

Webcast: The Anatomy of a Mass Tort

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Presented by ACC's Environmental Health & Safety Law Committee, and ACC's Litigation Committee, and sponsored by Goodwin Procter LLP

Presenters: Christopher J. Garvey, Partner, Goodwin Procter, LLP, Elizabeth Runyan Geise, Partner, Goodwin Procter, LLP, Valerie Ross, Partner, Goodwin Procter, LLP

ASSOCIATION OF CORPORATE COUNSEL

**Moderator: Mel Merzon
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Operator: (Mel), please go ahead.

(Mel Merzon): Welcome to all of you today. This is (Mel Merzon) and it's my privilege to serve as your ACC host for today's presentation, Anatomy of a (Mass Tort).

This web cast is sponsored by the law firm of Goodwin Procter and is brought to you by the Association of Corporate Counsel, ACC.

(Toxic tort) litigation has been with us, of course, for a number of years. There have been however recent developments in toxic tort litigation focusing on benzene asbestos, NTBE, and mold. To address the topic are our three panelists, Valerie Ross, Christopher Garvey and (Betsy Rice), all partners in the Goodwin Procter firm, all are experienced in toxic tort litigation.

From them today you will learn about the new types of lawsuits being filed, the new jurisdictions in which litigation is taking place and the newly (defended) being added to the target list.

Our panel will address the theories supporting these lawsuits and its potential defenses that can be raised including standards of proof of causation under the (Delbert and Fry) expert testimony text. Our panel will then offer you practical pointers for handling large caseloads in multiple jurisdictions with numerous plaintiffs. Following their presentation, our panelists will be pleased to respond, as time permits, to your specific questions and concerns. We ask only that you put them in writing in the area at the lower left of your screen labeled "Questions," then pressing "Send." Please remember as well to complete the evaluations, which is also located to the left of your screen under "Links." Let's click on number one.

May I now turn over the presentation to Valerie Ross?

Valerie Ross: Thank you, (Mel).

Today I'm going to start this morning by taking you briefly through the steps that a plaintiff's counsel might follow in finding potential plaintiffs, and bring a toxic tort lawsuit on their behalf. I'm going to use benzene as an example. But as I go along, you'll hopefully see how the active encouragement of the plaintiffs (bar) a small number of cases can quickly into a massive tort.

So benzene, potential plaintiffs are those who suffer from a disease allegedly related to benzene exposure. Likewise, in other toxic tort cases, potential plaintiffs are those who suffer

diseases that are related to the toxin in question. And the first step for a plaintiff's counsel is to try and identify those potential clients.

There are various diseases that have been linked to benzene in (halation) or skin absorption including a number of different kinds of leukemias. Specifically, some of the benzene related diseases are acute myelogenous leukemia or AML, aplastic anemia, acute lymphocytic leukemia or ALL, chronic myelogenous leukemia or CML, chronic lymphocytic leukemia or CLL, multiple myeloma, non-Hodgkin's Lymphoma and various other blood disorders.

There is a large potential pool of plaintiffs who suffer from one of the reportedly benzene-related cancers. According to the American Cancer Society, this year about 110,000 individuals will be diagnosed with one of the six kinds of cancer that have been linked to benzene exposure. Details are on the slide.

You can compare this number to asbestos-related cancers that are expected to be diagnosed this year. About 2,500 of (mezaphiliomas) and about 174,000 lung cancers. Of course as to the lung cancers, there is a viable alternative cause.

So how to plaintiff attorneys interested in pursuing benzene litigation and then growing their inventory of clients find one of these 110,000 potential plaintiffs? One way is by letting the potential plaintiffs find them. And so a common reaction to a new cancer diagnosis might be to search for information about the cancer on the Internet. And if someone were to run, for example, a search for AML leukemia on a popular Internet search engine, the first several hits they would see are not linked to Web sites providing information about the disease and treatment options, but rather linked to law firms who represent

potential plaintiffs in benzene cases. And as you'll see on this slide, the first three hits on this search that I did recently show our links to law firms.

If a potential plaintiff or a person who's been diagnosed with leukemia followed one of those links, they'd find themselves on the benzene Web page of some prominent experienced plaintiff firms, firms that have represented thousands of other toxic tort plaintiffs that have (bought) some resources to backup their cases and that have learned how to win difficulties.

So once a plaintiff's lawyer has been retained by a potential plaintiff, the next step is to determine the possible sources of that plaintiff's benzene exposure, and hence, to identify possible defendants. So, there's lots of places to look, in the workplace, at home, and in the neighborhood where the plaintiff lives. Benzene was and is widely used in the manufacturing of various products like plastics, rubber and leather, as a component in gasoline and other petroleum products. Traces amount of benzene can be found in many common household products. Solvents and other benzene containing products were used in many industrial facilities. And finally, benzene contaminated water, soil and air has been discovered near gasoline refineries, various types of industrial facilities with underground tanks and your landfills.

Now after the plaintiff attorney has figured out the possible sources of exposure, she next has to determine the kind of case she has. That, of course, depends on the benzene source. If the plaintiff's exposure comes from a household product, then the plaintiff can bring a consumer product case. If the exposure was at work, then the plaintiff's theory will be one of occupational exposure. And if the source was environmental, then the suit will be an environmental contamination case.

These are not mutually exclusive theories, particularly in the non-environmental exposure case, a plaintiff's lawyer will often not try to narrow their list of defendants unless there's (series) of liability. Instead, they'll name every manufacturer, distributor and premises owner that could possibly be linked to the plaintiff's (asserted) benzene exposure. Let me take you through a few examples of these kinds of cases.

A typical consumer product case might be allegations of exposure to paints or cleaning fluids or the like. But I want to talk for a moment about some recent atypical consumer product cases that involves soft drinks allegedly contaminated with benzene. These cases present an interesting example of how plaintiff's counsel find creative ways to bring toxic tort cases.

Specifically in early-April, an FDA June 2003 study finding that certain soft drinks might have elevated benzene levels became public. Now but elevated, I mean levels in excess of the five parts per billion safe drinking water standard. In the wake of the press reports about the study, the FDA stated that there were no safety risks associated with the levels of benzene found, and suggested that testing procedures may have caused the elevated results. That disclaimer did not stop the plaintiff's (bar), which less than a week after the first report, filed two class action suits. And within a month, three more suits were filed.

These cases were not for personal injury, but rather alleged patient's (warranty), false advertising and unjusted (richment) based that the claim that the soft drinks sold were not fit for consumption and that the class members would not have purchased the soft drinks if they had known that they have the tendency to contain benzene. The suit sought discouragement of profits earned from the sale of the soft drinks as well as other damages.

In August, two of the defendants of these cases reportedly settled, agreeing to alter the ingredients in their products to eliminate the benzene forming component and also to offer refunds to class members.

The typical occupational exposure case is brought by a plaintiff who was exposed to a benzene containing product on the job. For example, a gas station attendant or a steel worker. And the defendants in these cases include all of the manufacturers and distributors of any product that the plaintiff may have encountered at his or her job site. The defendants may also include a premises owner if the plaintiff was not employed by the owner of the premises but rather by some independent contractor.

And the claims in these cases are usually a mix of traditional product liability claims like negligence and strict liability as well as premises liability claims like failure to maintain a safe premise. As in most toxic tort cases, plaintiffs in these cases usually seek punitive damages as well as compensatory damages for loss income, pain and suffering and medical expenses.

Environmental exposure cases are brought by residents of neighborhoods in which there is allegedly benzene contaminated water or soil or air. The defendants are the current and/or the former owners of nearby facilities that are alleged to be the source of the benzene contamination including owners of underground gas or oil tanks and landfill operators. Some of these cases involve individuals that have been diagnosed with a disease linked to benzene exposure. For example, a little over a year ago, there was a \$13 million verdict in a case brought by a plaintiff who suffered from a blood disorder and who sued the owners of an oil refinery adjacent to his neighborhood.

Other cases, however, do not involve any sick plaintiff, but instead are multi-plaintiffs or class action suits seeking medical monitoring, cleanup and damages for loss property values. A series of cases filed in New York recently are (visitor). They involve residents of a Brooklyn neighborhood where there were historically oil refineries and where there was an oil spill many decades ago. The oil companies that operated those refineries have been sued and the damages sought are in the millions.

Finally, a plaintiff needs to figure out where to file suit. Toxic tort litigation is national in scope and there are cases brought everywhere. I've listed on the slide some of the more popular jurisdictions that plaintiffs favor because of the plaintiff-friendly tendencies of the jurors, of the judges or of both. To be sure, a case usually should be brought of a jurisdiction where the exposure occurred or at least the plaintiff lives. In some states, like Mississippi are getting much more aggressive in enforcing for a non-rule to demand such a connection. But other states, like Delaware or West Virginia, don't appear to care at all whether the plaintiff has any connection whatsoever with the state.

And so in sum, the plaintiff's (bar) is constantly searching for the next big topic tort, and they have their eyes on many possibilities. Benzene is certainly one example, but there are others out there, too like Vioxx and other pharmaceuticals, red paint and mold. Regardless, the approach is the same. Find a plaintiff or let them find you, identify and sue as many defendants as you can, be as creative as you can in developing series of liabilities but use the old standby of negligence and strict liability, too, and find a friendly jurisdiction to bring feud.

While not every new toxic tort will become a mass tort, so plaintiff's (bars) are constantly working to make that happen.

Now I'm going to turn things over to Chris who will talk about the (science) in these cases and highlight for you ways in which science is used and abused by plaintiffs in toxic tort cases. Chris.

Christopher Garvey: Thanks very much, Valerie.

As Valerie just said, we're going to talk a little bit about the scientific evidence considerations and how important it is to understand the underlying science involved in each of these types of cases so that you can figure out how plaintiffs use and attempt to use it to make a mass tort.

So again taking benzene as an example, we'll start with its scientific background. We have up there on the slide that it's a ubiquitous chemical meaning that it occurs in many different types of products many of which Valerie has already outlined for us. It's an aromatic hydrocarbon, clear (known) (corrosive) highly flammable. It occurs naturally in nature. It's also been very well studied over the years by a number of governmental and other agencies. One that I have up there to begin is IARC, or the International Agency for Research on Cancer. IARC has published what they call a monograph on benzene and have concluded that benzene and have concluded that benzene was a carcinogen in humans.

Now I have down below that gasoline. IARC has also put out a monograph on gasoline. Gasoline has a small component of benzene in it. But it's important to – and maybe we'll

get to this later, to determine the specific product (issued) in the lawsuit because, for example, IARC has determined that gasoline is not a carcinogen. It's stated that there's inadequate evidence of the carcinogenicity of benzene in gasoline in humans.

Another agency that has studied benzene over the years is the ATSDR, the Agency for Toxic Substances and Disease Registry, which is part of the United States Center for Disease Control. Their Web site, ATSDR, states that benzene "causes problems in the blood."

Other government agencies that have studied benzene include the EPA. In fact the 2005 CERCLA priority list of hazardous substances, benzene was listed sixth by the EPA after arsenic, lead, mercury, (imono) chloride and PCBs. By contrast, a well known toxin that's been a subject of years and years of mass (proliteration) asbestos was ranked 90th by EPA on their 2005 priority list.

Equally important in terms of understanding the backdrop of your particular lawsuits and your particular toxin is the regulatory overview of the chemical at issue.

The Occupational Safety and Health Administration, or OSHA, has promulgated standards for benzene exposure in the workplace. Current standard is one part per million averaged over an eight-hour day or a short-term exposure over 15 to 30 minutes of five parts per million. EPA has its own standard which Val already has alluded to, benzene in drinking water and that's five parts per billion with a "B."

Prior to the government regulation, (Department) Agency Regulation of the toxins, they had something called the American National Standards Institute or ANSI, which you also have to become familiar with.

Now one of the favorite tactics of plaintiffs in the litigation is to, excuse me, is to mind the preamble and other language of these regulations up there on the screen, something called the “No Safe Level of Exposure” is it’s favorites of entry tactics in mass torts. For example, in asbestos, for years the United States code and other regulations, OSHA and the like, have stated that medical science has not established any minimum level of exposure to (asbesticide) or ((inaudible)) in order to be safe if the individual is exposed (to the fibers). We see the same thing starting to happen with the benzene with the World Health Organization has stated that benzene is carcinogenic to humans and no safe level of exposure can be recommended.

And finally, another area of evidence although not necessarily scientific although sometimes (so) that you need to get a handle on is the long history of corporate knowledge and internal company and trade associations, investigations and studies of the toxin (asbestos) world the plaintiffs are found are referring to any defendant caught up in that lawsuit as the asbestos industry regardless of how big or how small the company’s involvement (was with asbestos, they will be willing to consume) a number of industry trade organizations. Some of the more infamous include Industrial Hygiene Foundation and the ((inaudible)) Laboratory.

In benzene, you will see the petroleum industry or chemical industry and you’ll see links to and references to the studies going back as far as 1948 for the American Petroleum Institute and Toxicological Review on benzene.

OK, so that's all the prelude to the types of scientific evidence that we're going to see. And I've listed them on the screen and we'll just go through them briefly and what are they.

We'll start with epidemiology, and what epidemiology are – is, is a study of disease in populations of human beings. And they can come in a variety of types of studies. You can have a backward looking or retrospective study of populations of exposed individuals. And then you can also have forward-looking or perspective studies using exposed individuals and also control groups of unexposed people. And you can draw conclusions about the types of diseases that exposure can cause.

Other types of evidence you'll see include case reports. Now what these are, are writings by medical and scientific professionals and journals and the like about one or more individual anecdotal reports of what they're seeing going on with an individual person. And the best use in the scientific community of these types of reports is to find the basis or hypothesis of that causation which then can lead to the larger epidemiological studies which can determine whether the toxins are causing disease in general populations.

Another type of evidence – scientific evidence that you're going to see are animal studies. This is where animals are usually laboratory rats and other types are exposed to the toxin in control settings, usually laboratories, and they're exposed really to large whopping doses, if you will, of a certain chemical over a short or long term period. Often animal studies, the argument goes, are a poor proxy for human causation because of their different biological systems and also because of the difference in the doses that they would be exposed to as opposed to what human beings will be exposed to.

We also see in mass tort litigations experimental cell biologists who sit in the laboratory with petri dishes and do lab analysis trying to determine the mechanism of disease. We've seen this for years in asbestos and we're beginning to see it also in benzene litigation where people are exposing cells to benzene and then drawing conclusions based on what they perceive to be chromosomal abnormalities or changes which they then argue are signature of benzene exposure. And they can relate to disease to exposure on that basis.

We already talked a little bit about regulatory standards and how the plaintiff's bar will try to borrow language from the regulations on the toxins, such as "no safe level," which we've already talked about. Interestingly, a recent decision in New York out of its highest court that some may be familiar with called "Parker verses Mobile Oil" has rejected the use of regulatory standards and stated they can't be used as proxy for causation.

Plaintiffs will also try to talk about peak exposures. These are short term high exposures where normally you may not have a violation of regulatory standard over an eight-hour time weighted average day, which is how all the regulatory standards are framed. What the plaintiff and some of their experts will argue is that a short-term peak exposure will exceed the regulatory eight-standard and that it will swamp the body's defense mechanism and will be much more harmful than the chronic long-term exposures.

Finally, when there's none of this evidence available, the plaintiff's experts will offer qualitative opinion in the form of – they usually take the form of something like the plaintiff was exposed to "high levels" of a toxin, and they were "frequently exposed." This is really

just what an expert says. They don't have any specific data of exposure at all, but they're trying to tie it back into studies. So these are the types of evidence that you may see.

Now how will the plaintiff's approach the introduction of scientific evidence in their case? Well, the approach is, and the argument goes, avoid scrutiny of the evidence and let the jury decide. And one of the main tactics used to try to achieve that is to argue that the evidence is not novel and therefore, shouldn't be subject to review. Many states that apply the (Fry) standard scientific expert admissibility have determined that if a scientist is not employing new science or novel methods, then there's nothing to review. Interestingly, the New York Court of Appeals in the decision I just talked about, Parker versus Mobile Oil has said even if there's not a novel science going on and epidemiology, toxicology, industrial hygiene are certainly not new branches of science, but there still should be inquiry into whether the methods themselves are novel and reliable. Or, even if they're not, whether there's adequate foundation for the expert opinions in terms of reliable scientific studies. But the plaintiffs will try as a first level to try to avoid that scrutiny.

Another argument and method that they will try to use is a linear no-threshold model. This argument really is very simple and facially attractive and it goes something like this. If a lot of a carcinogen is bad for you, then so is a little. And this is really an attempt to turn the tables on their plaintiff's causation burden of proof and they will flip it. Instead of saying this is the level where disease occurs, they say, there's not a level that has been established that is safe. And again, we've seen that a little bit in the regulatory language, and you can start to see benzene, you've seen it for years in asbestos and other mass torts.

The approach to this evidence really varies state by state. In New York, based on the Parker decision, specifically rejected this linear No Threshold Model. Other states such as California and other states which toxic tort suits are rampant these days, you will see this evidence come in, and we'll have to be prepared to deal with it.

Another approach is to extrapolate from high dose studies. We'll take studies where people are exposed to high levels over a long period of time where there are large excesses of disease and then they'll apply math and simply extrapolate down and arrive at predictions. Even at low levels of exposure over short periods of time, there would be excessive of disease, and they'll do this even where there are no studies to show disease at such low levels, or studies up such level show there is no excessive disease.

And this is really how the low dose case science gets established. You can take studies such as the (Nyash) study in benzene talking about development of aplastic anemia and AML or after exposure to 20, 40 to 200 part per million (years) and they will extrapolate down, and say even, you know, one part per million year (point), one part per million year, we have some statistically significant excess of diseases.

Another favorite tactic that we've seen is (ambient impair). We're starting to see this benzene and we've seen it for years with other torts. And what the plaintiffs will do is they will agree that exposures to ambient air, which is just the air we all walk around and breathe, does not cause the levels of toxins and that air does not cause disease because otherwise everyone would get sick. But then they would say, any exposure above that level causes or contributes to disease because it's an increase of the body's burden of the toxin.

Now there's no study that can be designed to show exposures that these ambient levels cause disease, principally because you can't have an adequate control group of unexposed people because by definition, everyone in the ambient air, everyone is being exposed to the levels of the ambient air so there's no unexposed population to control against.

Case reports and animal studies, we've already talked a little bit about, I won't revisit it. Next we have historical state of the art. This really isn't causation evidence, but it's worth mentioning because it can be used as such. And this is why I mentioned earlier the long history of corporate knowledge and medical and scientific knowledge of the toxin and its propensity to cause disease. And there are various theories of liability that Valerie alluded to earlier such as negligence and strict liability and failure to warn. And you'll get people who have come in and research the scientific literature and show the long history of an association between the chemical and the disease. And they'll say that based on that knowledge, it was known or knowable, therefore, the plaintiffs – the defendant who was negligent or, you know, should've had a warning on their product or should've redesigned the product. So it'll be really used for a notice to comment on the issues of notice.

But the jury, when they hear this recounting, of such a detailed recounting of the history in association between a toxin and disease, they'll agree by the time they're done hearing it, that the toxin causes any and every disease, that the defendants were wrong in including it in their product.

So how to counter this? What is the defense approach? The defense approach starts with the epidemiology that we talked about. It's generally regarded as the gold standard in terms of whether a toxin causes disease in humans or not. Closely related to that in the field of

toxicology is dose response, showing that disease occurs only after some threshold level and time period exposure. And also, being rigorous in challenging the methods of the plaintiff's experts both whether you're in a (Fry or Delbert) jurisdictions, state or federal court. You want to challenge that the methods are reliable and you want to challenge and make sure that there's adequate evidence of scientific foundation for the opinions. That's some of what we talked about with the Parker case versus Mobile Oil and the New Court of Appeals which has said that inquiry should be undertaken in every case.

So how do we do this and practically put it into effect? Well, the first thing you want to do if you're defending one of these lawsuits is you want to identify your product. And again, taking benzene as an example, are you talking about pure benzene that someone was exposed to from your product? Is it a different benzene containing product such as solvents, paint, carbonated beverages, gasoline which, as we've said with our IARC not to be a carcinogen or even food, food which contains certain levels of small amounts of benzene.

You then want to look at your specific plaintiff and identify the specific disease that that plaintiff has. It's not just enough to say that benzene is a carcinogen. You're going to want to see what your product is and you're going to want to see the type of cancer that they have. Is it AML which does have an association with benzene exposure? Aplastic anemia is another. Or, are there other leukemias or other cancers or blood disorders where the connection is more remote if it exists at all?

Some other types of claims that you will see include, and Valerie mentioned this a little bit earlier, medical monitoring. And what this is is really an ingenious creation by the plaintiff's bar if you must give them some credit, which is normally in a typical lawsuit, you have an

exposure. You wait for a person to get a disease and then you sue. Here, you sue on behalf of people who are exposed; you argue in the science that they're at risk of the disease; and you bring a class action to establish the (fund) to monitor them to see if they develop the disease.

So, if, for example, studies show that five percent of the people would develop a certain disease, rather than waiting for those five percent to get the disease and only bring those five percent of the cases, you sue on behalf of 100 percent of the exposed people and you establish a (fund) to monitor them. In asbestos litigation, you know, chest x-rays and the like. In the benzene litigation, it would be blood tests.

And finally, this type of creative claims – these types of creative claims are making their way into just environmental and property damage claims no longer are properties that are located near releases or a way for people to have actual impact to their property before suing. We're now having people who are near releases, saying that their property is threatened in some way by the presence of the toxin nearby. And in fact, there's an entire multi-district litigation in the Southern District of New York that's been going on for six years concerning the gasoline additive of MTBE where the vast majority of those cases are these types of threat claims of people who have never actually been injured and yet the case has been going on for six years.

So finally, in terms of breaking it all down, you want to tie the disease to your product. I think I've got two different bullet points up here. One is – illustrates the plaintiff's approach that benzene is benzene or asbestos is asbestos because once they tie your product to have a component of the toxin, they will then say there's an exposure that took place and tie it into

years and years of study. Contrasting that with the recent Parker decision out of New York, they said, in that case that a 17-year gasoline service station worker who developed acute myelogenous leukemia that his AML was the result of his exposure to benzene and gasoline. And they talked about benzene being a component in gasoline and then tied the AML to all the studies showing exposure to benzene causing AML.

The Court of Appeals of New York in (Parkers) said not so fast. It's very interesting that benzene causes AML at high levels, however you introduced no studies that shows that gasoline causes AML. And so, the case was dismissed the plaintiff's ((inaudible)) precluded because when the defendants tried to hold the plaintiff's of proof, the plaintiff's didn't come forward with any studies tying the specific product at issue, gasoline, to the specific disease at issue, AML.

I'm going to finish with just some practical tips on how to deal with the science. The first is, plan your challenge to the scientific evidence at the outset of the case. And I've got (Delbert and Fry) up there. I'm not going to spend a lot of time on that except to say that (Delbert) is a standard in Federal Court in some states. It focuses on methodology based on some Supreme Court cases, (Delbert) being ((inaudible)) case, General Electric verses (Joiner). And the trial court function as a gatekeeper to make sure that expert evidence is relevant and reliable.

Many but not all state courts, by contrast, apply the (Fry) standard, which means generally accepted in the relevance of scientific community. Even in (Fry) standard, you need to know how your jurisdiction applies it. For example, in California and a case called People verses Kelly, the California's court said if there are no novel – no new science or no novel methods,

there is in effect no review for scrutiny of the expert opinion, although California is – right now grappling at the California Supreme Court Level in part because of the number of lawsuits that have been engendered by their approach to scientific evidence in that (space). We'll see what comes of that.

You can contrast that with the Parker decision out of New York, which is also a (Fry) state. We talked about that several times. Which said even if there is no novel science, we'll look at methods and we'll look at the foundation. OK.

The next thing – this is really, in terms of planning, you got to be ready at your initial scheduling conference and you want to consider moving for something that's called a "loan pine order" in the toxic tort world and that just refers to a case in New Jersey many years ago when this was tried. And if you have the grounds and you're prepared, a (loan pine order) can be an excellent advantage for you in terms of litigating these cases.

In essence you ask the court to have the plaintiff justify that his exposure caused his disease and that there's expert testimony that is sufficiently reliable to be admissible on the issues of causation. If you get this order, the discovery in the case at the outset focuses only on medical records, plaintiff exposure, the plaintiff (recognition) and the plaintiff and perhaps defense experts. All other discovery is stayed and you avoid potentially costly corporate document searches, electronic evidence and corporate (rep) and 30B6 dispositions.

In order to be able to do this, you want to retain your experts early. Again using benzene just as an example, the types of experts that you want to use are (endocrinologists), a toxicologist and oncologist and hematologist who will talk about leukemia and other blood

diseases and also industrial (hygienists) will talk about plaintiff's exposures and we'll give you the basis for dose response testimony.

And just finally, don't forget the plaintiff's treating physicians. These are often disinterested non-parties who if they're diagnosis, treatment and opinions concur with your experts, it lends significant weight, so it's an area that you should mind.

And just finally, in terms of the efficient handling of these cases, you really want to try to (sustain) a stable of experts and develop and utilize them across cases if you have a number of cases that you can realize efficiencies. And also you'll find that plaintiffs' experts will tend to show up across cases, and so you want to develop a database of expert reports and former testimony on these people, and this way you can really refrain from taking a lot of repetitive and expensive expert discovery.

OK. That ends the presentation on scientific evidence. And with that, I'm going to turn it over to my partner, (Betsy Rice) who's going to talk a little bit about what companies can do to avoid litigation or minimize their exposure.

(Betsy Rice): Thanks, Chris.

My job here is to talk about what you can do as in-house counsel to either prevent these kinds of mass tort lawsuits or what to do if your (clients) gets involved in this sort of litigation.

In terms of prevention, the best thing to do is to have a very proactive approach, to try to establish in your company an early warning system that will help you know if mass tort cases are coming or perhaps avoid them altogether. The one thing you can do is monitor what are the regulatory agencies looking at? We've talked about a few of them here, EPA, OSHA, Consumer Product Safety Commission, other health and safety organizations, industrial (hygienist) have a lot of groups, what's the World Health Organization concerned about, IARC, the ASTDR. Try to be on top of these issues so you know what kind of regulations are coming down the pipe and what those agencies are focusing on. You need to educate your managers, managers in the plants, managers involved in your products, managers involved in environmental issues. Are you monitoring your employees? Are you testing your products? Are you keeping up with the science? Are you warning of hazards that cannot be avoided?

Think about document retention. These days we have both paper files and electronic files. What are you company's documentation retention policy? What are you keeping, what are you throwing out? Does it make sense? Do your employees follow the document retention policy? These are all issues that you need to focus on in order to try to avoid these sorts of cases in the future.

Another thing you can do as in-house counsel is to monitor legal development. What are the new tort law issues? I can think of a couple in the past couple of years who wanted ((inaudible)) cases whether there's a duty to (spouse or work) public nuisance claims. We see these in lead paints and other areas. Tort reform retroactivity, there's cases right now before the Ohio, Georgia and Florida Supreme Courts.

I think it's important for companies to support tort reform efforts. (Both in the) legislatures we've seen in the past five to 10 years a lot of tort reform in state legislatures and a lot of that has been brought about by active corporations who understand that those tort reform efforts are very important to their future as a company.

They can also support tort reform in the courts. A lot of trade associations who file ((inaudible)) and try to monitor tort reform in the courts and support it. Political action is also a possibility even publicity. We notice that in Madison County in Mississippi, that bad publicity in those jurisdictions being known as judicial hell hole has had a significant impact and made those jurisdictions a much better place for defendants to litigate. Now, what do you do if you get mass tort litigation or if (you this) type of cases start to grow. If you need to (straighten) things strategically, one of the first things you have to do is try to understand the overall litigation, who are the opponents councils that are bringing these lawsuits? Are they national (planis) council? Are they firms that have a reputation of being formidable trial council? Are they local council? Probably pretty easy to settle with and resolve the cases. What kind of lawsuit is it, Valerie outline? Can they be product lawsuits, premises or occupational lawsuits, environmental lawsuits? And, the most important thing, I think is that you need to get on top of the (facts defiance) and the law as soon as you can.

Let's talk about understanding the facts. Need to figure out what is the involvement of your company. What are the key documents? One of the first things you need to do is to make sure that the company retains any documents relative to the issue. There's a latent disease you probably don't have to worry about, electronic files because the facts of the issue happened a long time ago. But, if it is (in just to) worry about electronic files and paper files.

It's very important to make sure that your company retains a document, doesn't throw anything out.

The last thing you want, as the litigation progresses is the (spoiliation) claim. It's important to identify key witnesses early to interview employees, retirees, anyone else who could've been involved. Figure out what is going to be the company's story and how are you going to present it. Who is going to be your corporate representative, your (30B6) witness? One of the first things the plaintiffs to do in these cases is to serve a request for a (30B6) witness and you need to get somebody ready to be able to serve in that role and also think about your discover responses. There's nothing more important than making sure that your discovery responses, your interrogatory responses, your request to admission responses are accurate, thorough and consistent and tell the company's story in the best way possible. The company's discover responses live forever in this litigation and it is very important that they be accurate from the beginning of the (case).

The next thing you have to do is understand the science, Chris talked a lot about the various scientific issues. One way to get a handle on it is to use the company personnel. What do they know? How can they help you understand it? Sometimes it's useful to just hire a consulting expert, maybe somebody who's not going to testify that – who can educate you as to the scientific issues, explain them, and help you find experts that can testify in the defense of the cases. Also, you need to understand the law, what are the plaintiff's legal theories, Valerie outlined there can be very many different theories. What is the applicable law? Generally these cases are brought in state court and there can be variations. What important variations are there? Is there a statute to (repose) for example? Are there limits on the

damages? Does the jurisdiction allow medical monitoring claims before someone has any ailments. Those are all important things to know and analyze.

Let's talk about management of the litigation. We've already talked about how it's important to get a handle on the case early on as an early case assessment based on the facts and the science and the law. And, one thing that's going to occur to every in-house council is whether you can just settle these cases early, get rid of them, can you buy it off? Think that in that issue it can be very difficult to have an early settlement.

If you have to know enough about the cases to assess whether the settlement levels are reasonable, the company has to be credible, can't just be an easy mark going forward, there has to be a company that's perceived by the plaintiff's as able to present a defense. And, you have to be confident that an early settlement just won't encourage more claims. But, in some cases, depending on the litigation and the volume, it may make sense to try to buy it off early. There's also risks of not settling early, and there's some companies that take positions of, you know, no pay, they will not pay the cases. That can be also a dangerous policy, it can lead to very high costs of litigation, it can raise your profile. And, you have to realize the plaintiffs don't have to win all the cases, they just have to win a few. And, the companies, the plaintiffs win a few cases may not be able to keep the settlement cost down.

So the goal really here in my opinion is to have a credible defense, the ability to go to trial, and a reputation of paying only the (maratorious) cases and the perceive with that reputation to settle the (matatorious) cases reasonably and defend the rest. But of course, any (purchase) settlement can be a cookie cutter, you have to understand the facts, the science,

and the law and really assess where your company fits in the litigation and what makes the most sense for your company.

In terms of management of the litigations, many cases national council makes sense. The plaintiffs are generally organized nationally and the litigation is not local. National council can lead to a national document management and consistent national discover responses which again is very important and also have a national strategy and a consistent approach. There also can be economies of scale, there's a lot of recurring issues in these cases both with accompanying document, the company witnesses, the science and the experts. The experts are often national experts. The legal issues, even though the (tour) cases are often brought into state court can be a lot of overlaps between the states. And, the relationships with the co-defendants can often be best handled on a national basis. But again, it depends on the litigation, whether its localized or not. But, if you have national litigation, you probably need national council.

Other considerations, do you have insurance? If it's a late disease, you may not have a policies right at hand, you need to try to find them. You need to sometimes hire an insurance archaeologist to help you find the policies. You need to make sure you give notice to the carriers. You need to often engage coverage council, insurers don't generally pay just the – on the basis of a claim and often you'll need council to help persuade the insurers to cover the claim. And, consider whether you can buy additional insurance, again it depends on type of case.

When we (thought) yesterday together about five mistakes, we thought that in-house council often makes when they handle these kind of cases. And, we actually came up with

seven mistakes, and I'm going to close the program by outlining the seven mistakes we came up with. Number one, is inconsistent or inaccurate discovery responses that the plaintiffs find years down the road and read them in court. Second mistake is having a unfortunate (30B6) witness, a company witness who's not well prepared or not a good witness. And again, that kind of testimony will live forever, it can be reading all future cases. Third mistake, the failure to give notice to your insurance carriers and to forfeit coverage for lack of adequate notice. Fourth mistake is to have bad document retention, to have thrown away documents after a case starts and to have that come back in the litigation to haunt you. Fifth mistake is to have an inconsistent strategy where you settle some cases easy and take a hard line in others and don't have any credibility with the plaintiff. Sixth mistake is to make enemies with the co-defendants, it's very important to try to get along with the co-defendants and to cooperate to the extent you can. And the seventh mistake is really a failure to take the cases seriously, to hope they'll go away, to not get ready on the (facts) and law and then to find that your failure to take the cases seriously has created a significant litigations problem for your company. And, with that I'm going to turn it back to (Mel).

(Mel Merzon): This is (Mel Merzon) once again. I will now open the Webcast to your questions and turn it back to our panelists to respond to some of these questions as time permits.

Female: Thanks (Mel). Our first question is how to tell if you're facing just a single one off case or a trend that's going to become a mass tort.

(Betsy Guist): This is (Betsy). I think the one thing to do is to see what's happening to companies in the same industry. Are they just having single cases or is there a trend here, are they have multiple cases? Look on the plaintiff council's web site, are they advertising for these kinds

of cases? Do they seem to have a significant litigation in this area? Another thing it's just to see what's coming across your desk and who is advertising for either the defense of these cases or bringing them? What has (meles) having a conference on? What is (Harris Martin) having a conference on? And, get an idea of whether this is just a one off case or really a pocket of litigation that's coming through that.

Female: Thanks (Betsy). The next question, I think, is directed more to Chris and it – has there been much success with the loan (time) orders, Chris?

Christopher Garvey: The success with the loan (time) orders has varied the – as I said earlier, planning your loan (time) challenges the (outset) of the cases absolutely essential. I can say that we have had some success convincing courts to enter the loan (time) types of orders. We're involved, right now, in some benzene cases where the court has in fact (staved) the corporate discovery and focused on the causation issue between the product and the dose and the disease and we've been able to have some success bringing those motions.

And, it's really been a great efficiency for our case, it puts the plaintiffs to their burden of proof early in the case, it requires them to bring all their expert proof forward at the (offset), it keeps you from having to grapple with some of the many issues that (Betsy) talked about, like your own company documents, your own electronic discovery document retention, (30B6) witnesses and the like. So no, it's not a one size fits all, you know, (panafea) for mass tort litigation, but in the appropriate case it had – we have had success with it, yes.

Female: Thanks Chris. Any predictions about coming trends in the litigation? What really do you think is going to be the next mass tort?

Female: Oh, I will try and take at least a first crack at answering that question. You know, it's hard to know the plaintiffs council are constantly looking, as I said. One thing that's sort of been in the news lately a lot is nano technology, it's sort of a new thing in terms of what manufacturing companies are doing and using. I don't think there's a lot of science on there yet, but I am confident that plaintiffs are watching closely to see what's happening, to – they're going to jump on any report that suggests that there's any potential hazard and they will run with it. Other areas or probably some of the old things coming back, (lead) paint litigation, which I think has been around for a long time but, you know, sort of had quite a downer.

Recently there have been a few decisions on public nuisance that seems to be an attempt to revive that litigation, you know, but who knows what else. The plaintiffs are looking, they tried to do it with guns, I don't know that they've had a lot of success. They're clearly focusing in the pharmaceutical area and they're pushing pretty hard and, you know, there's probably other things out there. It's – sort of watch your newspapers and see what reports are coming from the FDA and other (dormant) agencies.

Christopher Garvey: And, this is Chris just to jump in as well. One trend that we've noticed is to – I think what Valerie alluded to earlier, sort of old things coming back and they can be repackaged in new ways, whether it be lead or mercury or arsenic or vinyl chloride as a like. We've also noted environmental contamination cases where rather than treating them as a simple one off case with traditional state law tort theory such as trespass, nuisance and the like and, you know, state law contamination type statutes. The plaintiffs are now – and going after people who release those chemicals, the plaintiffs are now swimming up the chain

really and trying to get the producers of the chemicals and asserting products liability theories, arguing that the releases of these chemicals are foreseeable. And, there's been a lot of litigation about these – really an old theory of liability, product liability, but asserted in a new way. So we've seen some of that and I expect that to continue.

Female: Thanks Chris. Do you think the (Parker) case in New York, that you talked about a lot, Chris, do you think that's going to be followed in other states that have adopted (fryer) that followed the (fry) rule?

Christopher Garvey: Well, it's really too early to tell. The decision is only a couple of weeks old and we'll have to see what other state courts do with it. I know that a lot of states are grappling right now with how to get a handle on their expert testimony limits. And, I would consider the New York court of appeals approach and the fact that it has a very influential courts that deliver the decision to be persuasive to a lot of states. As I've said, I think California right now is grappling with whether there should be limits and how they should – whether they should change the way they deal with the admissibility of expert testimony. I know (Parker) has been sighted in a number of cases out in California, at least the lower court decisions. I'm sure the New York court of appeals decision will be as well. And, I think time will tell, but I do think yes, it will be influential.

Female: Thank you. How – someone wrote in that they've heard about what's been going on in the (cylcal) litigation and the (MBL's) where there's been a lot of investigation of fraud among doctors diagnosing (cilica) related diseases when they don't really exist. Do you think that's going to have an affect in other mass torts and if so, what kind of an affect do you think it'll have?

(Betsy Guist): This is (Betsy). Yes, I do think it's had an affect. It's certainly had an affect in the (cylcal) litigation which is – has – from looking like it might develop into something like the (assessive) litigation is really not done that at all. And, I think Judge (Jack's) opinion has had a lot of influence there, even though the truth is she kept hold of one case and everything else went back to state court, she's a federal judge down in Texas. And, as best as I think its made a difference because some of the same doctors that she found had made fraudulent diagnoses are involved in the asbestos litigation. And, I think it (has) make courts very skeptical of those doctors.

And finally, I believe it will have an impact in other mass tort cases. Some of the professional societies are trying to regulate their membership a little more stringently. And, I believe that other courts may look a little more skeptically on somebody who just has an MD by his name and not just let somebody who has an MD by his name come in and say whatever he or she wants, regardless of the foundation. I think the (Parker) decision also illustrates that approach. So yes, I think that Judge (Jack's) opinion over time will have a significant affect on other (mass tort) lawsuits.

Female: Thank you (Betsy). Now, you talked a little bit about alternative approaches of settling early or settling late. But, I know that there are some companies out there that take a really hard line and they force every case to go to trial. That's been happening with some of the drug companies and some of that litigation today. What do you think of that approach?

Female: I think that they have to be pretty sure of their (defenses) to take every case to trial. It's important to have a credible trial threat. But again, the plaintiffs don't have to win them all,

they just have to win a few to drive the settlement costs up. And so, it's important, I think, to not only have a credible trial threat, but also to settle (naratorious) cases reasonably. You have to have both. The problem with a sort of a hell no we won't pay approach is that your transaction costs are tremendous. And again, you only have to lose a few cases to have created a pretty significant problem for your (council). So I would say in the majority of cases it's probably best to have a medium approach. But again, cookie cutter doesn't fit everybody, and you need to think about the litigation and our liability, and frankly what kind of company you have, whether they're (risks) from a risk or not.

(Mel Merzon): Our time is about up now. If you have any further questions, you may send them to our panelists. You'll find their e-mail address on the slide on your screen now. And so, we bring to a close today's ACC presentation under the sponsorship of Goodwin Proctor. We hope that you have gained much practical and useful information from our presentors, Christopher Garvey, (Betsy Guist), and Valerie Ross. We thank them for bringing you this important and timely subject. And, may I thank all of you as well for joining us in this Webcast. We hope you found that your time was well spent. Please remember, if you will, to complete the evaluation. This concludes our presentation. Thank you.

(Sandy): OK everybody, this is (Sandy). I'm going to move you into a sub-conference one by one.

Female: OK.

(Sandy): ((inaudible)) here a moment ((inaudible)).

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