

# Environmental & Product Liability

524(g)

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## Services spotlight

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### Financial reporting for future liabilities

Many companies are grappling with the legal and economic consequences of asbestos-related litigation. The difficulty is in predicting the amount and timing of future claims. Each company's experience is unique and involves different claims, law firms, and jurisdictions. Accounting for these differences is important in order to develop reliable estimates. The forecasting tool developed by Bates White for financial reporting accounts for all these factors.

Our modeling is robust and delivers insights that assist companies with strategic decisions. Furthermore, our financial reporting forecasting tool is designed for customers to view. The result is that companies and auditors alike get a complete understanding of how the forecast was derived and gain a superior level of confidence in its accuracy.

We have become known over the years for the following:

- Accurately estimating various liability scenarios and understanding potential exposures to future environmental torts
- Successfully analyzing the impact that potential future carrier insolvencies or coverage rulings could have on the net present value of future insurance recoveries
- Helping develop a winning strategy for negotiating settlement values

Companies that we have provided financial reporting and strategic advice to include the following:

- ArvinMeritor, Inc.
- EnPro Industries, Inc.
- Goodyear Tire & Rubber Company
- John Crane, Inc.

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### Classification of products and nonproducts claims

At the heart of many asbestos-related coverage disputes is this question: Is this a products claim or a nonproducts claim? If a claim is a products claim, the amount of recovery will be governed by the insurance policy's products hazard clause, which subjects the recovery to aggregate limits. If the claim is a nonproducts claim, the amount of recovery will be governed by the insurance policy's operations hazard clause, which does not subject the recovery to aggregate limits. Therefore, correctly answering the products claim vs. nonproducts claim question is a prerequisite for accurately assessing a company's liability exposure.

Bates White has a successful history of analyzing claims to determine when exposure occurred and whether the liability exposure should be classified as a products or nonproducts claim. In *Owens Corning v. Birmingham Fire Insurance Company of Pennsylvania*, we used cutting-edge techniques, sophisticated modeling tools, and alternative solutions to illustrate a bullet-proof, empirically driven approach. We demonstrated that Owens Corning's operations-related indemnity was many times lower than that which was being asserted by the opposing parties. The result was a settlement that saved our insurance client millions of dollars.

We continue to apply and enhance the analytical techniques that we pioneered during the Owens Corning case. Our additional experience in this area includes the following:

- Serving as testifying experts in several nonproducts coverage cases that involve regional insulation contracting companies.
- Submission of affirmative and rebuttal expert reports and deposition testimony on behalf of a joint insurer defense committee; quantifying the fraction of liability from a major insulation contracting company's claimants with operations-based exposure.
- Provision of mediation and/or arbitration support for potential nonproducts exposure for insurers with respect to bankrupt entities.

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## **Analysis of claims payments and offsets between the tort system and 524(g) trusts**

The establishment of a settlement trust through section 524(g) of the bankruptcy code is the de facto approach for dealing with asbestos-driven bankruptcies. These trusts represent a major alternative source of funds for asbestos claimants outside of traditional litigation. As a result of the expansion in trust assets, one would expect a significant reduction in the liabilities of the remaining solvent defendants in the tort system. However, current practice often prevents a solvent defendant from obtaining proper consideration for claim payments made by the successor trust of a jointly liable bankrupt codefendant. Such trusts will disburse over \$35 billion in the coming years; therefore, this question has become crucial: Will solvent defendants receive an offset for trust payments, or will claimants in effect double-collect on their claims?

We have been at the forefront of analyzing the state of the asbestos litigation environment to understand settlement and naming patterns, trends in average recoveries by asbestos claimants, and the process by which claims are resolved. Our research shows that (1) the average mesothelioma claim is worth ~1.1 million, not multiple millions of dollars as others have alleged and (2) the \$35 billion or more that trusts will disburse fully replaces the likely tort obligations of bankrupt defendants. As such, payments by solvent defendants should be reduced to the extent that the trusts have the assets to cover them.

Unlike other economic consulting firms, we account for offsets in our analyses. We apply our research to futures forecasts in financial reporting, estimates for valuing insurance coverage, and bankruptcy estimates. Our understanding of the underlying asbestos litigation environment affects how we determine claim values and enables us to more accurately estimate future expenditures. The following three examples are representative of our work in this area:

- Retained as testifying expert on behalf of the ASARCO Unsecured Creditors Committee in the ASARCO bankruptcy proceedings. Estimated potential future asbestos-related personal injury claims for two subsidiary companies and performed valuation of unfunded and "prepack" claims.
- On behalf of an insurer disputing asbestos-related liability with a regional insulation contractor, supported settlement negotiations and performed forecasting to account for trust offsets.

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## **Allocating environmental losses**

Environmental losses present many of the same allocation challenges as asbestos-related losses, including choices of allocation law, numerous and different occurrence rulings, and varying periods of triggered coverage. In addition, company-specific complexities such as access to multiple lines of insurance coverage or parsing of losses across multiple policyholders for a given site may require complex allocation strategies. Policyholders and insurers alike need to understand the quantitative impact that various allocation rulings can have on their insurance recoveries or policy payments.

By using our proprietary scenario valuation tools to analyze insurance allocation issues, Bates White helps firms reach that understanding. We can accommodate unusual and complex allocation scenarios, and we can run multiple scenarios almost instantly. Our tools give our clients a distinct advantage both during settlement negotiation and in planning their litigation strategy. Examples of our work include the following:

- Allocation of losses due to water degradation from mining operations, including risk quantification for damages within the policy period as well as pro-rata damages
- Allocation of losses for multiple site-based occurrences under alternative theories of coverage availability
- On behalf of various insurers, disaggregation of total state-wide damages from claims involving multiple insureds and multiple sites

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## Bates White in the news

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### Recent news

Bates White's expertise in asbestos bankruptcy litigation has been widely cited from [legal journals](#) to [blogs](#). The firm has been referred to as "one of the nation's leading researchers of asbestos litigation." Most recently, the *Madison County Record* featured Bates White in two articles. In its April 2 article "[Supreme Court Hearing Sheds Light on Tenuous Nature of Asbestos Trusts](#)," two Bates White asbestos litigation papers are referenced. And in an article published in May, "[Secrecy of Asbestos Trusts Critical Ally of Plaintiff Attorneys who Run Them](#)," excerpts were included from a presentation that Charley Bates made at HB Litigation Conference's "Emerging Trends In Asbestos Litigation."

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## Upcoming event

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### Seminar on quantifying losses and determining applicability of coverage

Bates White and ENVIRON Corp., copresenters, September 10, 2009

Building on the success of our seminar earlier this year that focused on quantifying nonproduct losses, Bates White and ENVIRON will hold another seminar. We have expanded the program to include environmental damages. We will lead off with a session titled "Qualifying & Estimating Environmental Damages: How and When Are Policies Triggered?" This will then be followed by a more specific session about asbestos exposure, "Quantifying Nonproduct Losses: How and When Were Claimants Exposed?" For more information or to register, please see the complete program description on our [website](#).

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### Bates White's Environmental & Product Liability Practice

Clients depend on Bates White for expert testimony, consulting, and litigation support in connection with complex and influential environmental and products liability cases. We combine scientific and industry expertise with advanced analytical tools to deliver quantitative and strategic solutions to environmental and products liability challenges. We delve into data with precision and clarity to provide rigorous and defensible economic analyses.

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