

The Future of Mass Torts

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ABSTRACT

In the world of mass torts, asbestos and pollution are the best known and clearly the largest to date, with \$29 billion and \$30 billion (respectively) of incurred losses as of year-end 1998 for the U.S. insurance industry. Can another mass tort of comparable size arise in the future? The authors argue that, while it is possible, such a large loss is unlikely. This is due to factors that are likely to be unique to asbestos (long latency, signature diseases, and union involvement), changes in risk management habits of U.S. corporations (larger SIRs and deductibles, more retro-rated policies, and changes in the U.S. legal system (greater use of class actions and ADR).

BIOGRAPHIES

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Asbestos losses may ultimately cost U.S. property/casualty insurers as much as \$40 billion or more. Pollution could claim about the same amount. Are the circumstances surrounding these two classes of losses unique? Could the industry experience a disaster of similar magnitude in the future? This paper will explore the characteristics of these two enormous categories of claims as well as those of several of the emerging potential mass torts facing the insurance industry.

For pollution, the most significant characteristic is the fact that, for the most part, pollution costs were imposed by legislation (the Superfund law and its analogues on the state level) rather than by tort law. As such, activity that was legal and accepted practice at the time resulted in obligations in the future to rectify the consequences of that activity. In other words, the rules changed and responsible parties were required to undo damages caused by themselves and others in the past. These responsible parties turned to their insurers to help pay the resulting costs. Although similar legislation could theoretically be passed in the future, memories of the Superfund fiasco should dampen that prospect. None of the emerging mass torts share this characteristic with pollution.

But, on the tort side, is another asbestos-like phenomenon possible? In theory, yes, but it appears more likely that the industry will face many different types of mass torts, none of which will reach the dollar level of asbestos losses. For a mass tort to have a major impact on the insurance industry, there must be large underlying costs, many exposed policies and a hospitable judicial arena. However, two primary forces are acting to limit

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the size of new mass torts: trends in the legal climate, and cost and risk management decisions by corporations and their insurers.

UNDERLYING COSTS

Underlying costs (actual damages and legal fees) of hundreds of millions of dollars are relatively common today. For substantial underlying damages to accumulate, a large population must be exposed to an allegedly injury-causing agent or event. Sometime after exposure, individuals would have to develop a serious problem that could be closely associated with the exposure. The problem could be health-related bodily injury or loss from property damage. Those affected would also have to be inclined to sue for damages.

It is easy to conceive of how a large part of the population could be exposed to something that could harm them. Even if a relatively small percentage of the exposed population develops a disease, it could still affect millions of people. If the resulting harm is latent (i.e., requires a long period to become apparent), the exposure pool would expand until the problem was identified. This was an important factor with asbestos, whose ill effects seldom manifest themselves in less than 15 years.

Once the damage becomes apparent, it would have to be clear — or accepted as clear — that it arose from the exposure. Causation can be hard to prove for bodily injury liability but is generally easier to demonstrate in property damage cases. Many potential mass torts fail because it is difficult to attribute most diseases (including most cancers) to a specific cause.

For example, claim activity arising from electromagnetic field exposure, sometimes touted as “the next asbestos,” has developed slowly because the results of scientific studies have been ambiguous. On the other hand, asbestos exposure has signature

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One would expect that after a disease-causing link was identified or suspected, a company would take corrective measures sooner than it might have in the past, if not from a heightened sense of social responsibility, then from a desire to avoid the costs related to such a problem. If steps to mitigate the threat of damage had been taken earlier, the population exposed to asbestos would have been much smaller. Because of the potential for irresponsible behavior by corporate insureds leading to significant mass tort liabilities (e.g., by ignoring early warning signs), insurers should consider the competence and integrity of management in underwriting liability coverages.

The final condition essential for creating large underlying costs is the inclination of injured parties to sue. If the population accepts the damage as a natural part of life, a mass tort will not develop. In today's litigious society, though, it is difficult to believe that a potential mass tort would be averted because of a reluctance to sue.

Several factors have changed since the early days of asbestos litigation that may impact the proportion of potential claimants actually filing suit or participating in a class. First, there is a very large pool of plaintiff attorneys who have gained experience as well as financial means from asbestos and state tobacco cases. These attorneys are well prepared to aggressively pursue new mass torts. Thus, the propensity to sue can be expected to remain high. In other words, as long as there is an attorney willing to work on a contingency basis, a potential mass tort can be expected to move toward litigation.

The second factor is the improved record keeping and communications enabled by technology and the Internet. It is much easier today to identify potential class members and solicit their participation than in the early days of asbestos. Thus, class action participation levels can be expected to be very high as is evidenced by the high participation levels in the breast implant and HIV-tainted blood class actions of recent years.

Finally, while unions have played a significant role in asbestos, unions are not as strong a force as they once were. Given the seriousness of workplace asbestos exposure, unions became a focus for identifying potential claimant populations. Mobile x-ray units sponsored by plaintiff attorneys and unions continue to seek out potential asbestos claimants to include in class filings. Asbestos-related diseases range from scarring of lungs (with little or no debilitating effects) to mesothelioma (a relatively rare cancer that is often fatal within two years of diagnosis). Mesothelioma claims make up less than 5% of asbestos cases but are generally combined with the less severe cases in class filings. As a result, cases that might not stand on their own merits are being compensated.

How do tobacco and lead compare to asbestos in this area? Although the diseases associated with tobacco use are life threatening, unions are not currently expending significant effort encouraging claims because tobacco use was not occupationally related. (An exception could be suits by flight attendants or casino workers over second-hand smoke.) Similarly, because most lead-related injuries, though severe, involve children, unions are not playing a role.

EXPOSED POLICIES

Large underlying costs do not present a problem for the insurance industry unless the costs are insured. For example, some forms of pollution will undoubtedly occur in the future, but they are unlikely to create an insurance crisis because most policies now

carry a complete pollution exclusion. While not fool-proof, the absolute pollution exclusion is expected to do its intended job.

However, a policy can exclude only so many types of damages before it becomes undesirable as a product. Consequently, exclusions tend to be adopted only after a problem develops. Thus, a long latency period for the damages leads to a larger exposed population and results in more exposed policies. This is particularly pernicious because many court decisions have put each of the exposed policies at risk of paying for the full damages, creating a substantial pool of financial resources for the insured.

To create this resource, however, the potential for loss must remain unidentified for some time. This has not been the case with tobacco. Virtually all product liability coverage issued to tobacco manufacturers since the mid-1960s is believed to have excluded tobacco products. Hence, if the major avenue for claims is through the products coverage, this exclusion will limit the effect on the insurance industry, even if the underlying costs are very large.

Incorporating specific exclusionary wording in policies for manufacturers may not totally insulate the p/c industry from claims. In asbestos litigation, such peripheral defendants as distributors, suppliers and premises owners have been brought into asbestos litigation to pick up the "spillover" resulting from the bankruptcy of the primary manufacturers. Thus, unless an exclusion is used uniformly on all policies (which is still not the case with asbestos exclusions for some insurers), insurers may find themselves exposed to a mass tort through peripheral defendants. Spillover has already taken place in lead cases with the involvement of building owners, and the potential for spillover in tobacco may be considerable.

Less obvious than exclusions but still effective in reducing insurers' risks are corporations' own insurance purchasing practices. Insureds will share more heavily in future mass tort costs if all or most of the exposure occurs in years with larger self-

insured retentions, per claim deductibles or retrospectively rated programs. These practices, common in the 1980s, were not significant in the 1960s and early 1970s, when much of the asbestos exposure took place. This should further reduce mass tort liabilities for the insurance industry in the future.

It should also be noted that most consumer products manufacturers' products liability coverage is written a policy form referred to as "occurrence reported" or "modified claims made." This form contains wording restricting coverage for batches of claims with the same underlying cause to one policy year. Thus, batches of claims are aggregated in one year penetrating vertical coverage rather than horizontal. This provision should significantly reduce the magnitude of future mass torts for the industry. However, this may be changing with the soft market.

JUDICIAL ARENA

U.S. courts are receptive to suits, and plaintiff attorneys are inclined to file them. Nevertheless, increased litigation, coupled with the widespread use of class action settlements, may actually have a limiting effect on insured losses from an individual type of loss. Various tort reforms and the increased use of alternative dispute resolution techniques are also likely to contain costs.

In general, legal action in a mass tort begins with individual cases and is followed by a class action, a quick settlement and lingering opt-out cases. The initial cases help to "price" the settlement deal, and the huge defense costs associated with the cases act as an incentive to settle. This may be true even in somewhat dubious cases because potential future defense costs may be much greater than the current settlement cost for a tort that could become a class action.

Class action settlements clearly have advantages for both plaintiff attorneys and defendants, particularly if there is limited opt-out activity. A class action settlement

allows plaintiff attorneys to gather all of the injured parties into one action so large that it is very likely to be settled instead of tried to completion. Because lawyers receive a part of any settlement, this allows them to accelerate their income, which would otherwise be spread over multiple smaller cases.

On the other hand, class action settlements also help defendants by enabling them to put the issue behind them quickly. In addition, the resulting trust arrangements may actually be an economical way to make payments. For example, the Dalkon Shield Trust Fund closed with excess funds, partly due to low expenses.

With both sides likely to see advantages in a class action arrangement, it is no wonder that the use of class actions has grown. However, a backlash has developed against the class action movement, evidenced by the failure to certify some classes, notably the proposed Center for Claims Resolution asbestos settlement. Judges have also struck down some settlements, observing that the lawyers for the plaintiffs obtained large fees while the plaintiffs received relatively little of value.

The changing legal climate also affects the insurance process in ways that may serve to limit the industry's involvement, both in costs and in duration. Preliminary investigations to support class action litigation identify the major defendants early in the process and are likely to cause them to notify their insurers quickly. This facilitates early case management decisions, including negotiation of settlements with insureds. Settlements tend to snowball because no insurer wants to be responsible for the last exposed but unsettled policy (and all remaining defense costs). Thus, while asbestos has been an insurance issue for nearly 30 years, the policies for other mass torts may be settled more quickly and with lower legal expenses.

Where insurers remain involved, the use of negotiated cost share and joint defense agreements among the remaining carriers helps to control costs. In the case of

asbestos, arrangements developed only after painful intra-industry litigation, but the lessons from asbestos are clearly being applied in current actions.

Tort reform may also serve to limit the magnitude and growth of future mass torts. Tort reform measures are generally too late to have an impact on asbestos because asbestos claims were grandfathered out of the reform in some states. Such reforms as limitations on the application of joint-and-several liability to de minimis defendants and statutes of repose that restrict the filing of products liability claims to a set period following sale, if upheld, would go a long way toward curbing an asbestos-like mass tort.

The use of alternative dispute resolution techniques may also contribute to containment of legal costs. In recent years, the American Arbitration Association (AAA) issued a set of recommendations designed to help alleviate the overloading of the justice system caused by mass torts. The recommendations included the early involvement of insurance carriers and the use of mediation and arbitration techniques before and during mass tort litigation. The AAA reported a 47% increase in mediation and arbitration cases filed with them during 1999, citing mass tort cases as an area contributing to this growth.

EXPECTATIONS FOR THE FUTURE

The likelihood of a single devastating mass tort creating losses on the scale of asbestos claims seems low. With asbestos, there were three critical factors that generated huge underlying costs:

- A very long latency period that allowed millions of people to be exposed
- Signature diseases that were closely linked to asbestos exposure
- An inclination to sue and easy access for plaintiff attorneys to potential claimants through labor unions.

Although these circumstances could occur again, none of the current "next asbestos" candidates satisfies all three requirements. Furthermore, through more cautious underwriting and changes in insurance buying practices, insurers' share of future mass torts will probably be less than for asbestos.

Although plaintiff attorneys appear no less interested in exploring (or exploiting) new forms of mass torts, judicial and corporate practices in the U.S. have evolved in ways likely to limit the ultimate size of a single category of mass torts. By applying lessons learned from asbestos and pollution regarding risk and litigation management, corporate America and its insurers appear to be putting limits on the insured size of a future mass tort.

Plaintiff attorneys have learned valuable lessons as well, but they seem willing, if not eager, to find more expeditious solutions. For their clients, such solutions tend to reduce both litigation costs and future uncertainty with respect to the tort at hand; however, they also provide funds to pursue the next mass tort.

In view of these factors, it is difficult to see how a single mass tort in the future could be as large as asbestos. Still, the potential for multiple mass torts remains significant. Individual insurers may want to hone their expertise in class actions, make sure they know their commercial accounts and use exclusionary wording consistently once a potentially dangerous mass tort exposure is identified.

