

Leg•a•cy Li•a•bil•i•ties

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Every three months or so, this space is devoted to a topic relating to legacy liabilities. The footnote summarizing the authors' qualifications states we practice in Butler Rubin's Legacy Liabilities Practice

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Group. Recently, we were asked, "what are legacy liabilities and why do they deserve a practice area?"

The implication being that creating a Legacy Liabilities

Practice Group was akin to creating a practice group for financial fraud committed on Tuesdays, or for auto accidents involving only illegal left turns. We decided to use this space to explain the subject and why it deserves practice group status.

The definition of the practice area is straight from Webster's. Legacy means "something handed down from an ancestor or predecessor." Liable, of course, means "exposed to a certain contingency or casualty." Liabilities is defined as "something for which one is liable; an obligation, responsibility or debt." Putting these together, we have "obligations, contingencies or responsibilities that come from earlier operations or acquired entities." Aha, you may say, this is a fancy definition for the defense of mass torts, like asbestos and silica. And you would be partially right. But were the practice that simple, we would simply call it "products liability" the way most other firms do. We don't use that name, however, because so much more is involved.

One of us recently was involved in tendering a case to a large chemical company. The company's attorney, a highly respected, experienced trial lawyer, rejected the tender because the transaction involved was "only an asset deal." When pressed as to the significance of his statement, he simply said the seller did not agree to be responsible because the product the buyer was being sued for was not the product the buyer bought. We walked through the agreement to highlight the provisions where the seller agreed to remain liable for anything not expressly assumed by the buyer and to indemnify the buyer if it was sued on account of any liability not

expressly assumed. A short while later, the seller accepted the tender. The story is not intended to embarrass the lawyer involved, but is offered because it is so very typical. Few litigators have the experience to parse complex corporate transactions, appreciating every nuance in the transactions and also have the experience of litigating the underlying liability issues.

Anticipating, identifying and tracking corporate liabilities involve more than reading and understanding transaction documents. Tracking liabilities, for example, involves knowing the common law rules third parties and courts seek to apply regardless of the agreement of the parties. Thus, we have seen situations in which an asset buyer was sure it was safe because of the form of the deal, but the court found the buyer liable under tort law theories that impose successor liability. In some cases, courts reach this decision because the buyer continued a product line under the same name using the same old facilities and employees. Too frequently, courts focus on these facts because they are obvious, not because they are relevant. Unfortunately, these are often the only facts before the court. On the other hand, we have also seen asset buyers successfully argue the buyer did not acquire liabilities. In many of these circumstances, the buyer knew the rules and went beyond the transaction documents to carefully manage and present the facts relevant to successor liability issues. And, we have been through cases where the key issue was the choice of law, and the court needed a crash course on choice of law rules and the constitutional significance of the Full Faith and Credit Clause of the Constitution. Analyzing the entire liability situation thus requires more than just reading the contract.

Liabilities obviously involve financial risk and obligation. A key part of the practice involves helping companies understand the value of hidden assets such as insurance coverage or other contracts that provide indemnity rights. Over the years, we have worked with a variety of insurance archeologists and have helped clients discover hundreds of millions of dollars of insurance assets. Like any area, capable people can learn the general rules and discover that which is not carefully hidden or terribly

complex. But experience helps company management evaluate the real value of what is found and the risks of various courses of action. One former client fended off a massive potential tort liability by invoking the unlimited defense obligation of a few primary policies with limits of only \$6 million.

Developing a sound strategy for handling legacy liabilities goes beyond finding old insurance policies or pursuing other contract claims. We have helped clients to invoke common law indemnity rights. We have also worked with insurance coverage lawyers to maximize insurance recoveries by helping them understand the underlying facts that may support a broader range of coverage or help minimize costly “per occurrence” deductibles. We also coordinate with coverage lawyers to ensure positions taken in underlying cases harmonize with positions taken in coverage litigation.

“Corporate family” legacy liability issues often have overtones similar to those disputes in real families; arguing over who should have how much of the pie created by prior generations. The corporate pie typically consists primarily of old insurance policies purchased by a parent corporation for itself and its subsidiaries, but also may include other goodies such as captive insurers, or reinsurance. We often encounter assets laced with undesirable retrospective insurance premiums, or muddled by old contracts drafted by lawyers who had little understanding of the workings of insurance, much less the impact of captives, reinsurance and even retrocessions. We have been through several disputes between dysfunctional corporate parents and their offspring as the various companies fight with each other and then move on to fighting with insurers.

Corporate planning is another part of the legacy liability practice. During the last three decades, the planning done by most companies did not include legacy liabilities. Now, many parent companies with extended corporate families find one or more subsidiaries beset by significant liabilities with no relationship to present operations. Today, forward-thinking companies focus on legacy liabilities in the planning process, and we have worked with them using finite risk programs to ensure future liabilities are anticipated, valued and paid for before they lead to nasty fights a generation down the road.

The Legacy Liability Practice also includes counseling clients about legislation, and then helping them develop and execute strategies for refining proposed legislation to

accommodate the client’s interests. For one client, by way of example, we found unpleasant surprises buried deep in the proposed “asbestos legislation,” and worked with them to eliminate the problem. Other times we have worked with clients to ensure the public hears a coherent message about why the company’s position makes sense. And we have worked with corporate law specialists to be sure procedures and information are in place within the frameworks required by SOX and the SEC.

Our legacy liability practitioners are involved in present-day corporate acquisitions. No general counsel wants to be the one “who acquired that massive liability,” especially one that is known. Hence, due diligence focused on legacy claims is an integral part of many acquisition efforts. On the flip side, sales of companies or parts of companies can be jeopardized by legacy liabilities, and we have on several occasions worked with transactional lawyers to “box the liabilities” so the transaction can proceed.

Last, but certainly not least, are the underlying cases creating the liability exposure. Too often, insurance companies retain counsel who continue to follow the approaches that have failed and caused a long list of companies to file Chapter 11. We have litigated the underlying cases, and are in a unique position to provide creative counsel to clients regarding the management and handling of such cases. We try cases when necessary, evaluate cases individually and on an aggregate basis, provide quality control so local counsel follow “best practices” for our clients and help manage the litigation load so it does not cause the company to lose focus on its business.

As long as the plaintiff’s bar continues to exist—and no industry that accounts for such a significant portion of the GNP ever just disappears—there will be a need for attorneys who focus their practice on Legacy Liabilities. The area encompasses the broad oversight and management of acquired or old liabilities, and these days, such legal issues are regrettably commonplace for corporate America.

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