A Checklist For Calming The Toxic Tort Nightmare

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Toxic tort claims are easy to initiate, but hard to defend. Think about how to respond even before they happen.

WHEN ASKED, most industrial or manufacturing companies will tell you that what keeps them up at night is the fear of toxic tort cases. In fact, all companies should share that fear. There is always the potential that a company's materials were released into the environment and migrated off-site. Almost any release to the environment, whether permitted, below federal or state standards, new or historic, can form the basis for a toxic tort claim. Targets of the claims include the current and historic owner/operators, generators of waste, consultants performing the cleanup, and anyone related to a property who might have had a duty to warn or undertaken a duty based on their actions. A company's efforts to be a good citizen are largely ignored by aggressive plaintiffs. Neighbors claim that their properties have been contaminated — such property owners arguing their "right" to pristine soil or groundwater — or worse, that a person's health has been affected. The claims are brought in state court and are usually based on common law allegations of trespass, negligence, negligence per se, strict liability and nuisance (private or public). They are relatively easy to maintain and difficult and expensive to resolve. The fact that a release from a facility is below a certain cleanup standard, for instance, is not necessarily a defense to a claim

that the company was negligent in allowing the release, or that a trespass occurred. The relative ease of bringing the toxic tort case is exacerbated by the amount of information about a company's facilities that is publicly available. *See e.g.* Illinois Right-to-Know law, requiring the Illinois Environmental Protection Agency (IEPA) to notify residents when IEPA learns of the potential for an off-site release. 415 Ill. Comp. Stat. 5/25d-3.

This article is intended to help calm a company's fears by providing in-house counsel with some level of control when anticipating or faced with a toxic tort claim. The control is in the form of a checklist of the tasks in-house counsel should be considering, the questions they could be asking, and the steps they could be taking. The checklist is not meant to be, nor can it be, an exhaustive listing of every possible decision path or consideration; nor can it be a list of legal theories or procedures for outside counsel, though it's a good start. Instead, it is intended to allow counsel to spot issues, and is intended to lead to conversations with the right experts.

1. Before Claims Are Filed

- Audit your facilities to assess which may be at risk for a toxic tort claim based on: proximity to neighbors, release inventories, plaintiff-friendly state/jurisdiction;
- Audit, assess and correct any alleged violations of environmental law that could later form a claim — a proactive approach helps defeat claims of irresponsible behavior and punitive damages;
- Take citizen complaints seriously — the response to a letter is critical in keeping an issue in control; it can be okay to say you are sorry in the right case (especially if it is in context of a settlement, making it inadmissible);
- Keep an open, but controlled dialogue with citizens — don't have internal staff giving "expert" advice or opinions and consider public forums for sharing information (Web sites);
- Review insurance policies for coverage for property damage and injury claims (especially historic);
- If state law requires notification of neighbors when a release has the potential to migrate off site (like Illinois), develop a response strategy right away. Consider whether the company will immediately sample private wells to avoid allegations of delay/negligence later, or offer monitoring or a call center to answer citizen questions;
- Be proactive with environmental agencies asserting jurisdiction over your facilities. Assess what they think you do well, and what needs to improve;
- Submit Freedom of Information Act requests to determine what is in your agency file and ensure open issues are resolved, on paper;
- Keep a running list of experts in hydrogeology, toxicology, valuation, medical doctors, air modelers, epidemiologist, oncologists, regulatory specialists, and relevant historians;
- Consider document management and company emails. Tell employees, not to write it down if they do not want it to be public one day;
- Be aware of e-discovery rules in your jurisdiction. Fed. R. Civ. P. 26(a) requires parties to describe their electronically stored information— discuss whether you are prepared for discovery (team in place, systems inventory done, document retention policy reviewed);
- Always be concerned about privilege and seek advice to protect documents prepared by your employees and agents;
- Use caution when entering routine consent orders or administrative settlements; statements made may later be used as admissions against you;
- Before they are finalized, carefully review reports prepared by consultants for "admissions" and early opinions ("we believe x facility is the source"). Strike gratuitous comments;

- Validate data, whether required or not, to avoid proof issues later;
- Train consultants to minimize generation of unprotected memos, diary and field book entries, and emails;
- Ensure consultants have ability to segregate electronic data, accounting reports, and emails to avoid significant costs of recovery later;
- When involved in due diligence for an acquisition or merger, watch for potential toxic tort claims;
- Consider internal witness training sessions for key employees likely to testify;
- Have a "response team" in place consisting of counsel, management, public relations person/firm, and possibly a toxicologist;
- Have a prepared set of response actions that may include providing immediate protection from exposure or risk to human health, confirmatory sampling, and specific information gathering.

2. Once A Claim Is Filed

- Assemble the right team. Retain counsel and involve them in locating and retaining experts early;
- Begin document collection and organization. Electronic systems are costly but are well worth it in the long run. Include issue "binders";
- Send internal letter to preserve documents and electronic information;
- Contact insurers;
- If you are a public company, assess whether the potential liability rises to the level of disclosure in SEC filings;
- Examine the jurisdiction — state versus federal; jurisdictions within a state;
- Sever "joined" actions to align parties and issues and achieve efficiencies (Fed. R. Civ. P. 20, 21). Plaintiffs are then required to bring separate civil actions;
- Consider joint defense agreements — pros and cons;
- Fight the class action. Toxic tort cases are generally not candidates for class status because individual issues prevail over common issues;
- Ask whether the Class Action Fairness Act of 2005 applies;
- In high-profile cases, consider taking a proactive approach to media versus response-only;
- Assess whether to defend cases separately or seek consolidation for discovery or trial;
- If covering different districts or areas, ask about multi-district litigation (MDL) (28 U.S.C. §1407) or corresponding state procedures;
- Request basic information from plaintiffs specific to each plaintiff's claims and injuries. Conduct early discovery;
- Assess case management techniques:

__ Where evidence of liability is weak, consider bifurcation (liability first); or if damages are speculative, consider reverse bifurcation (damages first);
__ Don't forget trifurcation (liability; then the separation of damages element into individual and punitive);
__ Request a case management order;
__ Consider bellwether or test plaintiffs.

- Discuss ways to reduce costs of discovery and trial:

__ Using teams of counsel that partner lower cost practitioners with larger firms;
__ Using contract attorneys or paralegals for initial document searches;
__ Investing early in electronic databases;
__ Focus initial discovery on "dose" and exposures to other hazardous substances to help assess claims for early disposition;
__ Identify in-house attorneys and paralegals to be part of the litigation team.

- Discuss inspections of plaintiff's property and/or examinations of person(s) for exposure;
- Consider environmental sampling and pathway analyses to counter allegations of causation;

- Consider retaining a data qualifying expert;
- Address *Daubert v. Merrell Dow Pharmaceuticals* issues for experts on both sides, early and often;
- Review unique defenses — i.e., preemption of state law claims by a federal environmental scheme;
- Consider the need for modeling to assess magnitude, timing, and duration;
- Have a relevant company employee, on counsel's request, prepare a timeline;
- Don't forget private investigators. They can be efficient at locating and interviewing witnesses; assessing plaintiffs' claims.

3. Thinking Resolution

- Consider jury focus group/jury research, using demonstrative exhibits, to assess themes and verdict ranges;
- Have counsel begin a list of undisputed facts or documents/stipulations;
- Think about mediation, ADR, or early settlement — American Arbitration Association and other organizations are retaining neutrals with environmental expertise:
  __ Mini-trials;
  __ Summary jury trials;
  __ Early neutral evaluation;
  __ Mini depositions/interviews;
  __ Discuss non-monetary options for resolution (i.e., property value guarantees, monitoring programs).
- Consider class action settlements (Fed. R. Civ. P. 23 or state equivalents);
- Ask about "take-out" agreements (the ability to preclude plaintiffs' counsel from taking the next case as part of settlement) and the applicable ethical issues that may differ by jurisdiction;
- Consider settlement versus trial and the impact on your other operations and future suits (will settlement set an undesirable precedent?)

4. Going To Trial

- Request a trial plan from counsel that details the witnesses, experts, issues and trial team — but remember it's a living document;
- Clarify up front what you want your involvement to be — regular status calls or review of briefs?
- Keep in mind that corporate defendants tend to be held to a higher standard in a jury's eye;
- Trial is not the time to be penny-wise;
- Ensure the right corporate officials are present at trial;
- Trust and support your litigation team.