



**TOP TEN QUESTIONS TO ANSWER  
WHEN DEFENDING AGAINST A CALIFORNIA ASBESTOS CLAIM**

Eric Haas

March 2010

**10. Can you make it someone else's problem?**

It never hurts to keep asking about (1) past insurance issued to an asbestos defendant or its predecessor; and (2) its commercial arrangements, including vendor's endorsements and express and implied indemnity rights.

**9. Can you apply more favorable law?**

Standards for liability and causation vary greatly between states and should be determined by place of injury and not necessarily the location of plaintiff's lawsuit. Also, is federal court an option?

**8. Do the latest developments in case law impacting liability apply to your case?**

Key issues related to duty, failure to warn and elements of strict liability continue to evolve, e.g. California is currently wrestling with the doctrine of sophisticated user and an original manufacturer's responsibility for replacement and affixed parts.

**7. Same question regarding damages.**

An evaluation of ultimate exposure in a liability case should include consideration of recent case law regarding the scope of recoverable medical expenses, as well as an estimation of set-offs against the plaintiff's verdict for past settlements with other defendants and payments received from settlement trusts of bankrupt tortfeasors.

**6. Are you prepared to prove the fault of others?**

In most jurisdictions, the primary means of reducing your exposure is having the ability to satisfy the burden of proof a defendant has to allocate fault to co-defendants (who will be long gone at trial), bankrupt parties and non-parties (such as the U.S. Navy and others).

**5. Are you prepared to deal with the new complications to settlement created by enforcement of Medicare set-aside provisions?**

There is no way around your obligation to protect Medicare's interest in plaintiff's claim and having an understanding of the mandatory notice and reporting requirements under federal law.

**4. Does your counsel maintain an extensive database of prior testimony and other documents from past cases for cross-examination, rivaling the databases maintained by plaintiffs' firms?**

Many key issues in the asbestos wars have been litigated for decades and the websites of plaintiffs' firms promote their creation and access to databases which include past testimony and other documents helpful in establishing the liability of commonly sued defendants, identifying co-workers and reconstructing work and materials used on many past major construction projects in a given state or region. Burnham Brown has been collecting similar information since 1978 for use in cross-examining plaintiffs and their experts.

**3. Does your defense counsel have its own stable of qualified experts?**

Asbestos claims involve an array of sophisticated issues which require access to a number of expert disciplines and a thorough understanding of epidemiology and medical literature over the past 100 years, especially where state-of-the-art is a critical issue. Burnham Brown attorneys work closely with a selection of highly qualified, court-tested experts to identify the liability and damage issues most likely to reduce the value of plaintiff's claim.

**2. Do you benefit from selecting counsel with local knowledge of the jurisdiction in which your claim is being litigated?**

It's a bad sign if your counsel has to take a airplane or use "CourtCall" to attend important court proceedings. Local knowledge of court procedures, the judges assigned to asbestos departments and the tendencies of local plaintiffs' firms is a critical component of a good defense.

Burnham Brown's offices are walking distance from Alameda County Superior Court and a 35 minute BART ride to San Francisco Superior Court. And it doesn't hurt that one of its partners is currently President of the Alameda County Bar Association.

**1. Is your defense counsel ready, willing and able to try your case – and charge you less than \$275 an hour to do it?**

We know, we know. Settlement, not trial, is the desired outcome in the vast majority of cases. But on that rare occasion when liability is extremely thin to non-existent, it is important to set a precedent for a defendant new to the asbestos litigation or plaintiff's counsel's last demand is off the charts, does defense counsel have the necessary courtroom experience or is your only real option to educate and parachute in new counsel *pro hac vice* at considerable additional expense? Since trying the first asbestos case to go to verdict in California in 1980, Burnham Brown has employed trial attorneys who are prepared to and have gone to the mat, including a late 2008 trial with the Kazan McClain office – for an hourly fee that didn't start with a 3 or a 4.

*Eric Haas is a member of Burnham Brown's Asbestos Law Practice Group which consists of 8 partners and 14 associates. He can be reached at 510.835.6733 or [ehaas@burnhambrown.com](mailto:ehaas@burnhambrown.com). You may speak with any other member of the group by calling 510.444.6800.*