

OUTSIDE PERSPECTIVES

10 Tips For Corporate Counsel Facing Asbestos Suits

WOULD READERS WORKING FOR COMPANIES that are subject to no conceivable risk of asbestos litigation please step forward? Dear reader, not so fast ...

The number of companies targeted by asbestos claimants continues to rise, with lawsuits currently involving about 10,000 different companies. Lawsuits remain pending against a range of companies far wider than the manufacturers of asbestos products.

Defendants include companies that used asbestos in any way, whether directly in their products or incidental to their operations. The mere existence of asbestos on a company's premises has subjected it to lawsuits. In one suit filed in Texas in November 2009, a truck driver who had contracted lung cancer sued more than 100 companies whose premises he claimed to have visited regularly.

Furthermore, even if a company didn't deal with asbestos directly, dealing with another company that did use asbestos can subject it to liability based upon allegations of conspiring to hide the danger of asbestos or failing to provide adequate advice on safety procedures.

Despite more recent indications that claims filings have declined slightly, the cost to resolve those claims show no signs of abating and are estimated to potentially exceed \$250 billion. As a result, over 90 companies have filed for bankruptcy protection thus far.

Asbestos-related litigation differs greatly from other forms of litigation and presents unique challenges for companies forced to defend asbestos claims. Here are some basics tips we recommend that will help you navigate the insurance component of what one U.S. Supreme Court Justice has called the "elephantine mass" of asbestos litigation.

Notify the Insurance Companies

The first and most important step is notifying your insurance company that you have been named in an asbestos lawsuit. Insurance funds are vital to defending asbestos claims, and placing your insurance company on notice as soon as possible is essential to recovering the money necessary to adequately defend asbestos actions. If you rely upon your broker to provide

notice, make sure to follow up and keep updated on all correspondence. Reliance upon your broker is not always a defense to late notice.

Develop Partnerships Among Your Allies

Experienced liability defense counsel is necessary to provide you with assistance in preparing and coordinating your efforts to successfully defend what often is a deluge of claims. Handling this unique and complex litigation, however, only begins there. In addition to defense counsel, insurance coverage counsel, risk managers and in-house counsel are all natural allies with unique contributions to a comprehensive solution to your asbestos problems.

For example, recent legislation in connection with Medicare reporting requirements present a novel issue to asbestos personal injury defendants in order to avoid a "self-insurer" designation.

Locate Documents

Just as asbestos litigation often turns on documents that date back at least 40 or 50 years, the coverage available to you does as well. A review of your historical insurance portfolio may uncover specific coverage issues such as the existence of "missing policies" that require special attention.

Consider Alternative Sources of Insurance

Investigate other sources of insurance that potentially cover your asbestos liabilities. For example, in addition to "products liability" coverage, general liability policies often provide "premises" coverage which may apply depending upon the specific facts underlying your case.

Likewise, "other people's insurance" also may be a resource. This can include being an "additional insured" under a subcontractors' liability policy or bringing a direct action against the insurance company of a potentially responsible third party.

Don't Give Up on Coverage From an Insolvent Insurance Company

Mounting asbestos liabilities have not only placed defendants in bankruptcy, but also have helped to place

an increasing number of insurance companies in insolvency proceedings as well. Insurance coverage counsel can help navigate the myriad state laws surrounding insurance liquidations and receiverships and, with respect to foreign insurance companies, laws governing insolvent "schemes." As a preliminary matter, it is essential to file a timely proof of claim as a creditor and consider filing a claim against the state guaranty fund in one or more possible jurisdictions.

Evaluate Your Insurance Assets

Despite insurance companies' claims of "seamless" coverage, different policies, even follow-form policies, can have markedly different characteristics. For example, multiyear policies often provide annualized coverage, which multiplies the stated policy limits by the actual number of years for the entire policy period.

Likewise, even a single extra month of coverage provided under a "stub" period can provide an additional set of full policy limits. Reading each policy carefully is the only way to fully maximize the insurance available to you.

Anticipate the Insurance Companies' Defenses to Coverage

Don't wait for the insurance companies to assert a defense—they consistently have been denying coverage for asbestos liabilities over decades and those defenses can be anticipated. For example, insurance companies will look for any aspect of the investigation, defense and settlement of claims to allege the policyholder failed in its "duty to cooperate." Anticipating the defense at the start of the underlying litigation will help to preserve coverage and decrease costs in the long run.

Develop an Insurance Recovery Strategy

It is no secret that insurance companies will often test their policyholders' resolve by issuing an initial denial of a claim whenever there is any remotely plausible basis for doing so. When that happens, the policyholder should undertake an independent evaluation of its insurance claim. If litigation becomes necessary, considerations include whether or not to initiate a lawsuit and, if so, choosing an appropriate forum.

Discovery management also should be an early consideration. For complex matters, this can mean meeting with a company's front- and back-office employees to establish the appropriate protocols to locate and preserve key documents.

Once those protocols are in place, maintaining open lines of communication is critical to quickly resolve any unanticipated issues with easy access to the right parties.

Develop an Insurance Settlement Strategy

A litigation strategy simultaneously should include pursuing meaningful settlement negotiations not only among the lawyers, but also with the active participation of principals from both the policyholder and the insurance company.

With respect to any eventual settlement, considerations should include:

- Avoiding "buybacks."
- Carefully identifying "carve outs."
- Recognition of the net settlement amount.
- Understanding allocation and exhaustion consequences with respect to nonsettling companies.
- Having a long-term view on any requests for indemnification.
- An awareness of potential pitfalls in acquiescing to confidentiality provisions.

Maintain Proactive Communication With the Insurance Company and Broker

As a general rule, when responding to an insurance company information request, never say no. This does not mean a policyholder has to fulfill every request exactly as it is presented. Look for creative ways to satisfy the insurance company's needs, while maintaining all necessary confidentiality and minimizing costs.

Expect the same from your insurance company and do not accept no for an answer. Challenge the insurance company's denial of coverage. Determination and persistence often mean the difference between coverage and no coverage.

Following these tips will greatly prepare you and your company, and help your counsel in maximizing insurance coverage for your asbestos, silica and mixed-dust liabilities.

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