Is It Time for the Peripheral Defendants’ to Change Their Strategy of Defense?

By
Kay B. Baxter,
Robert F. Redmond, Jr. and
Brandie M. Thibodeaux
When the King of all toxic tort litigation, asbestos litigation, began several decades ago, the plaintiff firms targeted asbestos product manufacturing companies; particularly those companies that were associated with pipe insulation, block insulation, the muds and/or large insulated equipment. These defendants made easy targets because their products were highly friable (i.e. dusty) and/or they used highly potent amphibole asbestos – amosite or crocidolite. The initial target defendants were sued for both the more common non-malignant pneumonconioses – asbestosis and pleural plaques – and the rarer malignancies – mesothelioma and lung cancer.

 Plaintiff firms and the unions cooperated in mass screenings which resulted in literally hundreds of thousands of claims.

 These early targets were overwhelmed with the volume of the filings. Additionally, the mix of non-malignant claims and malignant claims raised the stakes for all cases. Plaintiffs typically sought to try cases in large groups, mixing weak non-malignancy cases with poignant and highly sympathetic malignancy cases. Juries typically focused on the malignancies and the non-malignancy cases benefited from the overwhelming emotional reaction that jurors had to the malignancy cases. Efforts by the defendants to separate the malignancies from the non-malignancies were defeated by the Plaintiff’s lawyer who argued that trying large groups of cases together was judicially efficient. Judges, with high volumes of asbestos cases tended to agree.

 In the early days of asbestos litigation, companies were defending against thousands of non-malignant claims which drained the resources and led to a variety of defense strategies. Some asbestos defendants chose to stand and fight all claims. Others hoped to weather the onslaught of cases by adopting a “low profile” strategy. They worked out “matrix” agreements
with Plaintiffs’ firms that calculated settlement payments based on the plaintiff’s self-
identification of exposure to the “low profile” defendant’s products.

Neither strategy worked very well. Eventually, all of the original target defendants
succumbed to bankruptcy through the 1980s and 1990s. By the early 2000s, over 70 United
States corporations had fallen into bankruptcy. However, the number of claims for the asbestos-
related diseases kept increasing, the plaintiff’s firms began to look for new viable defendants, or
what was referred to once upon a time as the “peripheral defendants”. These peripheral
defendants were “peripheral” because

- They were not directly involved in manufacturing asbestos containing products
  (i.e. distributors or wholesalers);
- They manufactured products using the less-potent chrysotile asbestos;
- They manufactured products where the asbestos was encapsulated in other, non-
  friable material (i.e. gasket manufacturers, putty manufacturers, roof cement
  manufacturers);
- They manufactured products that did not contain asbestos but would normally be
  installed with asbestos containing insulation manufactured by others.

Plaintiff’s counsel became creative and developed new theories of exposure to target the
peripheral defendants. They retained material scientists to perform “work practice” studies to
show, in exaggerated fashion, how a simple task like removing a gasket could generate respirable
fibers. (These studies were aided by high intensity “Tindall” lighting that amplified every loose
particle release into the air). Plaintiff’s counsel came up with novel theories like “industry-wide
conspiracy” and “after market insulation” to tie the peripheral defendant to the now-bankrupt
asbestos manufacturing defendants.
The most important theory, however, was the “linear, no threshold, exposure” theory that posited that every asbestos fiber above the environmental background level was a “substantial contributing cause” of a plaintiff’s asbestos injury. This theory, which has never been peer-reviewed and has little objective scientific support, allows a plaintiff to get to the jury on minimal exposure to a defendant’s product even when the plaintiff has substantial exposure to the highly potent asbestos products of the bankrupt defendants.

The dawn of this new era broke abruptly for many “peripheral defendants”. Defendants who routinely coasted along, riding the coattails of other defendants; settling for a few thousand dollars before trial suddenly found themselves alone with a huge demand from plaintiff’s counsel. Those defendants who had not retained their own experts found that the bigger defendants with experienced experts had cut deals with plaintiff’s counsel preventing their experts from testifying on behalf of any other defendants. Those defendants that eschewed preparing pretrial motions – preferring, instead, to “join” the motions of other defendants, found themselves without any pretrial evidentiary motions. Those defendants who had never developed a corporate representative who could testify about the company in deposition and at trial found themselves scrambling to find and train a witness who could stand up to withering cross-examination before a jury in a hostile venue.

The new frontier – where the peripheral defendants became the target defendants – has caused a critical re-evaluation in the defense bar. No longer can a peripheral defendant expect to “buy peace” with low dollar settlements. Now, every peripheral defendant is a potential target defendant.

Through decades of litigation and the changing strategies of the defendants trying to find a solution to stem the tide of litigation, (from the “scorched earth” strategy of fighting every case
and bringing in all possible 3rd party defendants to agreeing to settle without the need to actually file a formal suit), the judiciary has been “educated”.

As a result of the various defense strategies over the years, the judiciary has been “educated” by both the plaintiffs bar and the defense bar to believe that if you sue defendants, they will pay. If you get defendants to the courthouse steps, they will pay. And as the traditional defendants disappear, the large verdicts from some jurisdictions have increased the demand to all defendants; and those demands have continued to climb.

The remaining asbestos defendants must now make a strategic decision to either “hide in the weeds” or stand and fight. Once the decision is made, the defendant needs to execute on it. This article is for those defendants who choose to stand and fight and is meant to address some of the basic preparation needed to create a solid defense. A good example of the new type of asbestos defendant, the litigation history of that defendant, and what lies in store for that defendant, is contained in the following hypothetical:

**The Product**

“Super-Tuff Miracle Tile Whitener” was first formulated in 1937 by Ed Walker, owner, founder and sole shareholder of Walker Products, Inc. “Super-Tuff“ – as it was known – was a blend of gypsum, feldspar, corn starch, and talc. It was originally sold door-to-door by Mr. Walker from his home in Natchez, Mississippi. The product was sold in 1 lb. to 4 lb. cans with a memorable logo, on a bright yellow wrapper. On the wrapper was a mustachioed pirate holding the words “Super-Tuff” over his head. Soon, the product was being sold in hardware stores and sales gradually spread throughout the South. The product is still sold to this day and the formula has not changed over time.
“Super-Tuff” still maintains a loyal following of customers. Its popularity was boosted when it was prominently featured on PBS “This Old House” program as the best product to clean 1930s era tile. Today, “Super-Tuff” is sold in big-box hardware stores.

The company expanded the product line to add “Super-Strong Tile Grout” in the mid 1940s. “Super-Strong” was a combination of feldspar, gypsum, binding agents and 2% chrysotile asbestos. The product was also sold in 1 lb. to 4 lb. cans. It was a wet product intended to be placed in existing tile. (It was not intended to set original tile or replacement tile.) The logo also included the mustachioed pirate holding the words “Super-Strong” over his head. The packaging, however, was bright red. The product never had any warnings related to asbestos on the packaging but did clearly state “With Asbestos” underneath the pirate’s feet in medium type.

“Super-Strong” was never a big seller and the company gradually phased it out sometime in the early 1950s. Inventory was run off until sometime in the late 1950s.

With respect to asbestos, Walker Products phased out its production of “Super-Strong” tile grout before the company learned of the hazards relating to asbestos. In the 1970s, it received several letters from its talc supplier, Governeur, confirming that its talc did not contain asbestos. The company also received annual MSDS sheets from Governeur advising that its talc did not contain asbestos. In the late 1980s, Walker Products decided to have the talc tested by the Mississippi State University to determine if the product contained asbestos. The product was tested by a Professor in Chemistry and was determined not to contain asbestos. Later, when it began to be sued in asbestos litigation, Walker Products asked Governeur for information about its talc and any asbestos contamination. Governeur provided several test reports from experts all of which showed that the product did not contain asbestos. Ultimately, because Governeur
refused Walker Products’ repeated requests for indemnity and defense, the company stopped using Governor’s talc in 2010.

Walker Products still operates in Natchez but all of its manufacturing operations have been contracted out. Its chief assets are its relationships with the big-box hardware stores, its product formula for “Super-Tuff,” and dozens of primary and excess insurance policies dating back to the 1940s.

The Litigation

Walker Products was first sued in asbestos litigation in the 1990s in North Dakota. It was among 77 defendants in a class of janitors seeking damages for asbestos related diseases. The janitors claimed that talc in “Super-Tuff” was contaminated by tremolite asbestos. The company’s primary carrier settled all the claims at the outset of the litigation for $300 per claim. No depositions were taken in the case but Walker Products provided written discovery responses indicating that Governor Talc was its talc supplier.

In 2005, Walker Products was sued in three asbestos cases in New York. The claims also alleged that talc in the company’s “Super-Tuff” was contaminated with tremolite asbestos. Plaintiff’s identified several well-known Atlanta-based experts to testify that Governor talc contained tremolite asbestos and that products incorporating Governor talc also contained asbestos. Governor Talc was a co-defendant and took the lead in defending the claims against it. Walker Products tendered its defense to Governor Talc but Governor refused to defend Walker. Governor claimed that there were alternative grounds alleged for Walker’s liability. Walker’s counsel recommended that the company “ride the coattails” of Governor rather than incurring the cost and expense of formulating a standalone defense. The primary carrier agreed. The litigation progressed and Walker Products answered written discovery. In its discovery
responses, the company disclosed that it sold an asbestos containing product – “Super-Strong” – for some period in the mid-century. Governeur Talc settled the three cases well before trial and Walker Products was asked to contribute $5,000 per case. It did.

In 2009, shortly after the settlement of the New York cases, Walker Products was sued in four cases in Pennsylvania. Again, Governeur Talc was co-defendant in each case. Walker’s counsel recommended a “low profile” defense with Governeur as lead. Walker again tendered its defense to Governeur but Governeur refused.

There was never a formal agreement between Governeur Talc and Walker Products regarding the defense or Walker’s ability to use Governeur’s experts. Two of the four Pennsylvania cases were mesothelioma cases. These two cases were selected for trial in 2010. The two living plaintiffs each identified Walker’s “Super-Tuff” tile cleaner. Neither identified the “Super-Strong” grout. About three months before trial, Governeur entered into settlement negotiations with plaintiffs in the two mesothelioma cases. Governeur agreed to settle with the plaintiffs. Governeur and the plaintiffs then contacted Walker’s counsel and advised that Walker had to contribute to the settlement on a 50/50 basis. Walker Products’ counsel was told that if Walker did not contribute to the settlement on a 50/50 basis, Governeur would settle and prohibit Governeur’s experts from working on behalf of Walker. Walker did not have any experts of its own and opted to settle the two cases for $250,000 per case.

In 2011, Walker was sued in six cases in California and in three cases in Massachusetts. The California cases are mesothelioma cases. The Massachusetts cases are lung cancer cases. The claims, like the earlier claims, were based on tremolite asbestos in the talc. In written discovery, all of the plaintiffs identified “Super-Tuff” tile whitener as the product they recall using. None of the plaintiffs mentioned “Super-Strong” tile grout.
The California plaintiff’s counsel has issued $1.5 million dollar demands to Walker in each case and has indicated to Walker’s California counsel that plaintiffs are looking for settlements in the range of the Pennsylvania cases – $250,000 per case.

In 2012, Walker was sued in five more Pennsylvania cases; three cases in New York; four cases in California; one case in Missouri and one case in New Jersey. The plaintiff’s counsel in all of these cases have an informal alliance.

**The Defense and Strategy**

Walker Products’ case count has risen significantly over the past several years and there is a concern that the number of claims could increase dramatically in the near future. The company’s former strategy of relying on Governeur Talc has not been successful at reducing case count or indemnity costs. Defense costs, however, have been fairly low, primarily because Walker’s defense has been limited.

Walker’s primary insurer has retained National Coordinating Counsel to supervise the overall asbestos defense effort. There are currently four cases set for trial in the fall of 2012. Two of those cases are mesothelioma cases in Los Angeles County, California. Two cases are lung cancer cases in Massachusetts. In no case has any plaintiff identified the asbestos-containing “Super-Strong” tile grout as a product that they used.

In the aforementioned hypothetical, as in real-life practice, in presenting the client’s defense, the best place to start is the client’s history. That is accomplished by getting to know the client’s product or service.

**Step One: Client Discovery**

It is important to research the history of the client. A visit to the premises where the product was manufactured would be a good start to learn how the product would have been
manufactured. Learning the installation process of the product and if it changed in any way over
the years, would also be key. Interview as many people related to the company as possible,
including current and retired employees. During the interviews evaluate the interviewees for
purposes of designating a corporate representative/witness. Knowledge of the company is
important but it is also important to find a person who is personable and credible. Think not only
about the representative's knowledge but also his/her presence on the witness stand. Someone
who has worked his/her way up in the company, or who has a good foundation of the history of
the company, but who is not necessarily witness material, might be an excellent consultant.

During the course of your investigation, you need to ask certain questions of your client,
regardless of whether you believe those are relevant to the litigation at issue. Many judges will
agree that what occurred at a manufacturing facility is not relevant when the lawsuit involves a
plaintiff who did not work at manufacturing facility. However, just as many judges will agree
that it is relevant. You need to be prepared for that ruling. Therefore, ask if any testing was done
at the manufacturing facility or of the product itself and/or the installation and/or removal of the
product. Whether or not the company ever employed a company doctor and/or an industrial
hygienist are standard discovery and corporate deposition questions. You should inquire into
whether there were ever any workers' compensation claims for asbestos related injuries filed as a
result of the manufacturing process. It is also important to look into when the first asbestos
workers compensation law was enacted in each of the states where the product was manufactured
or sold. Plaintiff’s attorneys often claim that if the company really was a good corporate citizen,
then the enactment of such a law regulating exposure to asbestos provided notice to the client of
the hazards.
Find out if the history of the company was memorialized in any way. A search should be made for old advertisements. These may or may not be helpful but either way, you can prepare in advance for whatever they reveal. Newsletters may be useful in locating former employees and supporting the client’s story. They may also be sources of photos for use in humanizing the client and/or identifying people, products, equipment and/or contractors which might offer more avenues of discovery for developing the defense. If there were awards for achieved safety goals, would the company really be concerned about only one area of safety? Or is it more likely that once the company knew about a safety or health concern that it took action? Are there any photographs or videos of the company or the product being manufactured, installed or removed? YouTube and the internet are easy searches for this kind of potential demonstrative evidence. Did the client keep scrapbooks? Has the product changed in any way? Are there any reports issued by an insurer after a site assessment? It is possible that studies were done by local college/university students who interned at the facility.

Did the client have an industrial hygienist? Did it have a plant doctor? Did it have a safety director or safety program? Compared to other local companies in the area, what were the practices within the community and within the industry itself? The goal is to make sure that you know more than any of your witnesses and make sure that your witnesses know as much as the plaintiffs know.

Know your client's place in the community. What was/is its reputation; nationally and/or locally? Did it take an active part in the community? Did it encourage members of the community to visit/tour the facility? Did it participate in school programs? Did it support any of the community activities? Was the company a large employer in the area? If the answer is yes,
these are assets and they are going to ensure that the jury pool has a clearer image of who your client is.

**Step Two: Fact and Expert Discovery**

If you intend to defend the asbestos case, you will need your own experts. This simple proposition is not always followed in asbestos litigation because of the past history of peripheral defendants “keeping costs down” by taking a low profile and relying on expert witnesses retained by other defendants. Those days are over. Your cooperative, hard-working co-defendant, today, could settle out with Plaintiff and take all of its’ expert witnesses tomorrow. If you don’t have independent control over your expert witness roster, you are at risk of being unable to present expert testimony.

Prior to retaining experts, or deposing the plaintiff’s experts, you will need to learn the factual basis which forms the plaintiff’s claims. This is typically done with written discovery. In many jurisdictions, there are form interrogatories and request for production of documents that plaintiff’s will typically provide early on in the case. These will have been “propounded” by plaintiff to plaintiff without objection by defendants…another unique asbestos litigation twist or perversion of legal procedure. Also, typically, plaintiff’s counsel has a well-developed strategy of providing as little useful information as possible in the written discovery and of larding the responses with caveats that the written responses may change based on ‘information later acquired” and “information provided by defendants in discovery”.

Although written discovery is the precursor to taking a plaintiff’s deposition, the defendants rarely have the benefit of having meaningful responses to written discovery prior to that deposition. This is particularly true in the case of living mesothelioma plaintiffs. With “living” mesothelioma plaintiffs, plaintiff’s counsel typically springs a deposition notice on the
defendants early on in the case, often before all the defendants are served. Plaintiff’s counsel
offers a “one day discovery deposition” followed immediately by a trial deposition orchestrated
by plaintiff’s counsel. Defense counsel are forced to prepare a trial cross-examination of the
most important witness with one day’s preparation; usually within a month or less of receiving
the file. This common practice is limited almost exclusively to asbestos litigation.

Although you may be forced to walk into a plaintiff’s deposition with only limited factual
knowledge of the plaintiff’s alleged exposures, it remains your duty to fully explore all possible
exposures to determine your client’s potential liability, as well as the liability of those entities
which may settle the case, may not have been sued in the case, and/or which are bankrupt. For
example, a plaintiff’s petition may allege that he was exposed to asbestos from a product at a
certain facility from 1961-1962; however, during his deposition, the plaintiff may discuss other
jobsites. Even though the petition only alleges certain exposures and years, that plaintiff is not
necessarily bound by those allegations. Furthermore, the plaintiff will often “stipulate” that he is
not alleging exposure at any other worksites than the ones that are defendants in the case. This
is self-serving as there are potentially other sites and products, possibly the bankrupt entities,
where the true exposure occurred. You need to develop all of the testimony that the plaintiff
offers with regard to asbestos exposure at the time that you are able to depose him. Otherwise,
you may find yourself with a deceased plaintiff, additional factual allegations, and co-workers
who are willing to speculate about what the plaintiff may have done. You will be left with the
realization that you could have combated that testimony had you asked all of the important
questions at the outset.

Once you have determined the facts underlying the plaintiff’s exposures, it’s time to think
about experts. Typically, in asbestos cases, defendants offer the following experts:
• Medical causation (typically a pathologist to dispute the diagnosis or to opine that the defendant’s product was not a substantial contributing cause);

• Industrial Hygiene (to establish that the defendant’s product does not release respirable asbestos fibers);

• Pulmonologist (to explain how certain type of fibers, like chrysotile, are readily removed from the lungs);

• “State of the Art” Expert (to show the prevalence of asbestos and, often, the federal government mandates related to the use of asbestos).

Plaintiff’s typically have similar experts as well as economists and life care planners.

Find out who the plaintiff’s experts are. Once you learn who the plaintiff is calling as experts, find out if any of those experts have ever testified in your jurisdiction in a similar case. Find out if their opinions have ever been excluded as scientifically unsound pursuant to a Daubert/Frye challenge. If possible, try to get a copy of the transcript of that testimony and/or hearing; talk to the attorneys who challenged the expert and/or defended the case; and if those experts testified at trial, try to determine how they were received by the jury. Find out if the jury was interviewed after the verdict regarding their opinion of both the experts and the trial attorneys. If the jurors from those trials were not interviewed, determine if it is still possible to locate any of those jurors for interviews. If trial transcripts are not available, then look for prior depositions in order to learn not only what those experts are saying now, but if they ever testified to the contrary in the past.

Before choosing your experts, do the same homework regarding your potential experts as you did for the plaintiff’s experts. Further, I suggest that you have your expert(s) visit your facility or attend a training session on your product. If you have located the appropriate
corporate witnesses and/or consultants, have your expert interview these people. Your expert can then testify with confidence that he or she is more familiar with the product at issue, and all facets concerning the product than is the plaintiff’s expert.

No doubt, plaintiff’s state of the art expert will testify that your client could have and should have known about the hazards of asbestos during the time the plaintiff encountered your product, and you should assume that it contained asbestos, regardless of whether that is factually correct. Some plaintiff industrial hygiene experts have created a "state-of-the-art" time line that can be "personalized" to your client and/or industry. Choose your state of the art and/or industrial hygienist expert not only based on his/her ability to refute what the plaintiff’s expert will say, but based on his/her ability to appear credible and knowledgeable to the jury. Have your expert know how and where asbestos was used, if at all, in your product. Make sure he/she knows how and when the plaintiff may have been exposed, or was NOT exposed, to asbestos through your product.

**Step Three: Becoming a Plaintiff in Your Own Right**

As noted above, Plaintiff’s like to pick and choose who they will target. This creates a high level of uncertainty that is an asset to the plaintiff’s counsel in negotiating settlements. A defendant may try to counter this strategy by filing cross-claims and third party claims against other parties who may be the more likely cause of Plaintiff’s injuries. Keep in mind that this strategy will likely weaken overall cooperation amongst defendants. More importantly, it may not be effective because most Plaintiffs will insist that the Court sever all cross-claims and third party claims and most Courts will agree to do so. Therefore, the cross-claims and Third Party Claims will lie dormant until after the trial. If the case settles before trial, the cross-claims or
third party claims may never be prosecuted because few defendants have the appetite to litigate a contribution or indemnity claim after settling an asbestos claim.

The decision to try to maintain the status quo for as long as possible, settle or go to trial will depend on the information from your jurisdiction, settlement values in your jurisdiction, and your individual judge. If you decide to go to trial, I suggest that your client consider becoming a third-party plaintiff. If the original plaintiff has not already done so, you might third-party in additional asbestos manufacturers, suppliers, contractors, employers, and/or premises owners. In some jurisdictions a non-party defendant, such as a bankruptcy trust, for instance, cannot go on the verdict form unless they have been brought into the case as a defendant. I certainly recommend at least sending a subpoena duces tecum to the trusts for any submissions by the plaintiff, and in jurisdictions where it is allowed and required, filing a third-party demand against the trusts.

If becoming a third-party plaintiff is part of the defense strategy that you decide to take, I suggest that you review abatement records for premises sites where the plaintiff may have worked, as well as the testimony of others who have worked at the plaintiff’s worksites to determine other shares of liability that you may be able to make at trial. You should also investigate submissions that plaintiff has made to bankruptcy trusts. Often those submissions contain admissible evidence of exposure to products manufactured by those bankrupt entities.

**Step Four: Understanding Your Venue**

Know your judge and his/her history in asbestos litigation. If possible, sit in on an asbestos case in the same venue, in front of the judge who will preside over your case. If that is not possible, look for a transcript of a similar case before that judge. At the least, if you can obtain a transcript of a dispositive motion hearing, you can get some idea of how the judge will
handle certain significant issues. Get to know the judge, and what will speak to that judge during oral argument. Also try to determine who is going to comprise the jury. Are the jurors going to be people who have a connection to your client? A client representative should be at the trial on a daily basis in order to personalize/humanize your client. Your client did not make a product that was designed to harm people; your client made a product which was designed to help.

Personalize, personalize, personalize your defendant. If you know that the jury pool is going to be pulled from people familiar with the type of product at issue for your client, you need to know their experience with it. If the jury pool is comprised of people employed in the same capacity as the plaintiff, you need to know that. Believe it or not, this may help you in more ways than you imagine at the outset, depending upon that juror’s experience, particularly if they have had experience with your product and/or type of product and have a personal opinion about it.

In summation, the best means of defending your client in today’s asbestos litigation is to be armed with information- information about your client, information about the plaintiff, information about the experts, and information about your judge and jury. If you arm yourself with information and use that information properly, you will be in the best position to fully evaluate the strengths and weaknesses of your case, and to properly defend your client. “Knowledge becomes power only when we put it to use.” - Anonymous.