



**CHICAGOLAND
RISK FORUM**
CHICAGO & MID-ILLINOIS RIMS CHAPTERS



Do Science and Facts Matter Anymore? Runaway Verdicts and Junk Science



INTRODUCTION

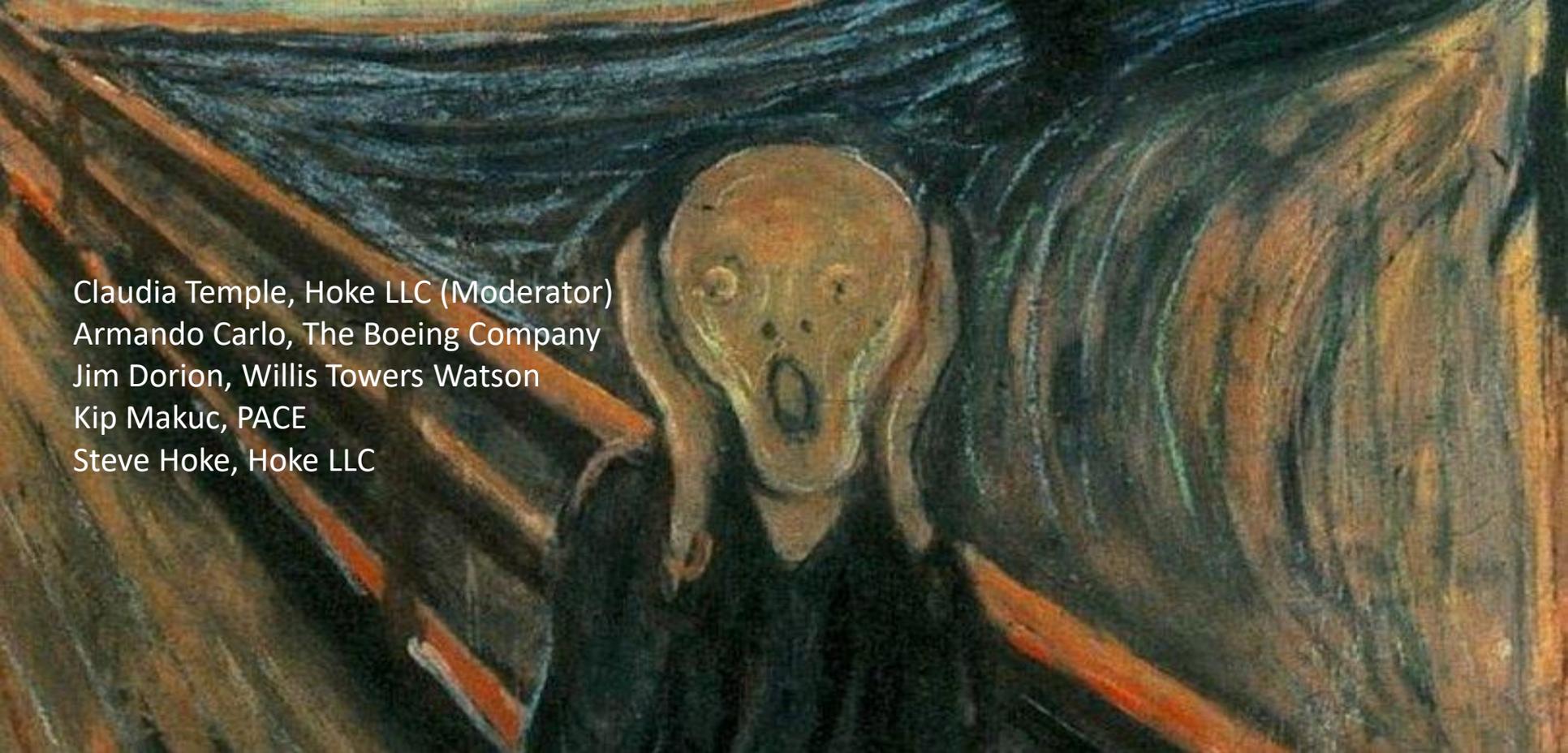
- I. Claims Experience
- II. WHY Don't Science and Facts Matter Anymore ... Or as Much as They Used To?
- III. Preparing For and Responding to the Worst-Case Scenario
- IV. Alternative Risk Transfer Alternatives



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Claims Experience Data on Verdicts and Settlements

The background of the slide is a reproduction of the painting 'The Scream' by Edvard Munch. It depicts a figure in the center with a pale, yellowish face and wide, staring eyes, holding their hands to their head in a gesture of distress or anguish. The background of the painting is a turbulent, swirling sea of dark, blue, and brown tones, suggesting a storm or a state of intense emotional turmoil.

Claudia Temple, Hoke LLC (Moderator)
Armando Carlo, The Boeing Company
Jim Dorion, Willis Towers Watson
Kip Makuc, PACE
Steve Hoke, Hoke LLC

ASBESTOS LITIGATION

- Longest-running mass tort in U.S. history
- Jurisdictions
 - IL (Madison and Cook County), LA, Oakland, NY, NJ, St. Louis
- Good News
 - Asbestos phased out in 1985/86 and claimants should be aging out
 - Filings decline, but mostly non-meso
- Bad News
 - Meso claims values increase
 - \$ spent continue to rise 2-3% annually
- Actuarial predictions
 - Decline coming, but women and non-occupational meso claims rising

ASBESTOS VERDICTS

- Since 2008, approximately 2,400 verdicts in asbestos litigation, declining over time
- Last five years, approximately 40 verdicts per year
- Plaintiffs win 60% / Defendants 40%
- But for a small number of outliers, verdict values have been relatively constant but rising
- Medicine for most types of exposures and cases is well-researched and agreed upon by both sides
- Legal and scientific battles continue over low-dose /no-dose, specific defendant products/actions, and shares
- Asbestos is generally not where we have seen mega-verdicts

TALC

Two Types of Talc:

Cosmetic and industrial

Two Types of Alleged Damages:

Asbestos Contamination = Mesothelioma

Ovarian Cancer

J&J Cosmetic Talc

Plaintiff Pool for Ovarian Cancer

22,240 annual diagnoses

14,070 annual deaths (2018, NIH)

Compared to only 3,000 annual mesothelioma diagnoses

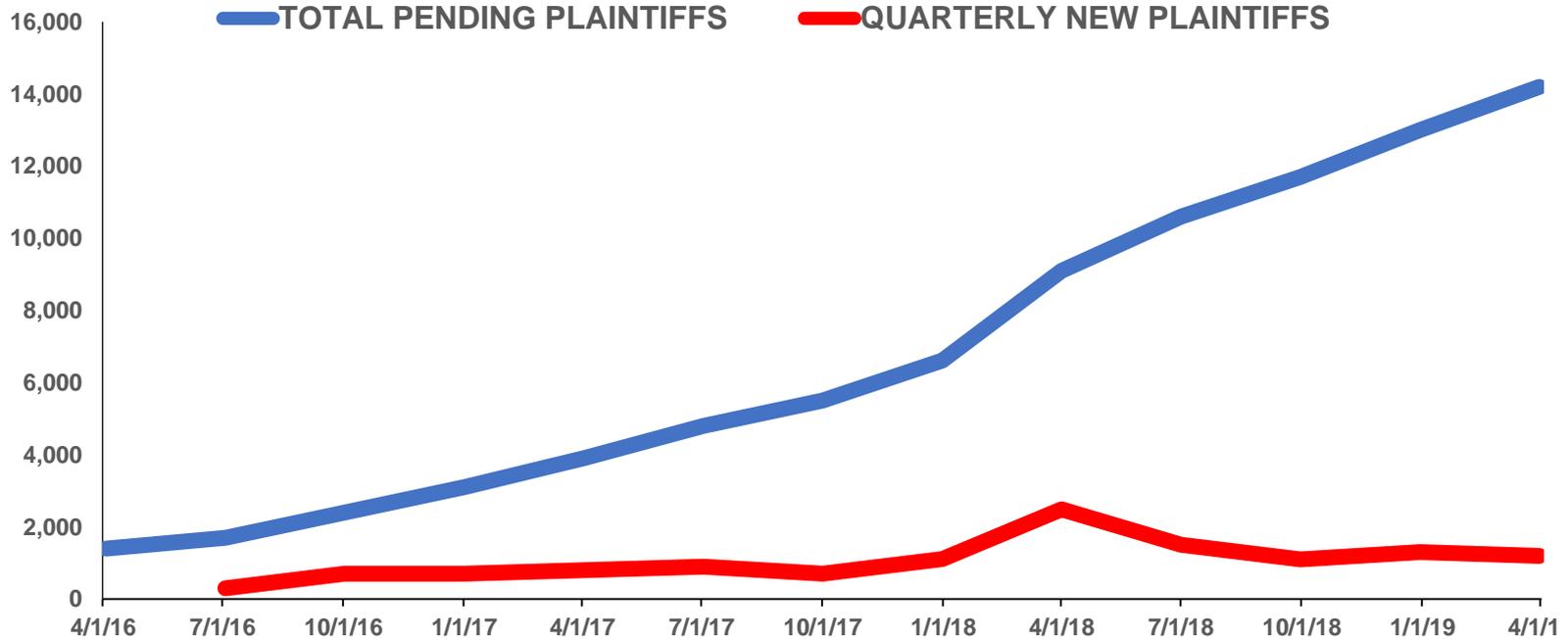
700% more potential plaintiffs than asbestos

Recent Select Cosmetic Talc Verdicts (Various Defendants)

State	Year	Case	Compensatory	Punitive	Total
MO	2016	Fox	\$10M	\$62M	\$72M
MO	2016	Ristesund	\$5M	\$50M	\$55M
MO	2016	Gianennecchini	\$2.5M	\$67.5M	\$70M
MO	2017	Slemp	\$5.4M	\$105M	\$110.4M
CA	2017	Echeverria	\$70M	\$347M	\$417M
NJ	2018	Lanzo	\$27M	\$80M	\$117M
CA	2018	Anderson	\$21.7M	\$4M	\$25.7M
MO	2018	Various (22)	\$550M	\$4.14B	\$4.69B
CA	2019	Leavitt	\$29.4M	\$0	\$29.4M
NY	2019	Olson	\$25M	\$300M	\$325M
NJ	2019	Various (4)	\$37.3M	TBD	TBD

- Appeals, where decided, have largely been successful in re-trials or reducing awards.
- J&J has not yet actually paid a damage award. Colgate has paid at least one settlement.
- Cosmetic Talc Distributor, Imerys, declared bankruptcy.

J&J Talc Filings



Glyphosate “Roundup”

- Most effective / popular weed-killer
- Monsanto (mfg.) main defendant
- Distributor / users vulnerable if litigation sustained
- Plaintiffs pursuing “asbestos model”

State	Year	Case	Compensatory	Punitive	Total
CA	2018	Johnson	\$89M	\$200M	\$289M
CA	2019	Hardeman	\$5M	\$75M	\$80M
CA	2019	Pilliod (2)	\$55M	\$2,000M	\$2,055M

- All verdicts against Monsanto
- Johnson and Hardeman punitive damages reduced on appeal to \$78M and \$25M
- Upcoming 14 plaintiff trial in St. Louis City, MO

Cyber-Risk

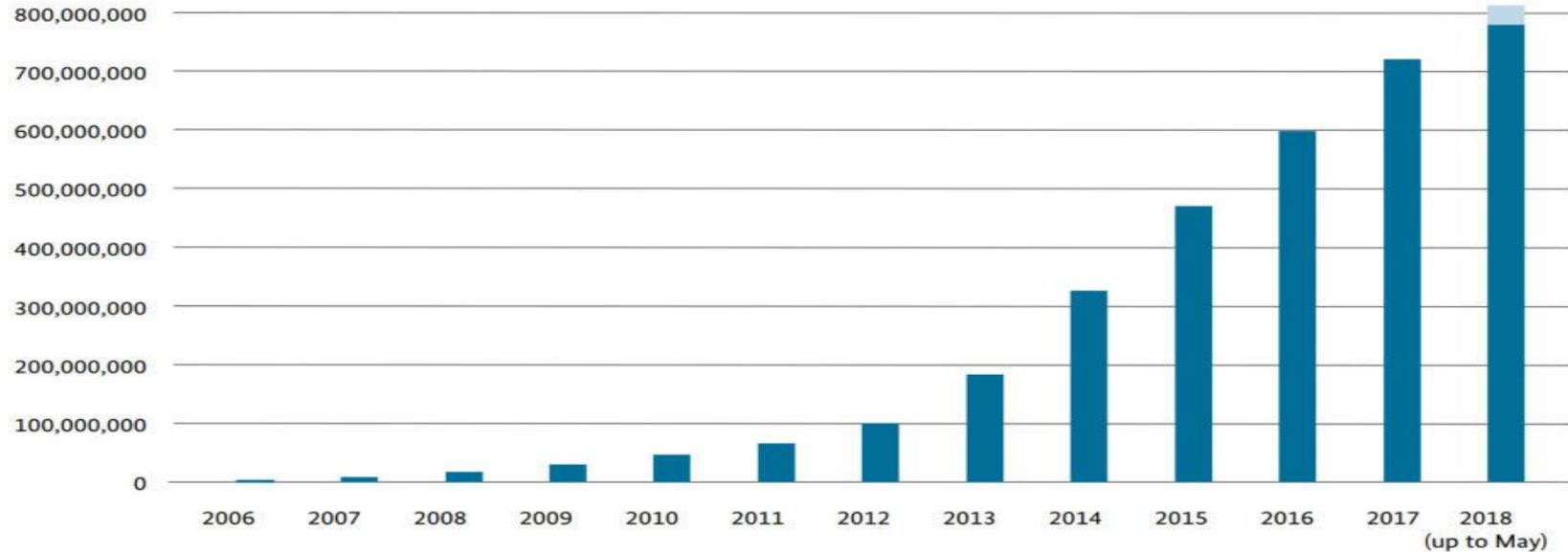


Figure 12 Known malware (2018 up to May), source AV-Test

* Data from Comparitech.com website; 300+ Terrifying Cybercrime and Cybersecurity Statistics & Trends [2019 EDITION]; May 13, 2019

Cyber-Risk

- New data privacy laws
 - Private rights of action
 - Treble damages, attorneys' fees
 - No actual injury required
- Illinois
 - Biometric privacy statute
 - Notice, publicly available retention policy, private right of action
- Class actions
 - Private and Government





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WHY DON'T SCIENCE AND FACTS
MATTER ANYMORE . . . *or* . . .
AS MUCH AS THEY USED TO?

JURISDICTION

Forum Shopping

- U.S. Supreme Court rules against forum shopping
 - *Bristol-Meyers* and *Daimler* decisions
 - Jurisdiction only if defendant HQ or the exposure was in-state
- State court judges resisting
 - Pennsylvania and St. Louis

JURISDICTION

“Judicial Hellholes”*

- California – Innovator Liability, Prop 65, Talc, Data Privacy
- Florida – Junk science, Invalidated Limits on Non-Economic Damages
- New York City - Asbestos Verdicts (Nycal)
- St. Louis – Talc Powder – Media Market Saturated With Plaintiff's Lawyers
- Louisiana – State Opioid Litigation Driven by Trial Lawyers
- Philadelphia Court of Common Pleas – Out-of-state plaintiffs permitted
- St. Clair & Madison Cos., IL – “No Injury” Class Actions
- Twin Cities, MN – 3M PFC Lawsuit, Supreme Court Rejected *Daubert*

* *American Tort Reform Foundation*

How Cases Go Awry

Judges Refuse to Act as Gatekeepers of Junk Science and Facts

Procedural

- Refuse to Dismiss Cases on Jurisdictional Grounds
- Refuse to Dismiss Dubious Factual Cases
- Unfair Discovery / Scheduling
- Consolidation / Joinder
- Refuse to Grant Summary Judgment

Plaintiffs' Goal: Win Big Verdict and Worry About it Later

Example: Refusal to Dismiss or Grant Summary Judgment

Blake v. Werner (TX 2018) – Truck driver traveling in slow lane of highway on a cold December day, driving below the speed limit. A pickup truck speeding in opposite direction loses control on patch of ice. Pickup slides off roadway, through grassy median, across fast lane and slams into defendant. Police put in their report that truck driver could not have done a thing to avoid accident. Jury finds trucking company liable for \$89M.

Facts and the Gatekeeper Function

Two ways admissibility of evidence influences outcomes:

- Admission of irrelevant or inflammatory facts

Example: 2018, GA Sup. Ct. upholds \$150M verdict against Chrysler after reckless driver rear-ended Jeep killing child. Permitted CEO's compensation into evidence reasoning that he had been involved in federal safety matters and his credibility was thus at issue. The evidence was introduced in the liability and not the punitive phase.

- Refusal to allow relevant evidence

Example: compliance with federal safety standards

Example: Evidence Admissibility / Dubious Arguments

Reavis v. Toyota (TX 2018) – Lexus was rear-ended. Two young children sitting in safety seats in back were severely injured when front seatbacks allegedly flexed or collapsed. Jury found front seats were defective because they did not protect rear seat passengers adequately. They apparently rejected idea that stiffening seats would increase likelihood of injuries to front seat passengers. Plaintiffs claimed Toyota knew about "the defect," and had time to change design or issue warnings, argued Toyota chose profit over safety. Jury awarded a total of \$242M including nearly \$146M in punitive damages.

JUNK SCIENCE

- Federal *Daubert* Rule: instructs and empowers trial judges to judge the credibility of novel scientific theories
 - Admissible only if based on “reliable science”
 - Many state courts and legislatures implement rule
 - Others ignoring even after legislative action
 - FL Supreme Ct.: allows “pure opinion”
- Battle of experts
 - When expert testimony off-sets, emotional appeal frequently breaks ties
 - Juries break the offsetting expert opinion in favor of plaintiffs

Junk Science

World Health Organization (“WHO” / “IARC”)

- Talc and Glyphosate
 - Both “probable carcinogens”
 - EPA expressly rejects
- Reviews 1000 substances, only one classified “probably not carcinogenic”
 - Relies on scientists with clear
 - Plaintiffs’ counsel contribute to funding

CA Prop 65

- Flips burden of proof onto seller
- Consumers can sue on behalf of state
- Coffee – cancer warnings on latte

Examples: Roundup & Talc

Johnson v. Monsanto (CA 2018) – Plaintiff worked in facilities for school system and claimed he developed cancer because he was exposed to glyphosate (chemical used in weed-killer Roundup). The EPA, the European Food Safety Authority and Canadian authorities all concluded glyphosate is safe. 800+ peer-reviewed scientific studies done on glyphosate, but none indicated it causes cancer. Only one group, which signed a consulting deal with Weitz & Luxemberg, claims to have found a link between glyphosate and cancer. Jury awarded \$289M to plaintiff including \$250M in punitive damages finding Monsanto acted with malice by putting roundup on market.

Talc: St. Louis cases: Juries hear that high-grade cosmetic talc is a carcinogen on the basis of WHO science despite fact that regulatory authorities consistently disagree. Compliance with federal standards is ignored. And, talc is offered as the cause of ovarian cancer despite ample research and studies that show no causal connection. The jury sees historical J & J marketing memos and documents in which it seeks to expand its sales in the African American market that are offered as proof of environmental racism. The plaintiffs' arguments are based on emotive and prejudicial arguments in combination with leveraging the perceived credibility of WHO.

NON-HODGKIN'S LYMPHOMA

Roundup



PROBABLE CARCINOGEN



DAVIS &
P.C.
CRUMP

ATTORNEYS AT LAW

1-800-277-0300

NON-HODGKIN'S LYMPHOMA

Roundup



International Agency
Research on Cancer



World Health
Organization



DAVIS &
CRUMP

ATTORNEYS AT LAW

1-800-277-0300

Appellate Courts and Legislation Driving Verdicts Higher

- Novel Legal Theories
 - Innovator Liability (California, Massachusetts)
 - Public Nuisance Cause of Action
 - No-Injury Lawsuits
- Legislative
 - Prop 65 (CA)
 - Data privacy
 - Statutes of Repose – asbestos, sexual harassment
- Supreme Courts v. Legislature
 - Damage caps unconstitutional
 - *Daubert*
- Punitive Damages

Government True “Black Swan” Events

- Tobacco is blueprint
- Opioids: states, counties, cities, tribes
 - Manufacturers and distributors (e.g., Walgreens, Prince's death)
 - To start
 - More political than legal
 - No meaningful way to defend
 - Public Nuisance
 - Lead paint, opioids, climate change
- Regulation through litigation
 - Private attorneys paid contingency fees
 - Political influence feedback

Plaintiffs' Success Drives Investment

Political contributions

- Judicial campaigns
- Leverage “Judicial Hellholes”

Advertising and SEO

- TV saturation
- “Mesothelioma” \$100 Google search term

Advertising influencing jury pool

- 30 second “closing arguments”
- Equate defendants with insurers

Sophisticated trial techniques

- Jury selection and presentation

Litigation financing

The Reptile Theory

Personal injury litigation approach

Considered most powerful tool in fight against tort reform

\$8 billion+ in verdicts and settlements attributed to approach

Strategy calculated to manipulate jurors to fear for safety of themselves, their families, and their communities

Used to invoke jurors to punish defendants for perceived unsafe and dangerous conduct

Safety is
always top
priority

Protection is
always top
priority

Sooner is
always better

Danger is
never
appropriate

Reducing risk
is always top
priority

More is
always better



Jury Composition

Millennials are 1/3 of jury pool

Educated

May be “status inconsistent”

Quiet in *voir dire* – active on-line

Homogeneity is a problem – convergence

Commerce & conscience

Higher standard (perfect)

Social justice crusaders

Sympathy driven, want to show compassion

“Can’t let the company off the hook”

“Not going to give a lot . . . maybe \$5M”

Jury Composition

Smart plaintiff counsel

Get rid of “low damages” jurors

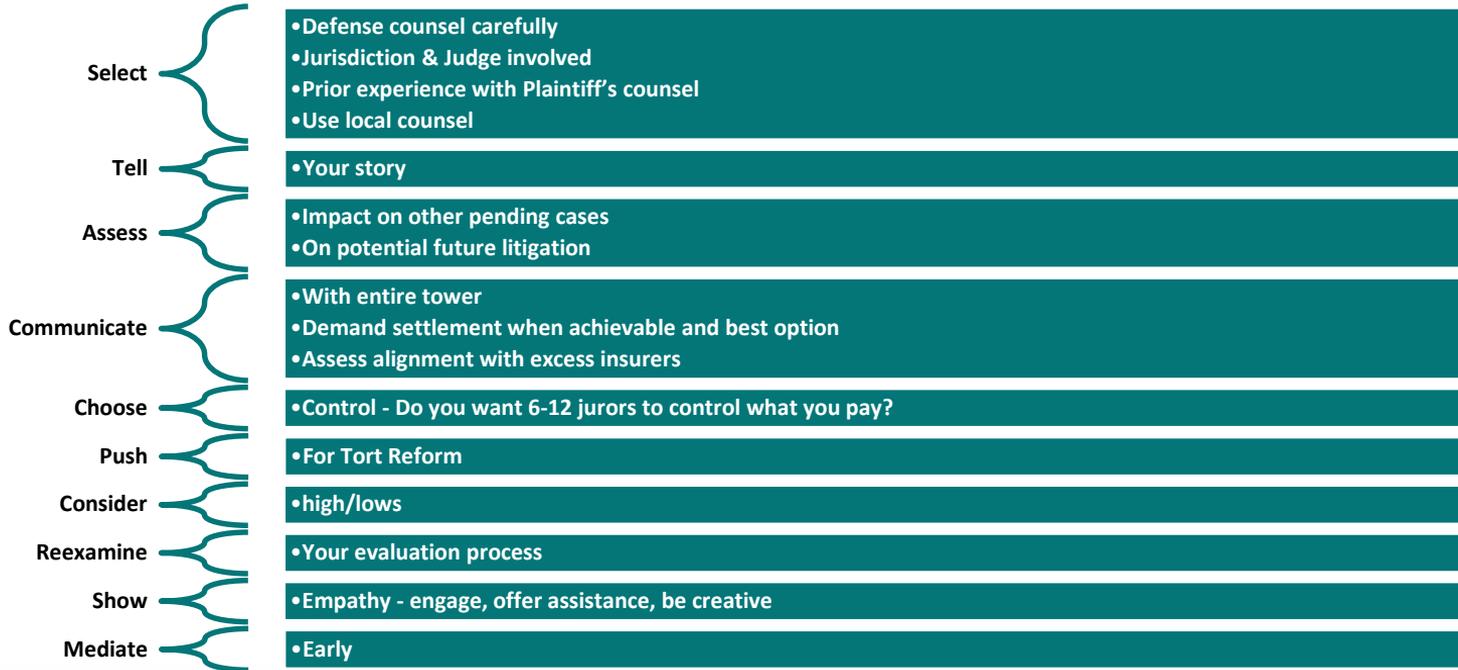
“How many of you think the judicial system is broken?”

Those that remain less willing to take a stand

Run MIT algorithm to skew towards emotional/moral decision making

High Exposure Litigation

What you can do





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**PREPARING FOR ...
RESPONDING TO ...
THE WORST-CASE SCENARIO**

Settle or Fight?

Settlement Amounts Increasing

- High stakes gamble
- Usually in unfavorable jurisdictions, chosen by plaintiffs

Very few cases go to trial

- Time-consuming and expensive
- Jury focus groups critical

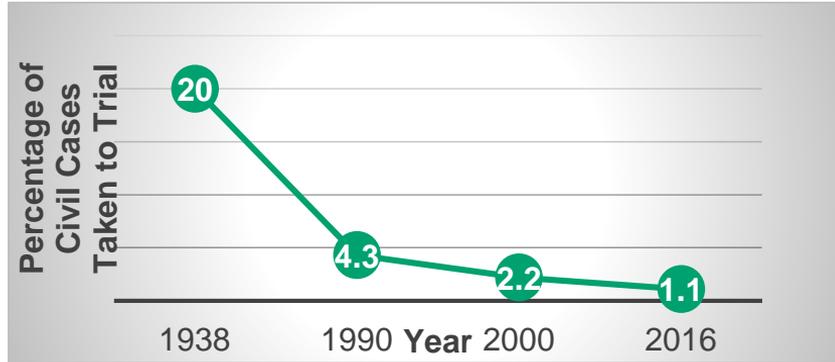
Public Relations

Insurance Considerations

- Control of Defense
- Brand / reputation issues
 - J&J drops from 6th most reputable U.S. corporation to out of the top 100
- all sums v. pro rata

Trials Increasingly Rare*

Federal cases



1938 - approximately 1 in 5 (20%) civil cases in Federal Court went to trial

2016 - that number dropped to just over 1 in 100 (1.1%) cases going to trial

1962 - 5,802 civil trials while courts disposed of 50,320 cases

2016 - there were half as many trials civil (2,781) while courts disposed of more than 5 times as many case (271,302)

State Cases

**98% of All Civil Cases
Filed in U.S.**

Trial Rates Varies by State

Lowest Rate: .05%

Highest Rate: .5%

Partnering With Other Stakeholders

- Preserve Important Insurance Relationships
- Manage Expectations
- Management, Finance and Legal
 - The world has changed / RM's role
 - Cost of Risk summary, ERM Program
 - What is or isn't insurable?
 - Evaluating the Exposure

WORKING WITH INSURERS

Right and duty to defend

Common problems that arise with insurers

- Resolute, Brandywine, Riverstone
 - Resolving differences in strategy
 - History matters
 - Reputation and brand
 - NCC and defense counsel selection
 - Privilege issues
- Reimbursement
 - Full and timely funding
- Exhaustion of primary coverage

Underwriting Issues

Claims-Made vs. Occurrence

- Up-Front Cost vs. Long-Term Consequences
 - “Occurrence” Long-Tail Coverage
 - Worst-Case Scenario

Align Policy Terms in Umbrella/Excess

- Difficulties Accessing Layers
- “Qualcomm Issue” (Settlement)

Control of Defense and Settlement

Cyber-risk

- Evolving Risk
- Lack of standardized language
- Frequently negotiable
- Size and IT sophistication important factors

Financial Reporting

- Contingent Liability Reserve and Valuation of Potential Assets to Offset
- No Substitute for Good Claims Data
 - Need Can Arise Suddenly
 - Management, Board, Auditors, SEC
 - Insurer Reimbursement
 - Need to Be Proactive
- Auditor Demands Unpredictable and Ever-Evolving
 - Both Between Audit Firms and Within
 - Reserving
 - “Reasonably Estimable”
 - How much and when
 - Loan Covenants
 - Disclosure - 10K and 10Q

M & A / Due Diligence Issues

Buyer Considerations

- Don't Infect the Company
 - Risk v. Reward
- Corporate successor liability underwriting
 - Asbestos, products, environmental
 - Ensure Access to Historical Insurance
 - Difficulty Identifying Past Coverage
 - “Assignment” of Coverage Issues

Seller Considerations

- Be realistic
- Professionally market liability



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ALTERNATIVE RISK TRANSFER

Alternative Risk Transfer

How can a company deal with or off-load legacy liabilities / risk?

- Objective – Finality
 - Protect assets
 - Facilitate corporate transaction
 - Reduce operational uncertainty
- Options
 - Coverage-in-Place Agreement (“CIP”)
 - Insurance Commutations
 - Isolation of Liability / Restructuring
 - Insolvency
 - 504(g) “pre-pack” asbestos bankruptcy

Sale of Risk to Third-Party

- Originated with Loss Portfolio Transfers between insurers and insolvent insurer claims for defendants
- Insurers reinsure their own asbestos risk
 - London, ACE, CNA, AIG, Liberty Mutual, Hartford
 - Berkshire buyer
- Policyholder long-tail Loss Portfolio Transfers
 - Objective – take off-balance sheet
 - To isolate liability from healthy assets or to facilitate sale
 - Private equity / reinsurance
 - Premium Cost High but Market More Competitive
- Valuation of liability and assets transferred are key considerations

Finality?

504(g) Pre-Pack Bankruptcy

- Operational continuity and pre-determined financial outcome
- Policyholder and plaintiffs' counsel v. insurers
- Timing critical to success
- No guarantees, messy, but frequently successful

Reinsurance

- Yes, but high cost

Third-Party Sale

- Takes off-balance sheet immediately
- No guarantee of finality
 - Fraudulent conveyance
 - Successor liability / “alter ego”
- Costly, but frequently successful

Isolation of Liability Without Sale

- Easiest but most risky



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THANK YOU!

Questions?

- **Claudia Temple** has 30 years of risk management experience in Director level roles for fortune 100 companies including Kraft Foods, Mondelez International, Brunswick and BorgWarner. She earned her MBA from Kellogg School of Management at Northwestern University. She is an active member of the Risk Management Society and was named one of Business Insurance's "Women to Watch". Claudia has received Innovation awards from Risk and Insurance Magazine and AON. She is past chair of the MAPI Risk Management Council, as well as past member of several insurance advisory boards.
- **Armando Carlo III** is an attorney and Director in the Risk Management & Insurance Department for The Boeing Company. He leads the liability claims group that is responsible for developing and implementing strategies for insurance claim handling and negotiating resolutions of insurance coverage disputes and issues. He is responsible for coordinating and overseeing the Company's insured claims, including claims involving aviation products liability, directors and officers liability, fiduciary liability, employment practices, environmental liability and property damage, as well as other lines of coverage. Armando also oversees insurance recoveries associated with insurance insolvencies and solvent and insolvent schemes of arrangement and is the insurance focal for merger and acquisition activity.
- **Kip Makuc** is a Senior Managing Director at PACE Claims Services LLC in Washington, DC. Mr. Makuc has significant experience providing accounting, financial, and litigation support services to clients involved in mass torts, particularly asbestos claims. Since 1995 Mr. Makuc has assisted policyholders, insurers, reinsurers, financial institutions, bankruptcy trusts, joint defense groups, and their legal counsel on a variety of asbestos, environmental, and other product liability and insurance matters. Mr. Makuc has prepared expert reports and testified on behalf of both insurers and policyholders. He prepares estimations of future claim liability for dozens of entities involved in the asbestos litigation.
- **James Dorion** has decades of experience helping clients maximize asbestos related insurance recoveries. This experience allowed him to develop useful working relationships with "decision maker" contacts in both the US and London insurance markets. Jim has personally negotiated the recovery of many dozens of large settlements. He uses his experience and contacts, along with his legal background and end-to-end knowledge of the insurance business, to provide clients with consultative advice and guidance on the development of insurance recovery strategies.
- **Steve Hoke** is the founding partner of Hoke LLC, a Chicago-based insurance coverage boutique that exclusively represents policyholders in high-value general liability, financial and professional liability matters. He has over 30 years of experience in complex commercial insurance coverage matters. He and his firm have successfully represented the largest historical miner of industrial talc through trial and appeal against 30 insurers. His firm recently argued a coverage case before the Connecticut Supreme Court that *Insurance Law 360* named the most important insurance case in the U.S. to watch in 2019. He has a Georgetown Law J.D., a Kellogg / Northwestern MBA and an Indiana University B.S. See, <https://www.hokellc.com/professionals/stephen-hoke/>.