that plaintiffs are not compensated twice for the same injury. Experts estimate that the existing bankruptcy trusts contain as much as \$34bn. The dollars contained in these massive funds should transparently and appropriately find their way to the persons who are currently suing solvent companies in the tort system. The inquiries aim to do just that.

Behrens: State legislatures have responded to the Garlock case by providing defendants with greater access to plaintiffs' asbestos bankruptcy trust claim submissions. For example, legislation enacted in Texas, West Virginia and Arizona in 2015 provides a mechanism to require plaintiffs to file their asbestos trust claims before trial and produce those materials to defendants. Access to asbestos bankruptcy trust claim forms can help defendants identify inconsistencies in a plaintiff's statements regarding that person's exposures to asbestos-containing products. The California Supreme Court's 2012 decision in *O'Neil v. Crane Co.* remains significant. In *O'Neil*, the court held that a manufacturer of a product is not legally responsible for allegedly injurious asbestos-containing materials made and sold by third-parties, simply because it was foreseeable that those other products would be

used near or in conjunction with the manufacturer's equipment post-sale. Many decisions nationwide have adopted this approach.

CD: Could you explain the implications of the 'bare metal' defence in asbestos cases? What impact is this likely to have going forward?

Lively: Put in plain language, the bare metal defence argues that a company cannot be held responsible for a product it did not manufacture. Many companies embroiled in the litigation today never manufactured or sold materials which contained asbestos. These companies made machinery such as pumps or valves which were made from steel, iron and other metals. Once these machines were installed in the field, asbestos materials were affixed to insulate, fireproof or seal them. These companies now fight to limit their liabilities to the product they actually manufactured, designed and sold. This legal battle has been ongoing in numerous jurisdictions across the United States. Some state courts have sided with the equipment manufacturers, others hold the manufacturers liable for the asbestos placed on their equipment by others and some require a fact specific analysis to discern whether the manufacturer could reasonably foresee that asbestos would be utilised with its equipment.

A major impact of these various rulings is forum shopping. Plaintiffs avoid the jurisdictions where the law vindicates equipment manufacturers and they file their cases in those jurisdictions where manufacturers have no such defence.

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Behrens: Some plaintiffs' lawyers are promoting the theory that makers of uninsulated products in 'bare metal' form, such as turbines, should have warned about potential harms from exposure to asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, such as by the US Navy. Plaintiffs' lawyers are also claiming that manufacturers of products, such as pumps and valves, that originally came with asbestos-containing gaskets or packing should have warned about potential harms from exposure to replacement internal gaskets or packing or replacement external flange gaskets manufactured

and sold by third parties. The Supreme Courts of California and Washington, appellate courts in several other states, and federal courts applying admiralty law have rejected these claims. Consistent with traditional tort law principles, the clear majority rule is that a manufacturer is not responsible for asbestos-containing products made or sold by third parties. Cases are pending in the highest courts of asbestos litigation epicentres New York and Maryland.

Crist: Over the years, plaintiffs have attempted to hold equipment manufacturers liable for not only the asbestos products that they directly supplied, but also the products of others that were used with their products. For example, pumps and valves had bare-metal exteriors on which some users added insulation. Defendants maintain they have no responsibility for products that they did not design, distribute, manufacture or specify. This defence also applies to aftermarket products such as gaskets, packing, brakes and

clutches that are replaced during the normal life of the equipment. Where the plaintiff cannot state he was the first to replace such items, he cannot establish that it was the equipment manufacturer that supplied them. Plaintiffs maintain that the defendants knew or should have known that such asbestos products would be used, and therefore were required to



redesign the equipment or at least provide a warning. While several courts applying maritime law have accepted the doctrine, state laws remain in flux.

Healy: The 'bare metal' defence, literally interpreted, should be successful in every instance, but it is not. Instead it is a perfect example of how asbestos jurisprudence has trumped traditional liability

analyses. Nowhere in traditional product liability schemes is a defendant responsible for a part it did not make, design, distribute, specify, sell, or require. And yet, as a result of the creative success of the plaintiffs' bar in winning large verdicts against equipment manufacturers that had nothing to do with the offending part, defendants have now crafted what is known as the 'bare metal defence', which should not have been necessary in the first instance. If an equipment manufacturer had nothing to do with the part that caused the injury, it should not, under any liability scheme, be liable.

CD: What advice would you give parties involved in an asbestos claim? What potential risks and liabilities might they need to consider?

Crist: We emphasise to new defendants accustomed to the demands and logic of normal tort litigation, that asbestos cases feature a host of new demands and considerations. Asbestos is a unique litigation, with its own customs, practices, doctrines and experts. The plaintiffs' bar is experienced, interconnected and well funded with significant legislative and judicial influence. They employ a stable of seasoned investigators, researchers, historians and archivists who have the ability to locate the most esoteric of documents. The defence must do the same. An early investigation of the claim, development of apportionment to divert

liability shares, development of corporate witnesses, review of corporate documents, and selection and vetting of multiple experts which vary depending on the product, date of exposure and frequency and proximity of use remain vital. Uniformity and coordination of discovery is a critical aspect of mass tort litigation that requires familiarity with the issues and the courts.

Behrens: There is no one-size-fits-all strategy. A low dose chrysotile defendant would likely approach the litigation differently than an amphibole insulation defendant. For today's low dose defendants, courts should require plaintiffs' experts to estimate the dose the plaintiff received to each defendant's product and demonstrate that the dose was sufficient to cause disease via epidemiology studies of similarly-exposed populations. The jurisdiction is also an important factor in assessing the risk of a particular case. Some jurisdictions, such as New York City, have a reputation for pro-plaintiff rulings by judges and large jury verdicts. Another consideration is whether the state has enacted tort reform legislation. If a state holds each defendant liable only for its 'fair share' of the harm, then educating the jury about the totality of a plaintiff's exposures to asbestos can help to show that others were partly or entirely responsible for the plaintiff's injury.

Healy: When a company is sued for the first time in asbestos litigation – which still occurs today because of the dwindling number of viable defendants – it must thoroughly research the legal and factual predicates as to why it is being sued. Any payment could, and most likely will, have national and long-lasting implications. Any payment, without the proper protections, will nearly guarantee a landslide of suits nationwide. Attorneys well versed

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DLD Lawyers*

in both traditional product liability/mass tort, as well as asbestos, should be consulted so that all legal defences – such as jurisdiction, successor liability, and so on – are pursued at the outset. Detailed factual investigations of the allegedly offending product often result in product design defences – such as limited use or application and product constituents that prevent fibre release, enabling the

newly sued company to quickly extract itself from the litigation without becoming targeted.

Lively: Companies which are newly added to the litigation must appreciate that this is a mass tort. How they handle the first case will impact the hundreds or thousands which they will defend in the future. Accordingly, find competent, experienced counsel when the first case is filed. This litigation is its own animal and there is nothing one-size-fits-all about it. Each defendant, whether a manufacturer, supplier, premises owner or contractor, has unique defences which are dependent on their product, their story and the jurisdiction they are located.

CD: In your experience, what kinds of strategies tend to be employed by parties in asbestos related litigation?

Healy: At the national level, two important aspects are early identification of high-risk cases and honest dialogue with plaintiffs' law firms. Whether the result is dismissal, settlement or trial, it helps when decision makers are well informed, risks are accurately assessed and the course of action is contemplated, round-tabled and consensus driven. At the local level, it is important to closely monitor the 'asbestos' nuances of those jurisdictions, as well as to understand the local bench, bar, practices and law. It is also prudent to develop relationships with the courts and parties that have a proven track

record of efficiency and respect. Companies that partner with their lawyers have been successful when all involved have a well-grounded appreciation for the risks and the potential national implications of their conduct.

Lively: There are hundreds of companies defending themselves in this litigation nationwide. Each of these companies has its own story. The strategies employed to defend them are equally as diverse and nuanced. It is essential for each company to find and refine their story the moment they are pulled into this litigation; it is the only way to develop and effectuate an effective defence.

Crist: For plaintiffs, asbestos litigation is reduced to a simple syllogism. Asbestos is bad, your defendant knew it, used it and the plaintiff was injured. For the defendant, the case can take on varying levels of texture and nuance that can mystify a jury if not carefully, logically and simply described. Some asbestos trials devolve into esoteric debates about ancient epidemiology articles. When possible, the defence should be simpler and tailored to the case. Where appropriate, the plaintiff did not use or was around the product, the product would not release sufficient dust to cause disease, and use of the product was consistent with the state of the art at that time. General causation is not specific causation. Just because asbestos can cause a disease is not the same as proving that this asbestos

did cause this disease. Additional defences regarding the accuracy of the diagnosis, alternative causations and the type, release and conversion of the fibre are also available.

Behrens: Defendants apply different strategies to manage their asbestos litigation depending on the type of product at issue and whether the company is a major target defendant or a minor player. In any particular case, other considerations may include the jurisdiction, the plaintiff's alleged injury and potential damages, the legal theory at issue, potential defences, and the plaintiff's law firm. But defendants need to think beyond just defending cases in court. They also need to improve the environment in which trials take place. Civil justice reform legislation is an example. Defendants should support efforts to replace joint liability with 'fair share' liability, enact asbestos bankruptcy trust transparency legislation, and require plaintiffs to have objective asbestos-related physical impairment to proceed with a claim. Amicus, or 'friend-of-the-court', briefs in appellate cases can help put a case in a broader context and suggest rules for courts to adopt in the current asbestos litigation environment. Legal scholarship is also a useful tool to educate judges about how issues in the litigation today should be addressed. Finally, shining the public light on abuses can lead unfair judges to become more balanced.

CD: How much credence do you attach to the 'every exposure counts' theory of causation often espoused by plaintiffs' experts? Is it becoming more difficult to challenge expert testimony in hotbed jurisdictions which abide by this theory?

Crist: Spawn of litigation and bereft of good science, the 'each and every exposure' argument is a litigation construct that appeals to any potential juror whose 'knowledge' of asbestos is based upon saturation advertising. At its heart, early iterations claimed that all asbestos exposures cause disease. Later iterations claimed that only exposures above background levels caused disease. Such arguments are fundamentally flawed, and have been barred in some jurisdictions, but have also been accepted by many. It allows plaintiffs with low dose transient exposures to claim causation to products rarely or directly used. The argument confuses marketing with science, and general with specific causation. It ignores the type, amount, frequency, duration, extent and date of exposures. It ignores issues regarding the carcinogenicity of fibres and the body's defence mechanisms. It ignores the variations in background exposures and assumes a linear dose response model with no threshold. While the precise explication of such concepts requires more time than is allotted here, the argument is flawed and must be challenged.

Healy: The theory that ‘every fibre is a substantial contributing cause’ – or proximate cause – has no basis in science. Causality science is based on epidemiology and accepted scientific principles, and yet many courts permit some plaintiffs’ experts to opine on causation when there is no underlying basis in real science. When causality only requires that a plaintiff be present in the vicinity of an asbestos-containing product and the presence of the product is based on the subjective testimony of the plaintiff or co-workers, defending that product becomes almost impossible. That said, the defence has made significant strides in convincing some courts – and federal courts in particular – to reject this theory as the junk science it is.

Lively: The so called ‘every exposure counts theory’ is a fiction which clever attorneys and their paid experts developed to get around causation standards. We can accurately rephrase the theory, ‘because we can’t determine which product caused this disease we will opine that all of the defendants’ products did it together’. From the plaintiff’s perspective, this fiction has the benefit of making each defendant liable and therefore a target for settlement dollars. Despite the lack of a solid scientific basis for this theory, there is evidence that jurors are open-minded to its logic. Accordingly, every defendant must be prepared to

confront it with appropriate motion practice and experts who can demonstrate how and why the theory is a litigation born fiction. The fight over whether this opinion is admissible continues to be fought in jurisdictions across the country. Keeping in mind that the standard for the admission of expert opinions differs greatly from state to state, several appellate courts have limited plaintiff’s ability to offer this opinion; other appellate courts have stated it is admissible.

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Shook, Hardy & Bacon LLP*

Behrens: The ‘every exposure’ theory represents the view of the plaintiffs’ bar that every exposure to asbestos above background should be considered a cause of injury. The judicial reception to this theory has been largely negative. Numerous courts have reasoned that the theory lacks sufficient support in facts and data. These courts include the highest

courts of Texas, New York, Pennsylvania, Nevada and arguably Virginia, and trial and appellate courts in Florida, Delaware, Ohio, Louisiana, Mississippi, Utah, California and Washington. The Pennsylvania Supreme Court has rejected 'every exposure' testimony three times, calling the theory a "fiction" and requiring experts to prove a causative dose. The US Sixth Circuit Court of Appeals and many federal district courts have rejected 'every exposure' testimony too, finding that the theory cannot be tested, has not been published in peer-reviewed works, and has no known error rate. California courts are an exception, arguably misapplying California Supreme Court precedent as to the acceptable level of proof for legal causation.

CD: What steps should parties take to manage the complexities of asbestos related litigation?

Lively: The first step is to appreciate that a defendant can't handle an asbestos case in the same manner as other types of litigation. Once you are brought into the litigation you will likely find yourself involved in it for decades facing hundreds or thousands of cases in jurisdictions across the country. A global and long term strategy needs to be effectuated. To assist in doing this it is essential to find competent counsel with ample experience in this litigation. Each company has its own unique story. Fleshing out that story needs to be done with counsel who knows which questions to ask, which people to talk to and which documents to look for. Companies will need someone with great expertise to develop a defence strategy and implement it effectively across the country. Many companies choose to hire an experienced law firm to act as national coordinating counsel to coordinate the company's defence across the country. This firm can perform due diligence, manage discovery, train corporate witnesses, develop experts and develop trial teams who can respond on a regional or national basis.

Behrens: Reforms are possible if defendants highlight abuses and work together to take steps to



address them. For instance, in the late 1990s and early 2000s, hundreds of thousands of asbestos cases were filed by plaintiffs who were not sick. The courts and state legislatures came to understand that allowing these claims to proceed was bad policy. Now, claims brought by unimpaired claimants are not a large problem in any jurisdiction. A few years ago, the Philadelphia trial court developed a bad reputation for tilting rules to favour asbestos plaintiffs. Groups like the American Tort Reform Foundation called Philadelphia a “Judicial Hellhole”. A new judge was subsequently appointed to manage the cases, and he made the system fairer. This year, a scandal involving a high-ranking state politician with ties to an influential asbestos plaintiffs’ firm indirectly resulted in a change in the management of asbestos cases in New York City. Defendants are hopeful the new judge will be more balanced in his rulings than his predecessor.

Healy: In my experience, companies that effectively control costs and risks have successfully done so through active management and coordination. Controlling costs and risks – with a preference to lowering both – can be done through in-house resources, national counsel, or a hybrid of both. But in any model, clear lines of communication and timely and thorough reporting are critical to achieving company success. Engaged counsel must communicate well with other defendants to cost share, as well as coordinate experts, theories,

strategies and defences. All counsel involved must be efficient, prepared and knowledgeable about the company, products and specific jurisdictional nuances, as well as sensitive to national implications.

Crist: Management requires consistent application of theories and defences in multiple jurisdictions. It requires counsel experienced with the issues and the parties. It requires the development of theorems, defences, experts and witnesses who understand the history, science and variety of defences that may vary depending upon the type of product, years of exposure, type of disease and type of asbestos. An understanding of the regulatory approach to asbestos, as well as the chrysotile defence and specific epidemiology that relates to each product type is also required. While the litigation can be managed in a cost effective manner, it should never be cheap. The numbers of plaintiffs, volume of corporate and historical documents and amount of potential verdicts prevent that. We use our 25 years of litigation experience in the defence of a wide variety of manufacturers, distributors and retailer of all types of products to help clients understand, navigate and manage such issues.

CD: How do you anticipate the asbestos claims and litigation environment developing over the coming years? Should we expect an increase in such disputes?

Healy: More than 100 companies have filed for bankruptcy. As brought to light in the Garlock estimation proceedings, and confirmed recently by the Rand Corporation, these bankruptcies result in plaintiffs no longer identifying bankrupt companies or associated products at deposition or in discovery. Plaintiffs and co-workers now recall obscure – though viable – companies and products. This subjective testimony, coupled with ‘any exposure is causative’, makes asbestos lawsuits sustainable. With more than 200,000 lung cancer diagnoses in the United States per year, the cohort of claimants is an annual renewable resource. If courts are permitted to ignore the fact that the vast majority of all lung cancers are smoking related, the outlook is grim. Still, legislative initiatives, aggressive motion practice, and implementing robust case management orders – which allow full and complete discovery, disallow trust manipulation, remove the threat of consolidation, enforce evidentiary rules and treat both sides fairly – will have a positive impact.

Behrens: Mesothelioma claim filings have remained near peak levels since 2000 according to recent studies. For example, a 2014 NERA Economic Consulting review of asbestos-related liabilities reported to the US Securities and Exchange Commission by more than 150 publicly traded companies showed that “filings have been fairly stable” for several years. Mesothelioma claim filings will eventually begin to decrease, but filings are

anticipated for several more decades. There have been some upticks in lung cancer filings in some jurisdictions by a few asbestos plaintiffs’ firms.

Lively: The incidence of mesothelioma in the US has been steady for several years and epidemiology tells us that the incidence should begin to decline. But every time we believe the litigation has settled into a steady rhythm, our colleagues in the plaintiffs’ bar surprise us with something new. In the late 90s it was tens of thousands of new claims asserting asymptomatic lung ‘changes’. In 2012 it was a wave of heavy smokers asserting their lung cancers were caused by asbestos exposure. The best prediction is that the litigation will continue and that it will certainly take on new twists and turns. Opposing sides will become more and more combative as solvent parties dwindle and as more and more entities that had little to no contact with asbestos are dragged into the litigation.

Crist: Overall, asbestos suits will continue to increase in value, if not in number. Plaintiffs will continue to push the boundaries in low dose exposure cases to non-traditional defendants. Asbestos litigation has been in a state of continuing evolution for years, progressing from suits involving persons with massive occupational exposures to friable insulation in manufacturing facilities to persons with minimal, intermittent exposures to non-friable consumer products in

residential settings. Defendants have evolved from manufacturers to premises owners and contractors. The mechanisms of exposure have evolved from direct exposures, to indirect exposures, and then to take-home exposures where the person never even used or saw the product to which they claimed exposure. Litigation has further migrated

from jurisdiction to jurisdiction so that cases and lawyers formerly centred in hotbeds of litigation such as Texas have moved to California or Florida. In Florida, exaggerated verdicts in mesothelioma cases combine with a renewed cottage industry of aging non-malignancy cases as the courts try to dispose of 10 year backlogs. [CD](#)



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