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ENVIRONMENTAL TORTS

While federal environmental enforcement is perceived to have waned in recent years, an aggressive plaintiffs' bar has filled any consequent litigation void, filing ever larger, more ambitious lawsuits, according to attorneys Lester Sotsky and Brian D. Israel.

Many of these cases gloss over weak causation facts and nonexistent damages, yet demand increasing sums in settlement or judgment, the authors say.

This article addresses the proactive measures companies can take—both before and during litigation—to protect targeted defendants and limit the risks posed by these cases.

Protecting Against Environmental Tort Litigation: Successful Strategies and Proactive Measures

BY LESTER SOTSKY AND BRIAN D. ISRAEL

I. The Changing Face of Toxic Torts

Companies today confront novel threats from a growing cadre of toxic tort plaintiffs lawyers seeking massive awards for alleged environmental exposure. A toxic tort—or environmental tort—suit is one where private plaintiffs, as opposed to federal or state offices, claim they personally are entitled to damages or other relief because of adverse environmental conditions in the soil, air, water or workplace caused by the defendants.

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These cases have become increasingly lucrative for plaintiffs because plaintiffs' counsel skillfully combine the public's fear of environmental risks, jury suspicions of large companies, public skepticism of ''experts'' and regulators, and the formidable scientific complexity of causation and exposure to yield a formula for potentially huge jury awards. With these volatile ingredients, *actual* harm and *actual* causation sometimes take a back seat to the inflammatory (and often mischaracterized) ''bad document,'' and to the hired ''expert'' willing

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to speculate broadly about *potential* exposures and damages. Often, these cases can be risky for defendants to take to trial.

Just as an example, in one of our recent property damages cases, class action plaintiffs in Florida sought nearly a billion dollars in supposed damages to them on account of historical groundwater contamination that emanated from an old manufacturing facility. Years earlier, the facility had been declared a federal Superfund site at which the responsible parties performed a multimillion dollar cleanup and implemented a long-term groundwater remedy consisting of monitored natural attenuation, which was selected by EPA as the appropriate remedy.

The plaintiffs never alleged personal injury and essentially conceded that there were no past or even present impacts to their property values. Instead, the plaintiffs relied upon a number of novel damages theories—including the unshouldered cost of *their* preferred and much costlier cleanup remedy (not selected by EPA)—as well as the possibility of future property value impacts. By following an aggressive and comprehensive litigation strategy, we nonetheless were able to resolve the plaintiffs' claims for a fraction of the alleged damages.

Recent environmental tort cases present novel challenges for a number of reasons. First, plaintiffs' counsel have become increasingly sophisticated and aggressive in developing novel legal theories that sidestep the usual obstacles to frivolous lawsuits. Second, many plaintiff law firms have enjoyed notable financial success from product liability and other class action litigation and are able and willing to expend significant resources to construct an environmental case even where none exists. Third, as explained below, a company's good-faith participation in the environmental regulatory process may, in some instances, undermine the company's position in a later tort action. Finally, many toxic tort cases involve legacy sites where there is no current reservoir of corporate knowledge related to historical site operations. The lack of historical evidence and witnesses can often hamstring a company trying to overcome opposing counsel's characterizations of past operations or historical documents.

Because the short-term and long-term threat posed by private environmental litigation is so serious, any authentic effort to address the problem must be comprehensive, systematic and innovative. This article puts forward the following three-prong strategy for addressing the growing risks of toxic tort litigation:

- For lawsuits that have already been filed or may be filed soon, defendants must replace antiquated litigation strategies with creative, energetic approaches;
- For properties with existing environmental problems, companies must manage these problems in a way that does not increase the probability or severity of a future toxic tort lawsuit; and,
- Independent of known problems, companies should consider developing a corporatewide, proactive management system that can identify and address future environmental lawsuits before they occur.

This three-prong approach is discussed in more detail below. The good news is that there are numerous measures that are both feasible and effective in reducing exposure to improper or unfair allegations. The challenge is determining the appropriate implementation of these measures for each potential target and its unique circumstances. In the end, however, we believe these strategies may significantly reduce the risk posed by the rising tide of toxic tort lawsuits.

II. Overcoming Antiquated Litigation Strategies

The first step to the successful implementation of a toxic tort litigation strategy is to have one. This obvious element is often missing as defendants become distracted and sometimes worn down by the immediate need to answer the complaint, respond to discovery requests, and fight over pretrial motions.

Moreover, it is increasingly clear that old litigation strategies do not work. For one thing, it is no longer the case—as some may have once believed or perceived—that the defense bar or its clients come to litigation better armed, funded, or experienced in these complex litigations. Nor is it sufficient to rely upon traditional legal defenses alone, as toxic tort plaintiffs are actively developing new legal theories. For instance, where plaintiffs find it difficult to prove damages, they instead rely upon hypothetical future damages, unjust enrichment calculations measured by the amount of money required to ''properly'' remediate a site, and punitive damages.

Here are six suggestions for overcoming antiquated litigation strategies:

1. *Take the Offensive: Framing the Case and ''The Story''*

In many toxic tort cases, the plaintiffs will seek to portray the defendants as willful tortfeasors engaged in egregious corporate misconduct. Further, plaintiffs will ask the court to view the case as an urgent and unusual matter, demanding novel and aggressive judicial intervention. This theme will infuse the plaintiffs' case in every filing, every hearing and every public statement.

It is critical that the defendants develop their own positive and forceful narrative that will counter the plaintiffs' characterizations and serve as a backbone for their own communications. Obviously, the particular themes in any given case will depend upon the specific nature of the allegations and the facts of the case.

Moreover, while themes should be developed early-on, the development of a narrative must follow a thorough internal investigation to ensure that all public statements are consistent with the facts that will surface in discovery. The important point, however, is that defendants must take the initiative in developing an aggressive and creative theme of their case from day one.

2. *Case Management Is Critical*

Toxic tort defendants face a number of case management and procedural issues from the outset, and the approach to these issues can be as important as substantive legal arguments. The first issue that surfaces in many toxic tort claims is whether to oppose class certification and, if so, when. In most cases, though not all, defendants will oppose class certification since class certification will increase the plaintiffs' leverage for settlement and is often not appropriate in environmental cases, given the individualized nature of the alleged exposure and the alleged damages.

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Defendants should consider bifurcating the litigation schedule in order to determine the class issue before allowing full-blown discovery on the merits. This approach forces the parties and the court to focus on the hardest aspects of plaintiffs' case, often while avoiding extensive discovery into the actions and knowledge of the defendants. But this approach should not be employed reflexively—in some cases, class certification can be the path to certainty, resolution and litigation peace.

Another important case management device is the *Lone Pine* order which may be available, whether or not the case is a class action (*Lore v. Lone Pine Corp.*, No. L-33606-85 (N.J. Super. Ct. 1986)). In a *Lone Pine* order, the court requires the plaintiffs to put forth prima facie evidence of certain elements of their claim, usually including the plaintiffs' alleged exposure pathway and *evidence* of causation. Since these elements are often difficult for plaintiffs to establish, this relatively simple case management device will severely limit the prosecution of frivolous claims. There are several other case management techniques that may enable the defendant to structure the case in a favorable posture, including bifurcation or trifurcation of issues, separation of plaintiffs or defendants, and early court-ordered settlement discussions. In addition, in complex or unusual cases, defendants may ask the court to require formal Case Management Statements (CMS). A CMS will often allow the defendant a much needed opportunity to present its view of the case as well as its proposal for an efficient resolution.

The important point is that defendants need to evaluate creatively the best procedural vehicles available—not just the best substantive arguments—in order to defend the lawsuit successfully.

3. *Launch Aggressive Motion Practice at Outset*

Another early task for defense counsel is to evaluate the appropriateness of threshold motions to dismiss or significantly circumscribe the case. This evaluation must be comprehensive and imaginative. Six types of early motions that should be seriously considered in many environmental tort cases are:

- ***Preemption*** — Notwithstanding the savings clauses of many environmental statutes, there is a reasonable possibility that certain state common law causes of action are preempted by federal statutes. One particularly fruitful area involves ''duty to warn'' cases wherein defendants can argue that the warning and communication standards prescribed by federal regulations preempt any duty to warn claim. *See generally Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001). As one court recently explained, under *Buckman* ''[p]laintiffs cannot bootstrap their arguments regarding defendant's alleged failure to report and to investigate adverse impacts to [the federal agency] into a defective warning case.'' *Webster v. Pacesetter, Inc.*, 259 F. Supp. 2d 27, 36 (D.D.C. 2003); *see also Nathan Kimmel, Inc. v. Dowelanco*, 275 F.3d 1199 (9th Cir. 2001) (holding state law claim based on comments made to EPA was impliedly preempted under *Buckman*). Also, defendants can advance a modified preemption argument in other instances by asserting that even if a state law ''duty to warn'' claim exists, the federal regime sets forth the appropriate standard of care.

- ***Standing*** — In most cases, defendants should evaluate a motion to dismiss for lack of standing both as a way to dismiss the matter early and as a vehicle for educating the judge regarding the difficult causation and remedy issues presented by plaintiffs' claims. In order to invoke the jurisdiction of the federal courts, for example, plaintiffs must satisfy the threshold requirements of Article III. Similar obligations and limitations are presented in state courts. The United States Supreme Court articulated three main elements for standing: (1) the plaintiff must have suffered a concrete or imminent ''injury in fact'' that is concrete; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be ''likely,'' as opposed to merely ''speculative,'' that the injury will be ''redressed by a favorable decision.'' *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because toxic tort plaintiffs often have difficulty establishing damages, causation and/or redressibility, as opposed merely to pointing at allegedly undesirable conduct or environmental conditions, an early motion regarding standing may succeed either in getting the case dismissed or otherwise will serve to educate the judge at the outset regarding the enormous challenges posed by plaintiffs' theories.

- ***Removal*** — Environmental and toxic tort cases are generally filed in state court, which plaintiffs' counsel perceive as advantageous for numerous reasons. As a general rule, defendants should consider removing the case to federal courts. Where there is not complete diversity of citizenship, other theories that may allow removal include fraudulent joinder of nondiverse parties and federal question under one of the environmental statutes. In addition, under the Class Action Fairness Act of 2005, S.5, Pub. Law 109-2, removal of certain class actions is easier. For instance, the Class Action Fairness Act abolishes the requirement of complete diversity for covered actions. Also, Congress rescinded a number of the procedural obstacles to removal such as unanimous consent by all defendants and certain time limitations. Of course, there are many circumstances in which the defendant may prefer to be in state court, or may decide for other reasons not to remove the case.

- ***Additional and Indispensable Parties*** — Defendants should evaluate whether additional parties, possibly including governmental agencies, should be added to the litigation. As a first point, the inclusion of additional defendants may allow the original defendant to identify other liable parties. Also, in some cases, defendants can emphasize, by early motions practice under Federal Rule of Civil Procedure 19, that there are numerous absent parties who are indispensable to the matter. An indispensable party is one who is needed either to provide the complete relief requested or who would be subject to inconsistent obligations or otherwise be prejudiced if they were not present. Pursuant to Federal Rule of Civil Procedure 19(b), if a party whose joinder is necessary cannot be joined, the court will dismiss the action in some circumstances. An illustrative example is the recent global warming lawsuit against electrical utility companies. Can and should courts, in such litigation, pre-

sume to set national policy on environmental matters (large or small) without other, indisputable stakeholders, such as the relevant federal agencies?

- ***Statute of Limitations*** — Often, toxic tort claims involve manufacturing operations or releases that occurred years if not decades before the litigation is filed. For actions related to hazardous substances, however, federal law provides that the statute of limitations commences only when the plaintiff knew or reasonably should have known of the damages. 42 U.S.C. § 9658(b)(4)(A). This rule—known as the discovery rule—also applies to state law claims even if filed in state courts. 42 U.S.C. § 9658(a)(1). Accordingly, environmental tort claims are rarely dismissed due to the statute of limitations since plaintiffs can argue that the limitations period was only recently triggered. Nonetheless, given the wide publicity that environmental sites often receive and the frequent involvement of local citizen groups, defendants may be able to narrow the case significantly through statute of limitations motions. In one recent matter handled by Arnold & Porter, we were able to dismiss the entire class of plaintiffs who were members of a local environmental group because of the group's historic activism related to the site in question.

- ***Motions to Dismiss —*** As in all litigation, plaintiffs often assert multiple causes of action that are susceptible to early motions to dismiss. For strategic and other reasons, defendants always should consider ''quick strike'' motions to pare the case to the true dimensions of legitimate justiciability. Demonstrating to the court early on that the plaintiffs have overreached in their prosecution of their claims can have numerous benefits. (Conversely, in some instances, it may be more desirable to allow a case to proceed in its unrefined form, either to obtain the benefits of discovery as relevant to prospective motions to dismiss or to posture the case in its entirety as ponderous, ill-focused and unsustainable in multiple respects. In toxic tort litigation, one particular area of focus and evaluation by defendants should be developing the best overall strategy to counter plaintiffs' novel, unprecedented damages theories, which often are advanced both to enlarge potential awards and to overcome plaintiffs' inability to prove either causation or concrete injury.

The foregoing motions are by no means an exhaustive list of possible early motions. Consistent with the need to develop a thematic narrative for the litigation, defendants should expect that they will need to ''brainstorm'' frequently to evaluate the motions discussed above as well as a myriad of others.

4. *Master the Facts and Science*

An additional pitfall commonly encountered in private party environmental litigation is the failure to understand early the facts that will be discovered in litigation. As a result, defendants unintentionally make public statements that are inaccurate, ambiguous or *appear* to be misleading. These statements can then be exploited by plaintiffs' counsel before the judge or even at trial. It is therefore critical that defendants quickly commence aggressive internal fact-finding efforts that encompass preserving evidence, reviewing documents and interviewing witnesses. You cannot be sure that what you proffer or say is right unless you know what ''you'' know.

Further, because toxic tort cases involve complex environmental issues, defendants should anticipate their expert needs at the outset and retain the necessary individuals. An aggressive effort to understand the scientific issues related to plaintiffs' claim is critical to ensure that the defendant's litigation strategy is adequately informed.

5. *Involve the Entire Organization*

A common pitfall in environmental litigation strategy is the failure to think beyond the litigation. Countless ongoing activities of a defendant has the potential to impact (adversely) its interest in the litigation, including public statements, community relations, evolving internal standards of care, internal e-mails, document retention, unrelated government filings, statements made by employees while not a work, the behavior of contractors, etc.

Defense counsel should help the company identify areas of potential risk and develop a careful, sensible approach to straddle ongoing business needs and prudent care in its conduct in myriad arenas. Sometimes, managers and employees need to be sensitized to, and sometimes trained in, document retention, document creation, company confidences, and other areas of ''spill over'' concern.

It may also be less critical to integrate public relations activities with litigation defense imperatives. Finally, steps must be taken to preserve applicable attorney-client and attorney work product privileges with employees, consultants and former employees, where appropriate.

6. *Consider Creative Resolutions*

Defendants, understandably, are often viscerally offended by plaintiffs' allegations in the typical toxic tort lawsuit. This reaction sometimes blinds defendants from exploring creative avenues for an early resolution to the lawsuit.

There are often nontraditional ways to give the plaintiffs what they claim they (not their lawyers) want. For instance, defendants could propose a property value protection plan for pollution claims. In cases involving alleged drinking water exposure, defendants might provide bottled water or even spearhead an effort to provide public drinking water—at a fraction of the cost of litigating tort claims. In these and other examples, a defendant might insist upon a funded program that would cap its exposure while also obtaining releases from future liability. That defendant might both limit its liability while legitimately presenting itself to the affected community in a positive, proactive manner.

In some cases, especially where causation against the defendant is weak or uncertain, defendants may be able to include interested governmental entities in creating a comprehensive solution that involves public grants, low-interest loans, community redevelopment and/or legislative appropriations. Innovative insurance packages also can sometimes play a positive role in an overall risk management strategy.

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Early on, a defendant should undertake a sophisticated effort to determine the probability of success, the potential financial exposure, and the inconvenience and expense of the litigation.

Finally, while it is not in any defendant's interest to pay money beyond the value of a case, most cases settle, and if it is possible to settle early, this avoids litigation costs and tremendous inconvenience to the company.

The company should therefore undertake a sophisticated effort early to determine the probability of success, the potential financial exposure, and the inconvenience and expense of the litigation. In sum, defendants are sometimes ill-served by a litigation strategy that pursues only scorched-earth litigation and fails to pursue other solutions. That said, many spurious and vastly overblown lawsuits are worth fighting as a matter of principle or on the merits, and we do not mean to suggest otherwise.

III. Overcoming Short-Term Site-Management Thinking

A sure-fire way to win a toxic tort lawsuit is to prevent it from happening in the first place. This section discusses in general terms a few methods for managing existing remediation sites and operating facilities so as to reduce the possibility that they will give rise to future litigation headaches or, at the very least, reduce the exposure, should the company be sued.

These suggestions stem from our experience in numerous circumstances where litigation has occurred or has been threatened. In simple terms, litigation demands that companies think about future toxic tort lawsuits when they evaluate environmental compliance, management and cleanup options.

1. *Broaden Risk Management Criteria*

Corporate managers must be rewarded for evaluating sites with an eye toward long-term risks. For instance, at sites that are currently being investigated or cleaned up, companies should calculate not only the immediate costs of remediation, but also the potential costs of future toxic tort litigation.

In some cases, depending upon countless site-specific circumstances, a company may elect to undertake a more extensive or expensive remedy in order to lessen the chance of future tort liability or at least reduce its severity. In other cases, the company may continue to pursue a more cost-effective remedy, but develop other strategies for addressing the risk of a future lawsuit.

These strategies vary, but in all instances their advocacy to government agencies should be fact-based and non-argumentative. In addition, in some circumstances, the company may prefer for the government to conduct the remedial investigation—even if the government will later be reimbursed—to make the chosen remedy less assailable, after the fact, by toxic tort plaintiffs.

2. *Pursue Creative Solutions*

As with cases already in litigation, companies may be able to find creative solutions to remediation sites that lower their overall costs and reduce the risk of future litigation. For example, in exchange for a greater willingness to address contamination at a site, a company may be able to secure indemnity agreements, deed restrictions (thereby limiting future exposure), government flexibility and even third-party waivers.

At one site with which we have been involved in, the client has proposed to implement immediately a remedy that will remove the alleged exposure pathway before the environmental investigation even commences. In this way, the company may save on overall remediation expenses, but more importantly, may eliminate or significantly reduce the risk of a toxic tort lawsuit. In most cases, creative solutions such as these will require the company to develop cooperative and constructive relationships with property owners, community groups, nearby residents and government agencies.

3. *Getting Smart About the Government*

Companies participate at remediation sites in a myriad of contexts including the federal Superfund program, RCRA enforcement, state environmental statutes, volunteer or Brownfields programs, and private party arrangements. Similarly, operating facilities are subject to numerous environmental regulatory programs. In almost all cases, the company must interact with government agencies regularly, ranging from mandatory compliance with standards to reporting duties to permit writing.

Communications with the government are rarely, if ever, privileged or confidential and will likely be discovered by plaintiffs if the site becomes the subject of a future toxic tort case. Accordingly, company representatives should take special care to communicate with governmental agencies in an appropriate and prudent manner. Representatives should both refrain from unnecessary and unfounded legal admissions, and ensure that every statement is clear, truthful, accurate and not susceptible to mischaracterization.

Further, it is rarely in the company's interest (either short-term or long-term) to allow relationships with government officials to become hostile, even where they are unavoidably adversarial. A hostile relationship will not only decrease the flexibility of the agency and its willingness to consider the company's arguments, it will foster an environment that has the potential to trigger future toxic tort litigation or make it harder to defend. Hostile or suspicious regulators often write documents that cast the company in a bad light, which future plaintiffs may, in turn, use to portray the company as a scofflaw that must be punished for its persistent refusal to ''do the right thing.''

Finally, there may be circumstances at cleanup sites where it would be best to allow the government to conduct the remedial investigation and feasibility study, even if the company must reimburse the government for its costs. The conventional wisdom has long been that the party responsible for a cleanup is well served by gaining ''control'' over site investigation, in order to better affect the direction of the remedial decisionmaking. However, in situations where toxic tort litigation is anticipated or likely, the company may wish to argue

later that it has conducted a cleanup solely as directed by the relevant government agency.

If the company itself performed the remedial investigation (even if subject to government approval), then the plaintiffs may argue that the cleanup was improperly ''selected'' by the company as a way to save costs. This contention has been used by plaintiffs to buttress calculations of vast ''urgent enrichment'' damages, measured by the theoretical ''savings'' enjoyed when a party who performed a cleanup allegedly steered decisionmaking toward cheaper, but less effective solutions.

This entire theory of damages might be mitigated if the government, rather than the company, conducted the remedial investigation. A responsible company could still participate in the process, but not lead it, in order to have input without being exposed to charges of having ''scripted'' a deficient plan to save money.

4. *Preventing ''Bad'' Documents*

For some companies, nearly every site is a potential toxic tort lawsuit target. Most technical and intercompany communications regarding a site, including e-mails, will be discoverable in future litigation.

Accordingly, all relevant employees should be regularly instructed about how to avoid creating documents that may be misinterpreted or mischaracterized by plaintiffs' counsel years later. Similarly, companies should manage their consultants and contractors so that they too avoid creating unnecessarily prejudicial documents. In addition, when the company must communicate about sensitive issues that it anticipates could be the subject of future litigation, it should determine if there are steps to ensure that, where appropriate, communications will remain privileged and confidential.

As many lawyers know, ''bad documents'' are the bread and butter of many plaintiffs' cases. There are well-recognized and wholly proper techniques to diffuse their harmful impact.

But no explanatory context or effective cross-examination can outperform avoiding bad documents in the first place. Thus, for example, in the preceding section on ''Getting Smart About the Government,'' we observe the delicacy of advocating positions to regulators. Care should always be taken to correspond or memorialize the merits of less costly solutions in ways that avoid giving an impression of callousness and to promote the reality of legitimate policy decisionmaking on the basis of relevant criteria.

5. *Purchasing Peace*

Many defendants are skeptical about the effectiveness and cost-reasonableness of insuring against specific or anticipated litigation risks, some for good reason. As insurance underwriting continues to evolve in the fields of litigation, product liability and toxic tort, however, we would urge current or prospective defendants not to be reflexively dismissive of these opportunities.

We have worked and conferred regularly, particularly in recent years, with a number of prominent insurance underwriters, and it is apparent that they believe that creative approaches to risk management in this area can be of value to targeted companies.

Whether this proves to be true is highly dependent upon the individual circumstances of potential insureds and the level, extent and nature of exposure to be insured against. For many, the biggest concern remains catastrophic or ''bet the company'' liability, which sometimes can be more effectively insured by a decision to ''self-insure'' a considerable, but manageable amount of the potential exposure.

IV. Proactive Toxic Tort Risk Management — Thinking (and Acting) ''Outside the Box''

The foregoing discussion largely applies to those sites or conditions that are either already the subject of litigation or known to present environmental problems. In today's environment, many companies and industries handle materials, manufacture products, and carry legacy liabilities that unavoidably makes them attractive targets.

In light of this, we are asked regularly whether there are any *effective*, corporatewide measures that companies can take to minimize proactively their exposure to toxic tort liability. The answer unequivocally is ''yes.'' While each of the following measures independently can address prospective risk, an integrated and comprehensive effort across the entire company is likely to be the most successful.

First, potential toxic tort litigation targets should scrutinize closely the standards of care by which they conduct their business, not so much in reference to applicable legal requirements or traditional principles, but in terms of how they could best defend their conduct before a jury hearing argument about their culpability for not mitigating some alleged harmful impacts from past or current conduct.

A self-critical *standard of care* audit, measured strictly against the most rigorous legal standards of the common law as it has evolved in states where litigation could be filed, might cause a prudent company to undertake modest, additional measures—operating practices, notification and disclosure materials, etc.—to be able to demonstrate later that which they wish to claim today: No reasonable person could have conducted this business more carefully in reference to the alleged harms (later) complained of.

In addition, it is important for companies to recognize that it is possible that conduct at *any* facility, or on behalf of *any* customer or toward *any* employee might alone set an applicable standard of care, leaving the company exposed should it fall short in any other context. Accordingly, a standard of care audit must seek to ensure consistency across the landscape of a business's engagements.

There are well-recognized and wholly proper techniques to diffuse the harmful impact of 'bad documents.'

Second, we believe in certain circumstances it would be prudent for companies to ask themselves whether they have an obligation, or will later be held to have had an obligation, to inform themselves of certain risks or hazards associated with their business. For example, most manufacturing companies rely upon federal and

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other authorities to conduct risk assessments and evaluate appropriate standards governing the use, handling, release and disposal of hazardous chemicals.

Sometimes, however, these same companies may be the targets of public or private allegations that their operations are causing various harms. At what point is a company, given such notice, obligated—morally, legally or as a prudential matter—to do more than rely upon other experts and scientists? In some instances, retention of one's own experts, performance of one's own risk assessments and analyses, and other means of critical self-evaluation in reference to suspected or alleged harms could be the *minimum* expected of a company by a jury or a judge. Once the lawsuit is filed, *post hoc* rationalizations may ring hollow in comparison to prelitigation, contemporaneous and volitional efforts to understand and manage the risks associated with one's business.

Third, in order to gauge whether and to what extent either of the foregoing or other proactive measures should be undertaken, an evaluation of the universe of potential plaintiffs in toxic tort litigation against the company could be enormously informative. What populations are exposed to what forms of potential harm over what periods of time and at what levels of exposure?

Asking these critical questions, as well as attempting to quantify (even grossly) the magnitude of the potential plaintiff population the company could face in the future, will inform decisionmakers about the necessity and wisdom of all forms of proactive, pre-litigation measures. Similarly, an evaluation of ''downstream'' users of company products or materials, which in turn may expose their employees or others, would also inform risk management decisionmaking.

Fourth, a critical evaluation of the quality and completeness of the notices and disclosures made to members of the public, employees, and other potentially interested or affected parties is also a deserving subject of possible proactivity. Time and again, alleged failures to inform or disclose have been a cornerstone of successful plaintiff litigation strategies.

Historically, some companies have relied too heavily on technical compliance with applicable legal requirements governing disclosures to meet these obligations. While this is often a proper defense, plaintiffs' lawyers will try to convince juries and judges not to abrogate to regulatory standards their own sense of justice in terms of what should have been disclosed, when and to whom. Analyzing this issue from the standpoint of potential future litigation against the company may yield a different and meaningful set of conclusions about what forms and content of disclosures should be made.

Time and again, alleged failures to inform or disclose have been a cornerstone of successful plaintiff litigation strategies.

Finally, an assessment of the companies' indemnification and insurance coverage situation should be a component of any proactive strategy. One can well imagine a diversity of outcomes in such an analysis, as well as the incentives or disincentives those outcomes create for proactive measures to mitigate against future litigation risks.

V. A Suggestion: Toxic Tort Due Diligence of One's Own Risks

Most prudent investors and all responsible companies perform thorough due diligence before making decisions concerning the acquisition of businesses, including those that might become the subject of significant mass tort or environmental litigation claims. Such diligence is, today, a matter of routine practice.

Surprisingly, however, few companies are similarly self-critical for existing assets. After the assets and businesses are acquired, how often do companies look anew at their exposure to the types of liabilities that might have chilled their interest in the investment in the first place? Whether or not such ongoing, self-critical evaluation is (or ought to be) required by the letter or spirit of existing securities law, common law, fiduciary principles of corporate law, or other legal principles, this article suggests that it is both possible and potentially life-saving to make that kind of assessment well in advance of actual litigation threats.

For a modest investment of time and energy, most companies are, in fact, quite capable of identifying potential litigants against them, the materials or theories upon which such litigation might be based, the disclosures or lack thereof that might be showcased against them, and the scientific uncertainties that might be argued as a basis for imposing punitive damages on account of an alleged manifest indifference to the harms of which the plaintiffs complain.

To assemble the relevant information, evaluate it critically, and think creatively about mitigation options in the face of potential litigation exposure, is the essence of risk management. Such risk management techniques have been embraced broadly in the business world for decades, generally in reference to other types of challenges and future concerns.

The techniques themselves, as well as the prudence of employing them, are readily pertinent to defending against toxic tort liability. With care and good fortune, employing those techniques might not only mitigate the risks posed by such litigation, but prevent cases from ever being filed.