

## Legacy Liabilities: Creative Management Needed

PATRICK J. LAMB  
KIRK T. HARTLEY

Within the past several months alone, thousands of asbestos and silica claims have been filed against scores of companies that have no business being named as defendants. The response, predictably, is to file the necessary answers and discovery responses and to join the long line of other defense attorneys seeking to take the plaintiff's deposition. This same approach plays itself out relentlessly, endlessly. And, we might add, most often ineffectually.

Businesses routinely carp mightily about the nature of the cases being filed ("unimpaired") and complain loudly that they do not belong in the cases. Yet other than carping and complaining, little is done to stem the tide. Instead, virtually all businesses fall back on a relentlessly routinized approach to defense, most often culminating in the issuance of a settlement check. This approach, however successful in the short run, however, only ensures that even more cases will be filed.

There are, to be sure, very legitimate reasons for some businesses to seek to remain below the radar. Concern about possible retribution from the plaintiffs' bar or plaintiff-friendly judges is a very real impedi-

ment. So too is the very real problem of short-sighted insurers who eschew investment in anything other than the lowest priced defense.

Less compelling but frequently cited is the concern that doing anything extra will incur extra legal costs, leading to lower earnings. Indeed, the litany of reasons is as long as the list of defendants complaining about the failure of the judicial system.

There are 60 companies in bankruptcy as a result of asbestos litigation, and more coming. Most employed the same defense strategy. It does not require much to conclude that the strategy used for the last 30 years may not be the right strategy for every corporation today. Being a "peripheral" defendant today should be of cold comfort: most of the bankrupt entities were "peripheral" defendants at one time, too. The standard defense strategies that continue to be used today have always been based on the assumption that the defendants could fund and win a war of attrition. The bankruptcies are sobering evidence of the fallacy of that assumption.

In response to the "war by attrition" strategy, the plaintiff's bar has created an alternative business model that creates incentives for them to file cases by the thousands with little or no concern about their ability to prove any element of their cases. The failure of business to

restructure their lawsuit defense model into a business model that competes with the plaintiff's model is a critical failure of imagination.

Let's parse this a bit further. Say a plaintiff's lawyer files 15,000 cases per year. Because the lawyer cannot always know which company will pay and which won't in a given case, it is important to this business model to sue as many companies as possible. The marginal cost of adding a specific company as a defendant is virtually nothing. Hence you see complaints with several hundred defendants. Even if half of the 500 defendants in any given case are dismissed, if the others pay just an average of \$250 each to settle a case, the gross settlement for that plaintiff is \$62,500. The lawyer's take, at a modest 33% contingency fee, is roughly \$20,500. If this take holds for just two thirds of the cases filed, the lawyer's take is in the vicinity of *\$21 million*.

Many companies first realize the predestined failure of their approach to asbestos litigation when considering how to report it in a public filing. Ever growing numbers of cases multiplied by an average settlement amount yields an unacceptably high number. There then follows a push to secure dismissals, only to be confronted with plaintiff's zero sum gain approach to settlement. When dealing

with boxcar numbers of claims for people barely injured, facts and legal defenses are close to irrelevant for a plaintiffs' lawyer focused on gross revenue. Suppose you can pay \$100 per claimant to settle 100 claims. Normally, it would follow that if you could whittle the number of claims to 50 because of facts and law, your total settlement payment likewise would be halved. But not under the new model: plaintiffs simply will demand \$200 to settle each of the cases, a classic zero sum gain.

The challenge for management is what to do. Legislation under consideration as this article is being written may end the asbestos wars, but it will not end the litigation problem. No multi-billion dollar industry ever disappears, and the plaintiff's asbestos bar is a multi-billion dollar industry. It will morph. Exactly how is hard to predict. Asbestos litigation in Europe and elsewhere is one model some plaintiffs' firms already are developing. Another model is silica litigation. Silica claims already are increasing dramatically in the same jurisdictions that are home to mass asbestos filings, brought by many of the same lawyers. Indeed, plaintiffs' counsel acknowledge combing their client lists for potential silica plaintiffs, and the same mass screening procedures are being employed. And there will be more. Other products and services will be attacked to feed the beast. So while asbestos legislation is a positive step, if passed, its effect will be to change the targets.

The authors believe that the only truly effective way of limiting the

mass filing of cases against corporations which have no business being named as defendants is to attack the marginal cost of adding those defendants. No one company or industry can successfully attack alone. There must be a "coalition of the willing" comprised of major insurers and reinsurers, along with the scores of "peripheral" defendants and their shareholders, who are the real victims of the plaintiff's economic model. Just as no sane army sends its enemy an advance copy of its war plan, this article is not the place to suggest specific strategies. The purpose, instead, is to encourage a dramatic shift in tactics and an understanding that war must be fought with a horizon longer than the next quarter. The envelope must be pushed and even torn apart.

*Patrick Lamb and Kirk Hartley are senior trial partners with Butler Rubin Saltarelli & Boyd, a Chicago litigation boutique. Both have substantial experience with product liability and mass tort defense. Both also have substantial experience litigating post merger and acquisition disputes. For the past decade, both have devoted substantial time to the convergence area, legacy liability management and defense. The views expressed are personal to the authors.*

