# Mass Tort Reserving

Ralph Blanchard

# Caveat

The following represents my personal observations and opinions based on experiences in the industry, work on various professional committees, and ongoing review of various disclosures and analyses read over the years. It is not meant to represent the official views of the CAS or my employer or any of the other organizations with whom I have been involved on these topics.

# Outline

- What is a mass tort?
- Normal tort vs. mass tort claim process
- Allocation issues?
- Coverage issues?
- Why traditional methods fail.
- Ground-up approaches.
- Trends over time
- Other mass torts
- The next asbestos?

# What is a Mass Tort

- Tort – "a wrongful act or an infringement of a right (other than under contract) leading to civil legal liability"
- Tort claim ≅ Lawsuit.
- Mass tort – many lawsuits coming from the same event or action (many plaintiffs suing one or many defendants)

# Mass Tort examples

- **Asbestos** (many plaintiffs, many defendants)
- Hazardous Waste sites (many plaintiffs, many defendants)
- Deep Water Horizon offshore oil well (many plaintiffs, a few defendants)
- Sexual molestation claims (many plaintiffs, sometimes only one defendant)

*(Frequently either a movie or series of lawyer ads on TV)*

- For our purposes, we focus on the many plaintiffs, many defendants

# Normal tort vs. Mass tort

| | Typical tort | Mass tort |
|---|---|---|
| Plaintiff | One injured party | Many injured parties |
| Defendant | One - clearly ID'd | Multiple*<br>Peripheral parties |
| Event | Single event<br>Clear location, time | Many events*<br>Many locations*<br>Long latency* |
| Filing lag | Short lag | Can be decades |
| Court | Clear location | Forum shopping |
| Coverage | Usually clear | Complicated<br>Allocations a big deal |
| policies | One | Several years* |

# Asbestos pleading – one example

COPY AMERICAN

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK
----------x

IN RE NEW YORK CITY
ASBESTOS LITIGATION
----------x

This Document Relates To:

ALL CASES
----------x

3M COMPANY;
A.O. SMITH CORPORATION;
A.W. CHESTERTON;
ALBANY INTERNATIONAL CORP.;
AMERICAN STANDARD, INC.;
AMTICO INTERNATIONAL, INC.;
AQUA-CHEM, INC.
d/b/a CLEAVER-BROOKS DIVISION;
ASTENJOHNSON, INC.;
THE B.F. GOODRICH COMPANY;

ASBESTOS MATTERS
Index No. : 40,000/88

Date Filed:

NYAL - THE LANIER LAW FIRM, P.C.

Plaintiff(s) designates
**NEW YORK**
County as the place of trial

The basis of the venue is
**DEFENDANTS' PLACE OF BUSINESS**

**SUMMONS**

# Defendants in this real-life example

- 3M
- A.O. Smith Corp.
- A.W. Chesterton
- Albany International Corp.
- American Standard, Inc.
- Amtico International, Inc.
- Aqua-Chem, Inc.  (d/b/a Cleaver-Brooks Division)
- Astenjohnson, Inc.
- The B.F. Goodrich Company
- Bird Incorporated (f/k/a Bird & Son, Inc.)
- Buffalo Pumps, Inc.
- Burns International Service Corporation f/k/a Borg Warner Corporation
- Burnham Corporation

# Defendants in this real-life example (cont.)

- Carlisle Corporation
- Carrier Corporation
- Certainteed Corporation
- Crane Co. (individually and as successor to Cochrane)
- Crown Cork & Seal USA, Inc.
- Dana Corporation
- Durabla Manufacturing Company
- Eastern Refractories Company, Inc.
- Fairbanks Morse
- Flowserve Corporation
- FMC Technologies, Inc.
- Ford Motor Company
- Foster Wheeler Energy Corporation

# Defendants in this real-life example (cont. some more)

- Garlock, Inc.
- General Electric Company
- General Motors Corporation
- General Refractories Company
- Genuine Parts Company
- Glidden, Homes Incorporated
- Goodrich Corporation
- The Goodyear Tire & Rubber Company
- Goulds Pumps, Inc.
- Honeywell International, Inc. f/k/a Allied Signal, Inc., and as successor-in-interest to The Bendix Corp.
- I.T.T. Industries, Inc. individually and as successor to Bell & Gossett and Grinnell Corporation
- IMO Industries, Inc. f/k/a Delaval, Inc.
- Index Corporation

# Defendants in this real-life example (and still cont.)

- International Paper Company
- John Crane, Inc.
- Kentile Floors, Inc.
- The Marley Company individually and a division of Weil-McLain Company, Inc. and successor-in-interest to The Wylain Co.
- Pneumo Abex Corporation individually and as successor in interest to Abex Corporation
- Quigley Company, Inc.
- Rapid American Corporation, as successor-by-merger to Glen Alden Corporation, Briggs Manufacturing Co., Philip Carey Corporation and Philip Carey Manufacturing Company
- Rheem Manufacturing Corp., successor-by-merger to Glen Alden Corp., Briggs Manufacturing Co., Philip Carey Corp. and Philip Carey Manufacturing Co.

# Defendants in this real-life example (and finally)

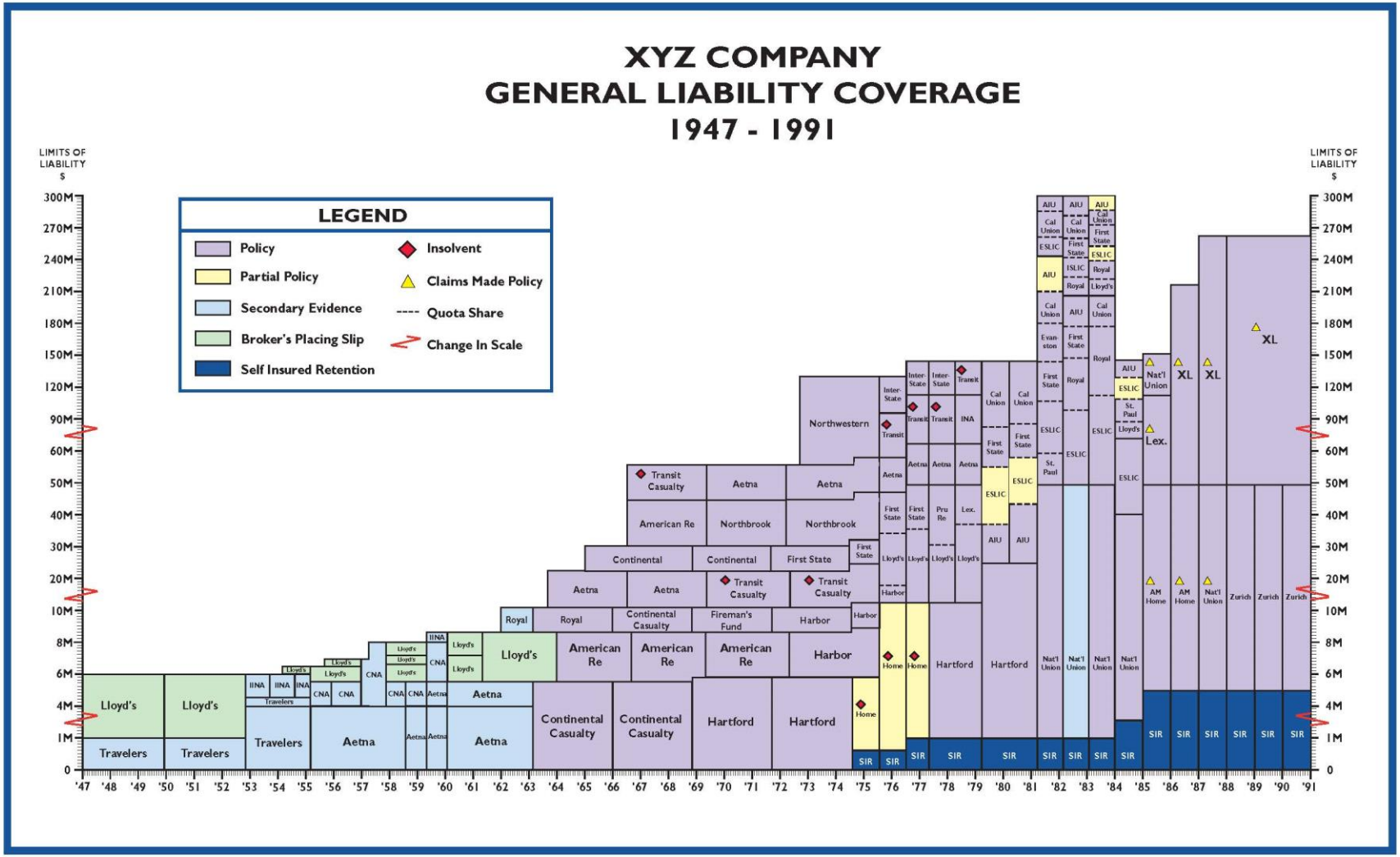
- Riley Power, Inc.
- Robert A. Keasbey Company
- RPM. Inc.
- Square D Company
- Tyco Valves & Controls, LP
- Warren Pumps, Inc. individually and as successor to The Quimby Pump Company
- Weil-McLain Co., Inc.
- Viacom, Inc. successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corporation
- Yarway Corporation
- Zurn Industries, Inc. a/k/a and successor-in-interest to Erie City Iron Works

# Allocation Issues

Uncertain how to allocate liability (if any) to:

- Defendants
- Years (of exposure, and hence ins. policies)
- Primary policies vs. Excess policies

# Coverage Charts



# Allocation Issues (cont.)

For a given defendant, allocation may be:

- Pro rata over all years of exposure
  - "Orphan share" issues (where no insurance)
    - Picked up by insured?
    - Skipped?
    - Not considered for years where ins. wasn't offered?
- Weighted by available policy limits in a yr.
- "Stove pipe" – all to one yr. (insured's choice)
- Exhaust layer by layer

*All of these alternatives are the law in at least 1 state.*

# Coverage Issues

- Definition of "occurrence" with regard to
  - Limits
  - Retentions/deductibles
  - Reinsurance
  - Loss-sensitive plans
- Lost policies ("secondary evidence"?)
- Treatment of insolvent layers
- Interpretation of policy exclusions
  - Primary vs. Umbrella vs. Excess layers

# Why traditional methods fail

Traditional method -

- Trace how cohorts of claims progress from beginning to end
- Assume patterns are stable from one cohort to another
- No single account/claim has material impact by itself

Mass torts –

- No history of how it ends. (2016 claims on 1950s policies)
- Typical cohorts don't apply (AY, PY, UW Yr)
  - one claim can be spread across multiple years (cohorts).
- Each traditional cohort has different layers, exclusions, policy terms, reinsurance
- Large losses/accounts tend to dominate.

# Ground Up Approaches

- Separate account-by-account analysis, reflecting deductibles/limits/reinsurance policy year by policy year.
  - In practice, may only analyze largest accounts, plus sampling of smaller accounts.
- Model the claim phenomena and how it applies to account.
  - May be able to assume that societal trends also apply to the account.
  - E.g., multiple defendants on each asbestos filing may imply consistent "piece of the [societal] pie".

# Ground Up – Asbestos example

Claim phenomena driven by:

- Injury
  - Mesothelioma ("meso")- a cancer largely attributed to asbestos exposure with incidence and death rates publically available (with lags)
  - Other cancers (not as easily tracked, although some public and private sources create statistics on filed lawsuits)
  - Epidemiological projections made on future cancer trends/volumes
- Exposure
  - From past claims can identify how typical claim is spread across years, and trends in that spread
  - Coverage charts obtained for an account
- Product ID ("matching" of injury to exposure)
- Claim patterns
  - Numbers and dollars ("run rates") generally stable yr. to yr.

# Ground Up – Construction Defect example

Claim phenomena driven by:

- Injury
  - Degradation of property's integrity or the like, allegedly due to improper construction.
- Exposure
  - Arising from date of construction.
  - Statutes of repose – limit on how long after the negligent act a claim can be filed. (10 years?)
  - Trends may vary by class of insured (e.g., general contractors, artisan contractors, architects).
- Claim patterns
  - Claims can be filed until statute of repose.
  - Report year development approaches seem to work for estimating ultimates, once claims are reported.

# Ground Up – Complications - 1

Accounts may be exposed to the mass tort in multiple ways

- E.g., for asbestos, as
  - Distributor
  - Installer
  - Product Manufacturer
    - Multiple products
  - Joint venture partner
- May need to model each piece of the account separately

# Ground Up – Complications - 2

Accounts change over time

- Mergers/acquisitions/divestitures
- Names can change
- Products can change
- Policy terms can change

Spelling of account name may not be consistent over the years

- XYZ Inc.
- XYZ Incorporated
- XYZ company
- XYZ corporation
- XYZ corp
- XYZ co.
- X.Y.Z. co.

# Ground Up – Complications – 3

IC Industries

- Illinois Central Industries created in 1962 as holding co. for Ill Central Railroad
- Bought Abex Corp. in 1968 (made brake pads)
- Bought Pepsi-Cola General Bottlers Inc. of Chicago in early 1970s
- Changed name to IC Industries in 1975. By then the railroad no longer dominated its business
- By mid-80s started selling off some operations
- Late 1980s, changed its name to Whitman Corp. and "rid itself" of the railroad.
- By 1990s, primarily a bottler of soft drinks
- In 2001 bought PepsiAmericas Inc. and adopted that name.
- In 2010, PepsiAmericas Inc. became wholly owned by PepsiCo.

Who has the liability now for asbestos lawsuits coming from the railroad and brake manufacturing?

# Ground Up – Complications – 4

- Problems with "one-offs"/aberrations
  - Aberration for one account may be normal activity for the portfolio as a whole.
  - Focus on the aggregate, even if doing calcs for an account
  - I.e., ground-up approach is trying to get reliable value for the whole, NOT for the individual pieces (accounts)
- Understand the book – typical limits, reinsurance, markets
- Be aware of changes in the book over time
- Remember the 80/20 rule – focus on the big dollar accounts
- May want to group many little guys as if one big guy

# Ground Up – Complications – 5

- Analysis varies by perspective
  - Society
  - Defendants
  - Insurers
  - Reinsurers
- E.g., limits/exclusions
  - Reduce cost for insurers
  - Increase net cost for defendants

# Simplified hypothetical example – asbestos "meso" claims

Model the following:

- Meso death rates by birth year cohort
  - Assume meso death rate is a function of:
    - Age, and
    - Asbestos usage per capita during years of employment

    *(Actual meso deaths by age available from CDC since 1999)*

    *(US Asbestos usage available from USGS)*
- Propensity to file claim
- Success at "product ID" *(claim success against defendant)*
- Claim allocation to years of exposure *(defendant access to insurance)*

Result is successful meso claims by CY by AY

Apply rates of change to actual data to get projected future.

Adjust for inflation, limits, reinsurance, etc.

# Mass Tort Trends - 1

- Litigation/claim environment can change materially over time.
- Asbestos example
  - Early 1980s – Strict Liability ruling, Exposure trigger rulings
  - Mid to late 1980s – exclusions become common
  - 1997 US Supreme Court Georgine decision (threw out class action settlement) – before this claims concentrated to major defendants.
  - Late 1990s, early 2000s – unimpaired claims (quantity over quality)
  - Early 2000s – prepackaged bankruptcy filings
  - 2005 - Judge Janis Jack decision – prior quantity not all valid – changed environment to one focusing on malignant cancers (quality).
  - Texas and Mississippi tort reform
  - Rise of Madison County Illinois (half of all meso filings in the US)
  - Future ?? - more bystander/take-home exposure cases

# Mass Tort Trends - 2

- Environmental Liability example
  - Superfund law (December 1980 – lame duck Congress)
  - Interpretations of "sudden and accidental" ≈ unintended
  - Absolute Pollution Exclusion
  - Changing views of how clean is clean
  - Reduced momentum for EPA identification of national superfund sites
  - Brownfield legislation
  - Attacks on pollution exclusion

Claims environments for mass torts can be very unstable – past history may not always be relevant.

# Other Mass Torts

- Silica
- Latex Gloves
- Breast Implants
- Chinese Drywall
- EMF (electromagnetic fields) & Cell Phones
- Y2K
- Diacetyl
- Talc?

Not all mass torts are successful.

Daubert standard is one reason why

# What's the next asbestos?

- Answer - Asbestos
- Arguments against another similar mass tort
  - Asbestos was big because it had wide use for a long number of years
  - Dangers were not well publicized until after long and widespread use
  - The internet today makes it hard for report of possible dangers not to be well publicized
  - Litigation environment of today makes it likely that lawsuit will be filed at first hint of possible health dangers, whether justified or not.
  - Hence potential liability unlikely to spread to decades of policies.
  - Claims-made insurance forms for many products with latent claim risk, hence for some products only a year or two of policies at risk.
  - General aggregates on policies limit potential insurance exposure.
- Mass torts will continue, but with faster development, lesser size to insurance industry. (Different issue for defendants.)

# Aside

- Basic approach of ground-up analysis has application to other specialty litigation –
  - Back-dating stock options (D&O policies)
  - Bank failures during 2007/2008 crisis (D&O).
  - Etc.
- Model the claim phenomena
  - Injury
  - Exposure
  - Resulting claim
- Somewhat similar to Cat Model structure

# Questions

?