

# Mass Torts And Legacy Liabilities - Back To The Future

For the past five or so years, our mass tort and legacy liability group has used this space for several articles regarding the future of mass tort litigation and

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other “legacy liability” topics. Now, with apologies to Michael J. Fox, we’ve gone back to the future through a return to update some prior articles anticipating what used to be the future.

## Corporate Criminal Prosecutions

We previously commented on the increasing risk of corporate criminal prosecutions arising from mass tort claims around the world. See *The “Flat” World and New Risks: Toxic Torts and Criminal Law*, *Corporate Counsel*, November 2006. (All cited articles are available at [www.butlerrubin.com](http://www.butlerrubin.com) under the heading “Articles.”) Since then, the risks continue to increase. For example, in 2008, the UK enacted legislation which establishes the basis on which a corporation – itself – can be found criminally liable for the death of a person to whom it owed a duty of care. The statute provides for a wide range of flexible remedies tailored to the situation, including a publicity order, which could force corporations to undertake well-publicized mea culpas. The legislation has spawned literally dozens of white papers from law firms. See, e.g., [http://www.howrey.com/docs/IADR/IADR\\_Mar08.pdf](http://www.howrey.com/docs/IADR/IADR_Mar08.pdf).

This type of legislation as well as recent product recalls have made the criminal law risks very real for some global entities and supply chains. Chinese-made toys laced with excess lead produced waves of worldwide bad press, and spawned Senate hearings and legislation to increase Consumer Product Safety Commission activities and to impose further criminal standards. See, e.g., <http://www.iht.com/articles/2007/09/13/business/toys.php>. Meanwhile, dozens of deaths have been attributed to impure forms of the drug heparin. ([http://online.wsj.com/article/SB121319780115964545.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB121319780115964545.html?mod=googlenews_wsj)). “Big pharma” personnel and Chinese personnel surely feel at least somewhat at risk as the stories continue to unfold.

## “Direct Participation” Suits Against Parent Corporations

Two of our prior articles analyzed potential consequences arising from a series of decisions ending with the Illinois Supreme Court’s 2007 *Forsythe* decision regarding suits against parent corporations. See, e.g., *Parent Companies – Not as Safe as Some Think – State Supreme Court Allows “Direct Participation” Claim Against Parent Corporation*, *Corporate Counsel*, May 2007. The *Forsythe* decision is significant because the opinion does not involve “veil piercing,” and instead turns on issues regarding whether the parent corporation “directly participated” in or controlled relevant actions (or inaction) of a subsidiary. The opinion also is significant because it provides a potential means for plaintiffs to bring overseas parent corporations into lawsuits in the U.S., even if the parent is a different entity than is a U.S.-based operating entity. That result may be good or bad for U.S. corporations in ownership, contract and sales relationships with overseas entities. Today, about a half dozen Illinois appellate and federal district court decisions have already applied *Forsythe* to particular fact patterns. We see even more issues arising in trial courts. *Forsythe* issues are likely to be with us for more of the future.

## International Tort Litigation

Another prior article noted corporate risks and opportunities that might arise from foreseeable growth of “mass tort” litigation around the globe. See *Risks and Opportunities From Personal Injury Claims Around the World*, *Corporate Counsel*, May 2005. The global risks and opportunities have only increased. For example, a lawsuit filed in Nigeria in 2007 seeks reimbursement for government medical expenses arising from cigarette smoking. The lawsuit is truly a global endeavor as it was filed by Nigerian lawyers, but is substantively backed by plaintiff’s lawyers from, among others, the SimmonsCooper law firm based in Madison County, Illinois. Class action legislation also continues to expand around the globe. In 2008, Italy approved legislation allowing class litigation of “common issues.” French lawyers say it is virtually cer-

tain that their country will enact class action legislation by fall 2008. Meanwhile, asbestos claiming is rising around the world, with claiming now occurring in Korea and Japan. Indeed, during May 2008, Japanese lawyers filed 167 asbestos claims against 46 defendants, and announced they have more claims to file.

Global tort litigation issues also include increased reputational risks. Today, for example, Japanese-owned U.S. entities face class action litigation in the U.S. arising from working conditions at a sprawling, decades-old rubber plantation in Liberia. The litigation issues are covered in some detail in an easily accessible website devoted to the plantation and the litigation. <http://www.stopfirestone.org/>. These kinds of increased risks arising from “mass tort” global litigation issues have caused well-known crisis management consultancies to issue numerous white papers, and even caused a new “global internet age” edition of a book focused on crisis management and reputational risks. See Levick & Smith, *Stop the Presses* (2d ed. Dec. 2007). The U.S.-based Defense Research Institute now has an active European branch. Indeed, U.S. and European lawyers are now actually meeting and talking to each other at seminars in Spain and elsewhere regarding how to execute global product recalls. See <http://www.drieurope.org/>.

### Entrepreneurial Actors and Creativity in Mass Tort Litigation

Almost three years ago, Merck’s first Vioxx trial result was our platform to describe the need for creativity in defending against entrepreneurial claiming. *Help Wanted: Creativity in Defense Of Mass Tort Litigation, Corporate Counsel*, November 2005. The entrepreneurial nature of claiming and litigation in general continues to increase. In Germany, a private company seeks to buy and prosecute antitrust claims. <http://www.carteldamageclaims.com/>. In Australia, a plaintiff’s firm (Slater & Gordon) used an IPO to create liquidity, and has acquired numerous different law firms. [www.slatergordon.com](http://www.slatergordon.com). Meanwhile, hedge funds routinely contact lawyers seeking to fund profitable litigation, and as a result of the United Kingdom’s Clementi reforms, investment bankers now see UK law firms as sources for business. <http://www.legalweek.com/Articles/1103125/Williams+and+Susskind+on+board+as+buy-out+house+targets+legal+big.html>.

The mass tort litigation process also continues to shift

as more nontraditional “fund” settlements are being implemented by corporations seeking stock price certainty, and litigants seeking a relatively sure recovery. The recoveries are sometimes paid for in part by giving the fund some shares of stock in the defendant entity. Both sides assume the share price will jump up when the settlement is announced. This process has now been used dozens of times for asbestos litigation and indeed some \$30 billion or so of trust fund money is now available for asbestos-related claims.

Merck recently used a similar process for Vioxx cases after winning and losing some cases at trial, and spending hundreds of millions of dollars on defense expenses. Merck entered into a settlement of U.S.-based claims (but not claims in other nations) based on the creation of a litigation fund, and a process for screening and paying claims from the fund at variable amounts based on a matrix of factors. <http://www.merck.com/newsroom/pressreleases/corporate/20071109.html>. Many analysts applauded the settlement, but others offered criticism, suggesting that Merck should not have settled until after some of the appellate rulings in cases. The company ultimately won. However, despite this criticism, the reality is that 1) settlements are most readily achieved in the face of the uncertainty that exists before appellate rulings, and 2) Wall Street dislikes uncertainty as to future cash flow and profits. Therefore, flexible settlement funds like Merck’s will no doubt see continued growth.

### Conclusion

The future of mass tort and legacy liability litigation looks fast and complex. The past, however, remains important because it provides the existing legal homework, and many of the legally relevant facts. Interesting and complex times are surely ahead.

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