

Hidden Asbestos Liability in Corporate Transactions and Acquisitions



The Asbestos Liability Risk Analysis (ALRA) Group is a team of six highly experienced defense lawyers who have represented defendants in over 300,000 asbestos bodily injury cases across the globe. The ALRA Group serves clients who require timely and accurate information and analysis of the risks posed by asbestos-related liabilities and asbestos litigation, providing counsel to companies, financial institutions, insurers and other decision-makers involved in the rapidly-evolving landscape of asbestos liability.

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ALRA Group Members



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Introduction:

During the last thirty years, dozens of well-known names in corporate America have succumbed to bankruptcy as a result of asbestos liabilities. Beginning with the bankruptcy of the largest asbestos products company, Johns-Manville, in 1982, such familiar names as USG Corp., Pittsburgh Corning, Armstrong World Industries, Inc., Babcock & Wilcox Company, National Gypsum, Celotex, Halliburton, W.R. Grace, GAF, and Owens Corning, have followed suit and filed for Chapter 11 bankruptcy.ⁱ Insurance companies are likewise not immune. Asbestos liabilities have had a dramatic impact upon the balance sheets of the nation's, and worlds, largest insurers, and have caused or contributed to outright insurer insolvencies, with such venerable companies as Home Insurance Company and Atlantic Mutual Insurance Company.ⁱⁱ Less well known are an even larger number of smaller companies that have simply dissolved, ceased doing business or otherwise simply closed their doors as a result of asbestos liabilities. These have occurred across all industries.

A particular problem stems from the fact that asbestos is a latent disease, with asbestos-related cancers such as malignant mesothelioma being diagnosed thirty, forty, and even fifty years after exposure to asbestos. Thus, a company which used asbestos in products or processes decades before may now have liability. Nor are statutes of limitation a defense to asbestos cases arising from such long-ago exposures. Typically, statutes of limitations, which range from one to six years, only begin to run upon diagnosis of the asbestos-related disease, not the actual asbestos exposure. Corporate acquisitions of businesses or assets can come with such legacy asbestos liabilities. Often there may be no corporate memory or understanding of such old, and unlikely, liabilities. Yet, the effect can be massive, running to the hundreds of millions of dollars—or more.

Scope of the Problem:

There are currently several thousand cases filed every year. The Complaint in each case typically names dozens, sometimes over 100, corporate defendants. Approximately 2,500-3,000 mesothelioma cases continue to be diagnosed each year in the United States.ⁱⁱⁱ Moreover, lung cancer, and other tumors such as esophageal cancer, are associated with asbestos exposure. Finally, pulmonary conditions such as asbestosis, a disease process causing fibrosis inside the lungs, and restricted breathing ability, and pleural diseases, continue to result in case filings. Companies with no known asbestos liability can face risks of future claims based on minimal or tangential dealings with asbestos. It takes experience and judgment to identify and assess these hidden liabilities as they are obscure and under-appreciated. The Asbestos Liability Risk (ALRA) Group is uniquely premised upon an ability to ferret out potential hotspots based on its members' decades of experience in defending asbestos claims and based on our continuing research into asbestos liability as part of our ALRA Group mission.^{iv}



Legal Issues:

Acquisition of Businesses or Assets with Unknown Legacy Asbestos Liabilities

The acquisitions of businesses or assets with potential latent asbestos liabilities contain pitfalls for four reasons. First, the long lapse of time from the days when asbestos liabilities may have occurred is a problem. Asbestos was commonly used in a wide range of products beginning dramatically during the Second World War, and then throughout the 1950's, 1960's and into the 1970's. In addition, installing asbestos-containing materials in buildings and on process equipment, was common in those years and a large source of asbestos exposure to surrounding persons. Although asbestos was discontinued in construction products into the mid-1970's, and in some cases, into the late 1970's, it was used in other products even more recently. Maximum asbestos usage occurred in the United States from the mid-1960's to the mid 1970's. Moreover, the more dangerous types of asbestos, the amphibole fibers of crocidolite and amosite, were more heavily used in earlier years. Unfortunately, corporate or institutional memory and documentation may be gone, scattered or incomplete from mere lapse of time.

Second, the type of potential asbestos exposure is often not readily apparent. Asbestos was historically used in products and places not readily apparent or understood today. Insulation, plastics, paper, filters, pumps, and valves are only some of myriad examples of asbestos uses which give rise to modern, large, asbestos liabilities. Three examples are illustrative; Crown Cork & Seal, the nation's largest metal packager, purchased Mundet Cork in 1963 for \$7 million. Although it only owned the construction portion of Mundet for a few months in 1963 before selling it, it has suffered several hundred millions in asbestos liabilities, which continue to present as it is currently a defendant in thousands of asbestos cases in jurisdictions all over the country. A second example is that of Pfizer, Inc. Its 1960's purchase of Quigley Company, which used asbestos in a small, virtually unknown process decades ago, has resulted in massive liabilities over a period of many years. Finally, W.R. Grace & Company sold a packaging business and assets to Sealed Air Corporation which, even though the assets were not involved in asbestos work or products, resulted in substantial liabilities to Sealed Air.

Third, a related problem stems from the fact that traditional asbestos producers and users have dropped out of the litigation as described above. The asbestos plaintiffs' bar has not let this development slow the asbestos litigation. Rather, it has simply searched, and found, increasingly peripheral defendants who, under the doctrine of joint and several liability available in most states, can be found liable for multi-million dollar damage awards even if only partially or remotely involved in a given asbestos exposure.

Finally, there are complex insurance issues which arise from such old asbestos liabilities. Insurance policies applicable are the old style "accident" or "occurrence" based policies, as opposed to modern "claims made" policies. Such decades-old insurance policies are often lost, missing, or incomplete. Brokers may likewise be unavailable, and records lost, destroyed, or missing. Further, such old policies had lower liability limits, sometimes subject to aggregate limits (or not, depending upon the types of coverages provided) and often eroded by the payment of other claims over the years. Finally, excess or umbrella policies may or may not be available, but will generally be disputed by the insurers, as will the relationships of all the policies over such long periods of time, creating such issues as how different state laws interpret the policies, gaps in coverage, "exhaustion" and "drop-down" issues, vendors' endorsements, and other specific insurance issues.

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Legal Issues:



Sale of Businesses or Assets with Asbestos Liabilities

The reverse side of the problems identified above also creates problems; business or assets with known, or potential, asbestos liabilities may be deemed impaired, diminishing their market or sale value, or impacting financing and credit options. There is often a knee jerk reaction or fear of asbestos liabilities which may be unfounded, or at least exaggerated. A careful, informed analysis of the real or potential liabilities is warranted. Such an analysis is best conducted with experienced analysts with actual, cutting edge experience with the vagaries of asbestos litigation. This is the service uniquely provided by members of the ALRA Group.

A related issue which often arises is an accurate assessment of pending or threatened litigation required by auditors in connection with financial statements or financial reporting. Asbestos litigation is particularly difficult to analyze in that context and, often, an informed analysis or opinion can be useful. An analysis of the value of pending asbestos liability cannot necessarily be performed solely upon a mathematical basis. Depending upon the jurisdiction, cases can move quickly, or languish for a substantial period of time. Case handling and resolution practices within a given jurisdiction are constantly evolving, often abruptly depending upon judicial opinions, changes in the law, and practices of the plaintiffs' counsel advancing the cases. Moreover, a single defendant, even if named in many cases, is generally unable to influence case handling, because of the multitude of other defendants. To effect change, multiple defendants must often act in a coordinated fashion, in ways not often obvious to outside analysts.

Likewise, with respect to pending litigation, past values are not enough for an accurately informed assessment. The filing practices of plaintiffs' counsel, their case inventory, choice and timing of jurisdictions, and other factors come into play as do recent verdict and settlement history, and the rulings of presiding Judges.

Please Visit

<http://alragroup.com/whitepapers.html> for Additional ALRA White Papers, Including:

- *Asbestos Claims and Litigation: Update and Review: 2010 New Case Filing: Summary and Analysis* (November 1, 2011)
- *Asbestos Claims and Litigation: Update and Review: 2009 New Case Filing: Summary and Analysis* (October 1, 2010)
- *Asbestos Claims and Litigation: Update and Review: 2008 New Case Filing: Summary and Analysis* (June 20, 2009)
- *Asbestos Claims and Litigation: Effects of the 2008 Elections: Summary and Analysis* (December 12, 2008)
- *Asbestos Claims and Litigation: Update and Review: 2007 New Case Filing Summary and Analysis* (May 1, 2008)
- *Asbestos Claims and Litigation: Update and Review: 2007 New Case Filing Summary and Analysis* (July 1, 2007)
- *Asbestos Claims and Litigation – Issues and Strategy: An Analysis of the Cases Through 2005 Against a Historical Context* (December 1, 2006)

Our Process at the ALRA Group for Performing Investigation and Analysis:

The members of the ALRA Group are uniquely positioned to provide guidance and advice with respect to these matters. The ALRA Group is composed of a team of highly experienced asbestos defense lawyers who have represented international, national, regional, and local, defendants in the asbestos litigation in every major jurisdiction throughout the United States for over 30 years. Together they form a group of the preeminent counsel who have handled, and supervised, the defense of several hundred thousand asbestos bodily injury cases. Their experience includes work as National Coordinating Counsel for defendants in diverse industries comprising all aspects of the products and exposures giving rise to asbestos bodily injury cases and claims. Most important, the hallmark of their efforts has been success amid the shifting, complex sands of asbestos litigation.

Members of the ALRA Group have been in the forefront of developing, analyzing, and presenting, scientific, technical, and medical developments pertaining to asbestos exposure, and disease. Uniquely, members of the ALRA Group have managed and handled the funding of expense, and settlement, of asbestos bodily injury cases over a period of many years for a diverse group of corporate defendants and insurance companies.

Members of the ALRA Group analyze asbestos risks for business insurance and financial clients and predict their future asbestos liability. The ALRA Group has a proven track record in counseling companies about asbestos liability risk management strategies.

Your Result:

Increased confidence that corporate transactions will be based upon an informed knowledge of asbestos liability.

ALRA Group
April, 2012



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ⁱ See Laura Zakaras, Rand Institute for Civil Justice, *Bankruptcy Trusts, Asbestos Compensation, and the Courts* (2011), http://www.rand.org/pubs/research_briefs/RB9603.html.

ⁱⁱ See *In the Matter of the Rehab. of Atlantic Mutual Ins. Co.*, No. 402424/10 (N.Y. Apr. 27, 2011), available at <http://www.nylb.org/Documents/AMIC-L.pdf>. See also *In the Matter of the Application of Gregory V. Serio*, Superintendent of Ins. of the State of N.Y., for an Order of Appointment as Ancillary Receiver of the Home Ins. Co., No. 402671/03 (N.Y. Sept. 24, 2003), available at <http://www.nylb.org/Documents/HomeIns-A.pdf>.

ⁱⁱⁱ See Howlader N, Noone AM, Krapcho M, Neyman N, Aminou R, Waldron W, Altekruise SF, Kosary CL, Ruhl J, Tatalovich Z, Cho H, Mariotto A, Eisner MP, Lewis DR, Chen HS, Feuer EJ, Cronin KA, Edwards BK (eds.), SEER Cancer Statistics Review, 1975-2008, National Cancer Institute, http://seer.cancer.gov/csr/1975_2008/.

^{iv} See Asbestos Liability Risk Analysis Group, *Asbestos Claims and Litigation: Update and Review: 2010 New Case Filing: Summary and Analysis* (Nov. 1, 2011), <http://www.alragroup.com/documents/asbestos%20paper%202011.pdf>.

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