

How Should Your Company Respond to Welding Rod Claims?

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Industry experts recently have asked whether personal injury claims based on exposure to welding rod fumes could become the “next asbestos” litigation. Asbestos mass tort litigation during the last several decades has consumed billions of dollars and caused the demise of numerous businesses and insurance companies. Because plaintiffs only have begun to bring large groups of welding rod claims, no one can yet determine whether welding rod litigation will follow that same path. Nevertheless, companies with potential welding rod liability would be well-advised to prepare now as though welding rod litigation could become the next asbestos.

Welding rod liability could develop into mass tort litigation because it presents many of the same factors that continue to drive asbestos litigation: an enormous pool of potential plaintiffs, allegations of serious injuries, a large pool of potential defendants, and significant financial investment by plaintiffs’ counsel in an effort to develop a new category of mass tort litigation. Potential defendant companies should begin to implement their responses to the threat of welding rod liability by implementing lessons learned in asbestos litigation.

Companies facing welding rod liability can take many steps to minimize the impact of welding rod liability. They should implement a concerted defense strategy aimed at defeating welding rod based claims before they are allowed to develop fully into “the next asbestos.” They should also preserve their assets against such potential future claims to the fullest extent possible through corporate reorganization strategies. Companies should also take steps to preserve their valuable insurance coverage. If

insurance companies adopt the strategy that they used in asbestos, they will seek to escape, limit or at least delay their coverage obligations to their policyholders through litigation. Potential welding rod defendants should cooperate to form a concerted response to the insurance industry's efforts to evade coverage.

The Potential Scope Of The Welding Rod Problem

Like asbestos, welding rods present a tempting target for claims because of their ubiquitous use. A 2003 report issued by the investment bank HSBC estimates that there are 700,000 to 800,000 current and former welders in the United States. That number does not count other persons who may have been exposed to welding fumes even though they did not themselves perform any welding. Nonwelders pose significant potential liability. The plaintiff in the recent, widely reported *Elam* case was a maintenance worker at Union Electric Company, and not a welder. Nevertheless, a jury awarded Mr. Elam \$1 million for his injuries allegedly resulting from exposure to welding fumes.

Prior to *Elam*, claims that welding rod exposure causes Parkinson'-like disease generally did not succeed. Such diseases are poorly understood, and plaintiffs generally could not establish causation. Plaintiffs' causation case changed in 2001, when Dr. Brad A Racette of Washington University School of Medicine compared fifteen welders who suffered from Parkinsonism with two groups of Parkinson's disease patients. Dr. Racette concluded that welding fumes could be a risk factor for Parkinson's disease. He also concluded that welders' symptoms appeared at an earlier age than nonwelders' symptoms. Despite the limited size of Dr. Racette's study and the limited scope of his conclusion, plaintiff's counsel in *Elam* utilized that study and

supporting expert testimony to reach the jury on causation. The jury concluded that Mr. Elam's disease resulted from his exposure to welding fumes.

Plaintiffs' Lawyers Prepare Welding Rod Litigation As "The Next Asbestos"

Recognizing that the supply of asbestos plaintiffs cannot continue forever, plaintiffs' lawyers are looking for the next mass tort to support their practices. They have set their sights on welding rod litigation.

Plaintiffs' counsel themselves are applying lessons that they learned from the asbestos litigation experience. For example, although there currently is little, if any, reliable scientific evidence to establish that exposure to welding fumes cause Parkinson's-like disease, plaintiffs' counsel reportedly already have filed thousands of welding rod claims against thousands of defendants. Precisely because the etiology of such diseases is poorly understood, experts can theorize regarding a causal link between welding rod fumes and Parkinson's-related disease. Plaintiffs' lawyers will use that ambiguous science to support their claims, while insurance companies will point to that same uncertain science to justify their refusal to defend or indemnify their policyholders for welding rod liability. In the asbestos context, causation and other difficult scientific issues provided litigable defenses for insurers attempting to escape their coverage obligations. Similarly, in the silicone breast implant litigation, plaintiffs were able to reach juries and obtain judgments or settlements based on expert testimony that since has been widely discredited.

Plaintiffs' lawyers also already are investing substantial resources in a search for evidence to support their conspiracy theory. The lawyers in *Elam*, for example, relied on minutes of a purportedly "secret" meeting, as well as other alleged "secret meetings" and on government documents from the 1940s.

Asbestos litigation also taught the plaintiffs' bar that merely increasing the number of claims that a law firm brings against a defendant company can inflate the value of each case. Plaintiffs' lawyers "inventory" claims and then present their massive inventory to defendant companies for settlement. If a defendant balks, the plaintiffs lawyers select the most compelling cases for trial – and refuse to settle unless the defendant company agrees to settle all other claims in the inventory. Many leading plaintiffs' lawyers are already actively seeking welding rod claimants through billboards, union solicitations, and avid use of the internet.

Liability Insurers, Too, Have Learned From Their Asbestos Coverage Experience

Not surprisingly, the insurance industry is closely following the rise of welding rod litigation as the potential "next asbestos." Insurers, too, will apply the lessons that they have learned in asbestos litigation to their responses to policyholders' claims for coverage of welding rod litigation. In fact, some insurance companies already have taken the step of excluding future coverage for welding rod-related liability – just as they excluded coverage for asbestos-related liability in the mid-1980s.

Given the threat that welding rod liability poses to insurance companies' balance sheets, insurers may file declaratory judgment actions against their policyholders early in the development of the litigation. Insurance companies will select friendly jurisdictions and focus on policyholders least able to defend themselves from the insurers' assaults on coverage. By filing these cases, insurance companies will attempt to prevail on key legal issues that could limit their obligations. One insurance company already has adopted this strategy by suing one of its policyholder in Maryland. That insurer claims that the pollution exclusion relieves it of any insurance obligations for welding rod liability. Other insurers have successfully avoided policyholders' claims

for insurance coverage by asserting the pollution exclusion. In addition to freeing these companies from their insurance responsibilities, these decisions also created law favorable to the insurance companies on a key coverage issue.

Policyholders Also Should Use The Lessons Learned In Asbestos Litigation To Prepare For The Coming Coverage Litigation

To protect against the potential future onslaught of welding rod litigation, potential welding rod defendants should start now to implement the lessons learned in insurance coverage litigation involving asbestos. Companies should protect their assets, protect and maximize their potential insurance coverage, and pursue a proactive joint insurance coverage strategy with other potential policyholder defendants.

Protect the Company's Assets

The asbestos litigation experience has led numerous companies to devise reorganization strategies to protect company assets so that unrelated portions of the company can operate free of asbestos liabilities. Potential welding rod defendant companies should do the same. Companies should consider these strategies while they are financially healthy, and not after they face numerous welding rod claims or potential bankruptcy. State laws generally nullify transactions that are made without fair consideration when the company is insolvent or is rendered insolvent by the transaction. Determining when a company is insolvent and the amount of fair consideration are subject to considerable doubt. A company will be in a far better position to defend its restructuring, however, if it enters into those arrangements far in advance rather than when the company is in economic jeopardy.

Protect and Maximize the Company's Insurance Assets

Collect and Preserve Prior Insurance Policies

A company's insurance policies are a valuable asset. All companies – whether or not facing welding rod liability -- should collect all potentially applicable policies, including policies that cover any time period for which the company conceivably is vulnerable to welding rod claims.

A company's historic policies may insure the company for welding rod liability arising from claims filed today or in the future if the policies are "occurrence" policies. Occurrence policies insure the policyholder for claims arising from injuries that either first occurred during the policy period or occurred earlier but resulted in continuing injury during the policy period. Although medical science has not yet established a latency period for welding rod injuries, plaintiffs' lawyers no doubt will argue that these injuries have latency periods that span decades. Plaintiffs could present injuries based on exposures that took place decades ago, at a time when many companies were not aware of the need to preserve historic policies.

If the company does not have its historic insurance policies, it should act now to collect and preserve available documents and/or testimony that establish the existence and terms of those historic insurance policies. Potential sources for such evidence include brokers, predecessor companies or affiliates, federal government records, state insurance regulators, former risk management personnel and even former customers. When written policies cannot be found, coverage can be proven through secondary evidence, such as certificates of insurance, broker testimony or the testimony of risk managers. Each of these potential sources, however becomes less useful as time passes.

Companies also should attempt to identify each instance in which they have been named as an additional insured under another company's policy. Additional

insureds generally have the right to access the named insured's coverage just as would the named insured. These policies can significantly increase a company's available coverage.

Provide Proper Notice to Insurers

Standard form occurrence commercial general liability policies generally require policyholders to notify their insurers of potential claims as soon as reasonably practical. Delays of as little as a few weeks in giving insurers notice could bar coverage. While some states require that the delay prejudice an insurer's rights before it destroys coverage, that rule is not universal. Claims made policies require notice within a date stated in the policies. Failure to give timely notice on claims-made policies bars all insurance coverage.

The issues of when, to whom and in what manner to give notice are fraught with complexity and risk. This is particularly true where, as here, injuries span both years covered by occurrence coverage and those covered by claims-made coverage. Companies should consult carefully with insurance coverage counsel to ensure that they comply with notice requirements under all potentially applicable policies. They also should develop a strategy to identify insurers to whom to give notice and the positions that the company will take with regard to the underlying events, such as, for example, the policy period(s) during which injury occurred.

Pursue an Aggressive Joint Insurance Coverage Strategy

Just as the insurance industry takes a strategic approach in choosing cases and issues for declaratory judgment actions, policyholders with potential welding rod-related liability should take a proactive, strategic approach to protect their insurance coverage. Like the insurers, they should work together to identify the best potential test

cases and jurisdictions and should pursue preemptive declaratory judgment litigation in cases and jurisdictions of their own choosing. By obtaining favorable rulings on basic coverage issues early in the development of the mass tort litigation, policyholders can remove opportunities for litigation delays and put pressure on insurers to resolve claims in a more timely manner. If policyholders fail to take such proactive measures, they leave the insurers to pick the battlefields for them. In addition to ensuring a coordinated approach, a joint insurance coverage strategy minimizes costs to individual companies by sharing costs with other companies facing welding rod liabilities.

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Whether or not welding rod liability will become the next asbestos is still an open question. There is no question, however, that companies facing potential welding rod liability should take immediate steps to protect their assets and to develop a joint strategy for protecting their insurance coverage in light of these potential claims.