Survival or Ruin in the Balance

Defendant Collaboration

By Jonathan Terrell

This article discusses the hot topic of collaboration between asbestos defendants. It is a subject that receives ample airtime, however, too little of it appears to happen in practice. From my perspective—I am a management consultant, not a lawyer—collaboration is discussed more as a concept than an action. As a result, I want to propose some practical areas in which defendants can learn to collaborate. Though it involves many parties, leadership by defendants themselves is essential if there is to be any change in the status quo.

Let's start with a consideration of why there is a need for collaboration at all. In a nutshell, the power dynamics of the tort system put defendants at a significant disadvantage relative to plaintiffs and their counsel; better equilibrium can only be achieved through collaboration. This is sometimes referred to as the collective action problem. I like to illustrate it through Aesop's classic fable, *Belling the Cat*.

> *Long ago, the mice had a general council to consider what measures they could take to outwit their common enemy, the cat… a young mouse proposed that a small bell be procured, and attached by a ribbon round the neck of the cat.*

In this allegory, the marauding cat is the plaintiffs' counsel, the mice are the defendants, and the action of putting the bell on the neck of the cat is going to trial.

The fundamentals of asbestos litigation in the tort system have remained relatively constant for a long time: many companies are sued by relatively few plaintiffs' firms concentrated in a few ju-

■ Jonathan Terrell is the founder and president of DRI corporate member KCIC, a Washington, D.C.-based consulting firm that helps companies manage their product liabilities. A DRI corporate member and a frequent attendee of DRI's annual Asbestos Medicine Seminar, KCIC works with corporations that are defendants in mass tort litigation in the manufacturing, chemicals, and pharmaceuticals industries. Mr. Terrell has over 30 years of international financial services experience with a background in accounting, finance, and insurance.

risdictions. When comparing national filing trends from 2014 to 2016, filings for mesothelioma and asbestos-related lung cancer—the main drivers of asbestos litigation—show little change, with a 0.2 percent increase and 2.9 percent increase in filings, respectively. KCIC, Asbestos Litigation: 2016 Year in Review 3–4 (2017), available at http://www.kcic.com.

Each state has its own rules, but as a general proposition, a plaintiff may sue many defendants in seeking a remedy, and there is no presumption that the loser will pay the costs of the winner. There is, therefore, very little downside to adding additional companies to a complaint, so long as the plaintiff can satisfy the relevant federal or state rules of civil procedure. While plaintiffs' firms cannot sue companies carte blanche without risking sanctions, as a practical matter it is not hard for plaintiffs to sue many companies and still satisfy the procedural rule.

But having been named, the downside for a defendant of going to trial can be profound. An adverse verdict may forever make them a target defendant and increase their settlement values. Corporate survival can be on the line. And defendants often feel the pressure from their insurers too, who may encourage them to take a case to trial. But for the insurer, the only downside may be the limit of an insurance policy. Corporate ruin is unlikely to be on the table for the insurer. Therefore, the timidity of the individual mouse to take on the cat is understandable. The situation requires the collective action of the whole colony; in other words, collaboration is needed to respond to the power imbalance in the tort system.

So, if collaboration is to be more than just a concept, where does one start? In this article, I propose five areas that offer promise for collaboration, including ones that involve collaborating with insurers and plaintiffs.

Keeping Bankrupt Companies in Evidence

Over the course of four decades of asbestos litigation, at least 120 companies have sought bankruptcy protection under Chapter 11 and have disappeared from the tort system. Mark D. Plevin *et al.*, Where Are They Now: Part Eight: An Update on Developments in Asbestos-Related Bankruptcy Cases, Mealey's Asbestos Bankr. Rep., Vol. 16, No. 2, Sept. 2016. These include most of the companies that were allegedly most responsible for exposing workers and their families to asbestos fibers. The largest and one of the earliest was Johns-Manville, and there has been a steady stream of bankruptcy filings through to Kaiser Gypsum in September 2016. The dynamics are well established: the bankrupt defendants almost immediately stop being named on complaints; they rapidly disappear from disclosed work histories and product descriptions in interrogatories; and defense attorneys stop asking about them in depositions. Dixon, Lloyd and Geoffrey McGovern. Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases. Santa Monica, CA: RAND Corporation, 2015. Scarcella, Marc C., and Peter R. Kelso, "Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation and Governance," Mealey's Asbestos Bankruptcy Report, Vol. 12, No. 11, June 2013. Without an actual admission by the plaintiff, the onus is on the defense side to connect the plaintiff to a site and a product of a bankrupt defendant, and the hurdles to do so can be impractical (more to come on that subject in a bit).

For these remaining solvent defendants, the implications are significant—including rising settlement values as plaintiffs seek to keep total settlements at the same level, and targeting of more peripheral defendants, who may have only a loose nexus between their product and the plaintiffs' alleged asbestos exposure.

It is almost never in the interest of the plaintiffs to continue naming bankrupt companies on complaints (though there is no legal reason why they should not continue to name them, the bankruptcy only protects the company from litigation, starting with service, not from being named). For starters, plaintiffs have the opportunity to "double dip"—harvest as many settlement dollars as possible from solvent defendants, then turn to the post-bankruptcy trusts for a double recovery. This scandal was highlighted in the now infamous *In re Garlock Sealing Technologies LLC, et al.* Second, there is a real downside to naming a bankrupt company on a complaint and keeping them in during the discovery process: the risk that a bankrupt company may get allocated a share on a verdict sheet; it is obviously in the interest of the plaintiff that all shares on a verdict sheet be allocated to solvent companies.

While there may be competing interests between solvent defendants to shift responsibility between themselves (at least on the case level), it seems to me that it is *always* in the interests of *all* solvent defendants to keep bankrupt companies in evidence. The corollary of the plaintiff wishing to avoid having a bankrupt company on a verdict sheet is the overwhelming interest of the solvent defendant to *put* a bankrupt company on the verdict sheet.

This is the first area in which I advocate for practical collaboration between solvent defendants. They can, and should, collaborate in sharing evidence of exposure to the products of bankrupt companies. Certain law firms, such as Forman Watkins & Krutz LLP, have made a practice specialty of researching the public data of post-bankruptcy trusts to provide reports to defense counsel that assist them in taking more targeted depositions. My own firm, KCIC, recently launched a fully automated tool that puts that research into the hands of defense counsel. Whatever approach is selected, sharing exposure evidence among solvent defendants would *massively* improve their ability to keep bankrupt companies in evidence.

Many defendants through their discovery practices over the years have gained access to pictures of the products of bankrupt defendants. These can be very helpful during depositions. A very practical tool in taking an effective deposition can be a site diagram. If it can be shown that the product of the bankrupt defendant was located in the part of a site where a plaintiff worked, then there is an opportunity for a productive line of questioning. Likewise, putting product catalogues, promotional materials, as well as interrogatories and deposition transcripts of earlier cases involving the bankrupt defendant into the hands of defense counsel is an important and obvious way in which solvent defendant companies can take back a little of the tort system power imbalance that is tilted towards plaintiffs.

Seeking Standing in Bankruptcy Proceedings

For four decades, defendants have, more or less, sat on their hands while defendant af-

ter defendant has gone into bankruptcy. I do not know of a single company that is not prepared, even ready, to pay significant settlement dollars to a genuinely sick plaintiff who was clearly made sick by exposure to a product that the company produced. But the bankruptcy processes have made a mockery of that well-established corporate dynamic. From 2006 through 2012, asbestos trust assets have grown by more than $27 billion, while paying out over $15 billion to claimants. Scarcella, Marc C., and Peter R. Kelso, "Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation and Governance," Mealey's Asbestos Bankruptcy Report, Vol. 12, No. 11, June 2013. A large number of the claimants would have received little, if anything, in the tort system, and huge sums have been paid to plaintiff firms. The total number of asbestos-related filings in the tort system in 2016 was likely just shy of 5,000 filings. A review of the public filing data of post-bankruptcy trusts shows that the larger trusts routinely receive multiples of that number of claims. The Manville Personal Injury Settlement Trust received almost 17,000 claims in 2016, and the Combustion Engineering 524(g) Asbestos PI Trust received over 30,000. There is an alarming disparity between the claims practices inside and outside the tort system, which prejudice genuinely sick plaintiffs, and benefit plaintiffs' counsel.

Plaintiffs are *always* a powerful party with standing during bankruptcy proceedings. The plaintiffs' bar is also the dominant force in the governance of post-bankruptcy trusts. There has been an implicit bargain in all of these proceedings: the debtor (formerly solvent defendant) escapes from the crippling defense costs and uncertainty of the tort system by coughing up a sum certain. Meanwhile, the plaintiff firms no longer need deal with the annoying evidentiary requirements of the tort system. Instead, they can get their entire inventories of plaintiffs paid off on tenuous evidentiary standards. The numbers speak for themselves. KCIC processed 4,788 asbestos-related complaints in 2016 (we estimate this is at least 90 percent of the total filed in the U.S.). The largest post-bankruptcy trusts process five times that number.

The parties that are *not* at the table are the remaining solvent defendants. As discussed in section one, they are deeply, materially affected by the bankruptcy of formerly solvent defendants, yet they seek no voice and are not heard during bankruptcy proceedings.

Therefore, another prime opportunity for collaboration among solvent defendants would be to seek standing in all pending and future asbestos-related bankruptcies. The drafting of the Trust Distribution Procedures (TDPs) is quite consistent across the various bankruptcies, allowing administrative efficiency for the plaintiffs' firms when making claims. The claims processing is swift and largely ministerial. The evidentiary standards should be no less rigorous than demanded in the tort system. Instead, a very cozy, Faustian bargain is normally struck between the debtor and plaintiffs, while the very real cost to the remaining solvent defendants goes unconsidered. As a result, vast sums are paid out to plaintiffs' counsel and to plaintiffs who would have a hopeless chance of recovery in the tort system.

Even if "official" committees cannot be formed, "unofficial" committees of solvent defendants should be formed in all current and future bankruptcy proceedings to explain to the court the real effects of the bankruptcy on remaining solvent defendants and to be a strong voice in the drafting of TDPs. The limp status quo of recent decades should be reversed—the only plaintiffs with a realistic chance of recovery from post-bankruptcy trust should be those that would have a chance of recovery in the tort system. Enough is enough.

Sharing Data

Going back to the mice, many defendants make their decisions in the tort system without any knowledge of what the other mice are doing. I get it. The whole legal dynamic is orientated towards defense counsel acting only in the best interests of their client in the matter being litigated. Just like the "game theory" illustrated in the movie "A Beautiful Mind" or the well-known "Prisoner's Dilemma," there can be a conflict between self-interest and the greater good. But there are *plenty* of reasons for the mice to collaborate through sharing their data so that they can get the bell on the neck of that damn cat.

Why? Why create a database of settlement values, verdict information, and other data that can be accessed for reporting purposes by those companies that contribute their data? At the most basic level, knowledge is power, and power is about forcing lower settlement values for all defendants through collective action, rather than continuing to experience settlement inflation as a result of the power imbalance in the tort system. While it is extremely helpful for similarly placed defendants to know where others in their peer group are settling claims, the really valuable, but extremely elusive, information is knowing the full value of, say, a mesothelioma claim and being able to compare that value in Illinois versus New York, for example. The plaintiffs' bar, by definition, has this data. The defense bar does not. Having this information gives more transparency to companies that need to reserve or estimate their pending population. It also helps defendants negotiate better, because they not only have their past history of payments, but also a collective past history of payments and averages.

One could use the "whack a mole" analogy. If only one defendant is trying to drive settlements down, the plaintiffs' counsel can litigate, and the threat of taking a verdict can be used to bang the defendant down. If every defendant is collectively pushing for lower settlements values, plaintiffs' counsel no longer has the power of threatening individual companies with a verdict. Just like when multiple moles in the game come up, there is no way you can hit all of them at once.

By partnering with third-party service providers, it need not be technologically or logistically challenging for defendant companies to share data in a secure, anonymous manner. The more defendants join such a settlement sharing collaborate effort, the more useful the database. It would also be possible, and useful, to break out subgroups of defendants—such as pump manufacturers or friction product defendants—so that their particular facts and circumstances can be separately analyzed and reported.

When it comes to asbestos litigation, the application of data sciences seems to be in its infancy. There are a variety of ways in which statistical tools can be applied to a database of shared data to analyze and un-

derstand correlations between data points. Some of these correlations are obvious—for example, mesothelioma in combination with a non-smoking history, or mesothelioma in combination with a young age of diagnosis. But many relationships are less obvious. The power of the technologies is that they make it easier to look at all these relationships, with multi-variable analytic tools providing exponentially more power in the ability to look at the relationships between multiple data points at once.

With the benefit of better data and collaboration, a group of defendants in a mass-filing jurisdiction may decide collectively to go to trial, rather than be picked off one by one in settlement and thereby begin to alter the easy money flow that the asbestos litigation business produces in such places.

Insurer Relations

This is a complicated one. Controversial too. For some defendants with certain insurers, the idea of meaningful collaboration is laughable—their insurer experience may be characterized more by ignorance, aggression, and bad faith conduct than any sort of constructive partnership. But not all insurers are the same, and within insurers, not all claims adjusters are the same. Many bring decades of meaningful experience and wisdom to the table. Also, not all defendants are models of meaningful collaboration either, and insurers have their own, fully justifiable needs for data, consultation, assistance, and cooperation.

Leaving aside coverage disputes over what and how much particular insurance policies are required to pay, insurers and defendants are in fact shooting in the same direction: the plaintiffs' bar. Insurers do so in the context of their own business model, the particular insurance contracts at issue, and typically a share of many, many defendants' liabilities. Defendant companies do so in the context of their particular claims experience, financial situation, and corporate philosophy. But it should be possible to agree more than disagree, and to collaborate in better managing asbestos liabilities together.

How?

One obvious area is in lobbying for a better tort system. Organizations like the Coalition for Litigation Justice, while dominated by insurers, do excellent work in promoting a fairer and more transparent tort system. Going to the points above about former defendants going into bankruptcy, since 1982, at least 10 states have enacted versions of trust transparency legislation, doing much to stop the plaintiff abuses in those states.

While the management of data at many insurers is chaotic, even Dickensian, it is indisputable that they do possess a lot of it. The judgement of counsel versus the analytical models of the insurer is a common area for rancorous disagreement between defendant and insurer in determining realistic settlement values. But insurers may well possess the settlement values of other defendants in this case and others, and while confidentiality prohibits them from discussing individual settlements, it is all part of the experience of the insurer that can amount to meaningful guidance. A collaboration of the judgement of counsel with the data of the insurer is more powerful than either in isolation.

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Plaintiff Relations

If the notion of collaboration with insurers is foreign, how about collaboration with plaintiffs? Sleeping with the enemy? Well, as I have written about before in these pages, there are plenty of ways that such collaboration is mutually beneficial in certain circumstances. Obvious examples include:

Documenting Settled Cases – Once a settlement has been reached, it is not in anyone's interest to drag out the completion of the settlement documentation that is required for payment. Yes, this is a frequent source of frustration, and even bad blood, which increases the costs for all. An obvious place for collaboration can be the in the use of plaintiffs' portals—where all needed documentation is uploaded in electronic form, allowing everyone to see missing, incomplete or rejected documentation quickly. It is transparent, quick, unemotive, and cost saving.

Triage – If you know you are going to pay eventually, why not pay early and avoid a lot of trouble? As mentioned earlier, I don't know of any defendants that are not prepared to pay reasonable settlement amounts to genuinely sick plaintiffs with strong exposure evidence to their asbestos-containing products. Both plaintiffs' counsel and defendants can collaborate to establish objective criteria to identify such cases early and settle them administratively without unnecessary litigation.

How should the fable end?

The plan to attach a bell to the cat is applauded by all the mice, until one mouse asks who will volunteer to place the bell on the cat. All of them make excuses.

Or?

And the council of mice, after due consideration, determined that no individual mouse would undertake to affix the bell to the neck of the cat, but that all the mice in the colony would collaborate in so doing. Some sat on the cat, others pulled his whiskers to distract him, a few took mouse files to dull the cat's sharp nails, and a party succeeded in fixing the bell to the neck. No mouse was hurt, and ever after the mice had due notice of the approach of the cat. Sometime later, the cat starved to death.