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CONGRATULATIONS! YOU HAVE A NEW PRODUCT LINE

Best Legal and Business Practices When Developing or Acquiring a New Product

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Best Legal and Business Practices When Developing or Acquiring a New Product

When developing or acquiring a new product the means by which you can protect your company from legal and business risks are, in theory, straight forward. As with most endeavors, the goals are to avoid risk, shift risk, and quarantine risks that cannot be avoided or redirected. Some guidelines for implementing these goals are set forth below.

AVOIDING THE RISK

A. Due Diligence
   a. As a rule, the more information which can be collected about a target business or product line the better equipped a product liability attorney will be to assess the risks arising from the anticipated acquisition.
   b. However, this self-evident rule must be balanced against evitable limitations of time, finances, and the practical reality of matching the effort with the relative size of the acquisition.
   c. From a product liability perspective, fundamental information to be obtained and examined during due diligence includes the target company or product's warranty terms, the warranty and product liability claims history of the target company or product, and the warranty response and handling process.
   d. This collection and examination of information and materials should concurrently include an assessment of the quality of the records documenting the product's claims history, as well as the warranty response and handling process.
   e. If possible, obtain independent advice evaluating the product, its design, whether the product meets applicable standards, and the nature and timing of failures.
   f. With this information, an understanding of the product's failures and likely warranty claims exposure can be fairly assessed.
   g. Additionally, any insurance coverage the company has which may be available to cover products claims and the claims previously made under that coverage should be determined.
   h. Likewise, an examination of any supply contracts – up and down the supply chain – for the manufacture and sale of the product is worthwhile to better understand the risk and obligations arising from such contracts and relationships. Understanding and investigating the supply chain and knowing the other entities' practices is increasing critical. This may require visiting, inspecting, and even monitoring during the production and the manufacturing, as well as review of quality control facilities and systems of suppliers to ensure that the goods being supplied are safe and compliant. Keep in mind that not all jurisdictions permit manufacturers, distributors, and sellers of products to impose contractual limitations of warranties and liabilities (e.g., means of risk shifting discussed below), thus it is important to have legal advice during due diligence from the jurisdictions where you are doing business to better understand the any contemplated contractual terms or limitations are lawful and enforceable.

B. Structuring the Transaction

a. In addition to the use of quality due diligence to avoid products liability risk, the structure of the acquisition is a method of de-risking the acquired product line.
b. When the company or product is being obtained by means of purchasing a company, the transaction is typically structured as either (a) an asset acquisition or (b) a stock acquisition. There are many considerations when determining which structure might best serve the company's purposes, yet from a de-risking perspective the asset purchase is usually superior.
c. In an asset acquisition the purchasing company buys the asset or assets from the selling company. The purchasing company can acquire all the selling company's assets or just a portion of the assets, such as a single product or product line. Regardless, structuring the transaction as an asset purchase usually means the purchasing company's associated debt or other obligations of the selling company do not follow the purchased assets. Any such liabilities remain with the selling company even if the selling company becomes an empty shell or is shutdown.
d. In contrast to a stock acquisition or merger, the purchasing company buys the stock of the selling company. The company purchasing the stock or merging with the acquired company becomes responsible for all of the debts and obligations of the acquired company. The acquired obligations include exposure to products liability claims whether such claims arise under theories of negligence, strict liability, or warranty.
e. Although the general rule is that when an independent company purchases all or substantially all of the assets of another company (via an asset purchase) it is not liable for products manufactured before its acquisition, there are several exceptions to this rule. It is important to note that before delving into the various exceptions to the general rule of non-liability, certain prerequisites must be established before a successor company may be subject to product liability under the exceptions.
f. The general rule remains prevalent that companies are treated as separate entities, notwithstanding the fact that they may be solely owned by another company or by the same individuals.
g. The majority of jurisdictions in the United States recognize some species of the following exceptions to the general rule of non-liability:
    i. The purchaser assumes the seller's tort liability, either expressly or impliedly;
    ii. There is a consolidation or merger of the seller and the purchaser;
    iii. The purchaser is a "mere continuation" of the seller; or
    iv. The transaction is entered into fraudulently to escape liability
h. In addition to these four "traditional" exceptions, a minority of states have recognized the following exceptions to the general rule of non-liability:
    i. Continuity of enterprise;
    ii. Continuity of product line; and
    iii. Duty to warn
i. The factors of these exceptions and some means to avoid the exceptions are as follows:
    i. Express or Implied Assumption of Liability

1. The courts examine the express language of acquisition agreements to determine whether there was an express assumption of liability. Similarly, when examining impliedly assumed liability courts will examine the acquisition agreement in conjunction with the buyer's conduct to infer the buyer's intent.
2. There are a multitude of fact specific considerations, but acquisition agreements should include the seller's agreement to indemnify and hold harmless the buyer, specific provisions outlining any liabilities the purchaser assumed, clear statements that the purchaser is not assume any other liabilities, and the seller listing its known or anticipated tort liabilities and explicitly retaining responsibility are good practice.

ii. Consolidation or Merger of Seller and Purchaser

1. A consolidation takes place when two companies combine to form a new company, while a merger occurs when the seller is absorbed into the purchaser. A merger can either be actual (one intended by the parties) or de facto (implied by the court because of the failure of two entities to observe corporate formalities).
2. The two essential factors courts assess when determining whether a de facto merger took place are continuity of shareholders and the consideration included shares of stock (e.g., paying for the acquired assets with shares of its own stock). Continuity of ownership is the most heavily weighted factor. Yet when addressing allegations of de facto mere courts have also looked at the continuation of the seller company's same management, employees, general business operations, locations, and general business operations. Courts will look behind the structure of the acquisition to determine whether a consolidation or merger was, in reality, merely a manipulation of corporate entities where the actual business continued unchanged. Generally, courts are in agreement that a de facto merger does not occur where assets are purchased for cash rather than for stock.

iii. Mere Continuation

1. Mere Continuation results when after a corporate reorganization occurs, only one corporation still exists and there is a continuation of the business and at least some of the same ownership as the seller. A continuation of just the business will not amount to a mere continuation, the purchaser must be the same legal person, only continuing their existence under a new name. This exception focuses on whether there is a continuity of ownership or corporate structure. Under the mere continuation exception, a threshold to establish successor liability is a showing that assets were transferred from the predecessor company to the successor company (e.g., an intra-corporate transfer of assets).
2. Usually courts rejected applying the mere continuation exception when there is not a continuation of the entire selling company

3. In an effort to avoid liability under this exception, the purchaser should consider making changes post-acquisition such as to personnel and management.

iv. Fraudulent Escape of Tort Obligations

1. When a transaction is used merely as a ruse to escape tort liability by the seller, this exception applies to impose liability. The fraudulent escape of tort obligations exception has been used to impose liability on a purchaser where consideration is inadequate or fictitious. This exception was created to protect creditors and third parties from companies which would fraudulently transfer all of their assets to other companies, effectively escaping liability for defective products.
2. However, showing a fraudulent intent can be challenging absent a prior relationship between both parties coupled with additional facts of intent. Some court have applied a good faith/or arm's length transaction test when examining this exception.

v. Continuity of Enterprise

1. The continuity of enterprise exception is only applied in a small minority of states – at this time Alabama, Michigan, Mississippi, and Louisiana. This theory focuses on the continuity of the seller's business operations after the transfer rather than on the corporate entity itself as in the mere continuation exception. Courts consider there to be a continuity of enterprise when "the totality of the transaction demonstrates a basic continuity of the enterprise."
2. In reality, the continuity of enterprise exception is simply an extension of the mere continuance exception. The Michigan which appears to have been the first to follow this expansion set forth the following factors for the continuity of enterprise exception: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity.
3. The continuity of enterprise been criticism by many including the American Law Institute. To avoid this the exception, the purchaser should consider making post-acquisition changes to the corporation such as changes to plant location and product lines, management, personnel, and policies.

vi. Product Line

1. The product line Exception has only been adopted by handful of states (e.g., at this time California, New Mexico, Mississippi, Pennsylvania, New Jersey and Washington). The product line exception may apply when (1) the purchaser acquires all of the seller's assets, leaving only a corporate shell; (2) the buyer holds itself out as a continuation of the seller by producing the same product line under a similar name; (3) The purchaser benefits from

the goodwill of the seller or acquisition resulted in the virtual destruction of tort remedies.

2. Courts in Florida, Kansas, Illinois, North Dakota, Nebraska, Wisconsin and Texas have not viewed the product line exception favorably.

vii. Duty to Warn exception:

1. When courts have adopted the duty to warn theory it has been applied when the acquiring company continues relationship with the seller company's customers, but fails of warn the customer of known product defects. The courts found that a continuing relationship exists when the buyer assumes the seller's service contracts for the product or the buyer services and repairs the product. It is not the acquisition in of itself that resulting in the imposition of a duty to warn because the liability does arising from the status as a successor, but instead the establishment of the relationship the with customer gives rise to the duty. Pertinent factors examined by court establish such a "special relationship" exists include the taking over or other succession to service contracts, servicing the acquired company's machines by the buyer, and the buyer's knowledge of the defect.
2. Avoidance of liability under this requires providing the customer an adequate warning. The Restatement (Third) of Torts § 13(b) provides that a successor corporation has a duty to warn only if (1) the successor knows of the product risk; (2) product owners can be identified and assumed to be unaware of the risk; (3) a warning can be effectively communicated to and acted on by product owners, and (4) the risk of harm outweighs the burden of issuing the warning.

j. Exceptions State-By-State

The Traditional 4 Exceptions	Recognize the Product Line Exception	Recognize the Continuity of Enterprise Exception
1. Arizona 2. Arkansas	1. California 2. Mississippi	1. Alabama 2. Alaska

3. Colorado	3. New Jersey	3. Michigan
4. Delaware	4. New Mexico	4. Louisiana
5. District of Columbia	5. Pennsylvania	
6. Florida	6. Washington	
7. Hawaii		
8. Iowa		
9. Illinois		
10. Kansas		
11. Kentucky		
12. Louisiana		
13. Maine		
14. Maryland		
15. Massachusetts		
16. Minnesota		
17. Missouri		
18. Montana		
19. Nebraska		
20. New Hampshire		
21. North Carolina		
22. North Dakota		
23. Oklahoma		
24. Oregon		
25. South Dakota		

26. Tennessee 27. Texas 28. Utah 29. Vermont 30. Virginia 31. West Virginia 32. Wisconsin		

C. Shifting the Risk

a. Regardless of the nature of the acquisition, explicit obligations for shifting the risk and liability to the selling entity or its principals should be included (when possible) in the acquisition agreement. There are a multitude of provisions including holdback of a portion of the purchase price, identification obligations, and defining historical claims and products allocations.

b. Of course, relative bargaining power sometimes necessitates accepting disproportionate contractual risk in order to purchase the company or product line. Thus, the challenge is balancing obtaining the target business while managing products liability risk arising from the acquisition.

c. Almost always representations and warranties will be negotiated in the acquisition agreements and these should address products liability and products warranty information. Representations and warranties impose liability risk on the party with better access to information in order to induce efficient disclosure.

d. Requiring certain representations and warranties to be made regarding the company and its products is one way to effectively shift the risk to the seller.

e. Keep in mind that representations are statements of fact made by the seller. Warranties are promises the seller makes that a stated fact is true. Representations and warranties address the information at the heart of the merger or acquisition by allocating the burden of information production, refining the scope of information required and enhancing the credibility of information provided.

f. Various types of insurance may also be available including representations and warranty insurance and warranty claims insurance. Representation and warranty insurance is obtained by buyer against losses that the buyer may incur as a result of a seller breach of its representations or warranties in the acquisition agreement. The insurance essentially shifts a portion of the risk arising from the seller supplying misinformation and thus only covers losses that are unknown to the buyer.

g. Particular focus during an acquisition should be on liability coverage for products defects to understand where the gaps in coverage may exist (e.g., own product exclusion). Also

consider whether warranty and contractual liability coverage is available for upstream risk from defense and indemnity agreements.

h. Despite their importance, indemnity and defense clauses are often poorly drafted, misunderstood, and mere copy-paste efforts. As a result, indemnity clauses should receive special focus during negotiations with specific analysis given to the trigger, proof of trigger. The indemnification obligation should distinguish between an allegation of fault (or other trigger is identified) versus some higher level of trigger (e.g., a judicial determination of fault). Assuming there is a duty to defend, the duty should be triggered by an allegation or claim alone.
i. With regard to the supply chain, certificates of compliance and product quality audits are other common methods of monitoring and maintaining supply chain integrity.
j. The overarching concept of supply chain risk management is that the risk arising from any relationship or transaction should be equivalent to its commercial investment and upside. As such, simply because a favorable contract term may be obtained through the relative strength in bargaining position, there may be circumstances in which it is expedient to agree to more balanced terms for the greater benefit of the commercial relationship, such as when dealing with a sole-source suppliers.
k. Where contractual limitations of liability may be negotiated within the supply chain including defense and indemnification provisions, contractually caps on liability to a stated amount, and or other metrics such as annual sales which make the exposure more predictable and connected to the commercial investment.
l. Every business involved in the supply chain needs proper and adequate insurance. While this is axiomatic, manufacturers and other supply chain parties often find themselves uninsured or underinsured in product liability claims and other supply chain disputes. Consumer and food product recalls and class actions can easily create liability exposure in the millions, or tens of millions, of dollars, so it is important to understand and insure for such risks.
m. Work with a professional insurance broker experienced in the specific industry to understand the nature, likelihood and potential quantum of the risks faced by the business, and to understand which risks can be insured and, if so, to what amount. Just as important as the insurance is an understanding of the gaps in coverage and exclusions.
n. There are numerous types of coverage available to supply chain parties, including property, commercial general liability ("CGL"), manufacturer's errors and omissions ("E&O"), recall, contractual liability, business interruption, bad debt and excess insurance. Each type of coverage is different and may require a separate endorsement or policy. For example, many CGL policies exclude coverage for a manufacturer's losses related to replacing defective products. Manufacturer's E&O insurance is designed to fill this gap. Equally, most policies exclude contractually assumed liability including, importantly, liability under indemnity clauses. Contractual liability is designed to cover such liability.
o. Duty to insure clauses are designed to ensure that the supply chain partner has sufficient insurance for third party liability claims and contractual liability claims, including claims for performance of defense and indemnity obligations under the supply contract.

p. As is always the circumstance, obtaining an indemnity from a selling principal or company that lacks financial wherewithal to satisfy its indemnification obligation is of limited worth. As such, being named as additional insured is particularly effective and can be an game changer in many circumstances.

q. An additional option to shift the risk of product liability exists under the seller's right to indemnity from the manufacturer. The Restatement of Restitution Section 93(1) states that where a supplier has supplied goods that, due to the supplier's negligence, are dangerously defective for the use for which it is supplied, and where both have become liable in tort to a third person injured by such use, the supplier (who may have been a manufacturer) is under a duty to indemnify the other for expenses paid in discharge of the claim of the third person if the indemnitee used or disposed of the goods in reliance on the supplier's care and such reliance was justifiable.

D. Quarantining the Risk

a. Having good contracts with the supply chain parties with whom you deal a good means of limiting risk. It is critical that manufacturers and other supply chain partners have comprehensive and robust contracts for key relationships which set out the rights and obligations of the parties in a way that reasonably allocates risk amongst the parties.

b. Whether and when a contract is required depends on the nature of the relationship and the transaction(s) in question but where the transactions are sizeable and repeated, a master supply contract may be a good idea. Many companies are reluctant to incur the legal cost of contracts for "small" supply chain relationships. While economic pragmatics should usually rule the day the old adage that a chain is only as strong as its weakest link is particularly applicable.

c. Key contractual terms for supply chain contracts include: product specification and quality, warranties, epidemic failure, pricing, order, payment and delivery, intellectual property, confidential information, recall, limitations of liability, indemnity, insurance; termination, breach, choice of law, and choice of forum/arbitration. While these clauses are important, the "protective" clauses of limited warranty, limited liability, indemnity, insurance, and choice of law and forum are of particular importance and should be considered closely. As noted above, it is important to have local legal advice so you understand the laws of where you are doing business. It may be necessary to revise standard contracts and terms to reflect and comply with local laws.

d. If the business circumstances do not require or permit a supply agreement, then it is critical that manufacturers and other parties have comprehensive standard terms and conditions which are incorporated into that party's commercial documents (e.g., purchase orders, order confirmations, invoices) in a way that ensures the terms and conditions apply even where the other party seeks to assert its own terms and conditions (i.e., "the battle of the forms"). Standard terms and conditions should include the key contractual terms and be incorporated into common commercial documents and used consistently.

e. An additional method to quarantine the risk is to seek the home court advantage. Dealing with foreign supply chain parties poses particular challenging. The best way to mitigate the risks of dealing with foreign parties is to secure "home court advantage" through choice of law, choice of forum (courts), and/or arbitration clauses in supply contracts or terms and

conditions, where permitted by law. This way, any disputes will be governed by Canadian or American law and courts. If arbitration of disputes is preferred, you may be able to contractually mandate arbitration using an agreed-upon law, procedure and location. Having home court advantage in supply chain disputes is often a major strategic advantage, and should be sought aggressively in negotiations. Again, it is important to understand the laws of where you are doing business as numerous North American jurisdictions prohibit or restrict the use of choice of law, choice of forum and arbitration clauses in certain contracts (particularly consumer contracts).

f. If the foreign party has no assets in North America (or another jurisdiction where they are eligible), you may seek to have some type of security in place. There is little to be gained by a over a foreign party if the party has no assets in accessible jurisdiction and the judgment cannot practicably be enforced (e.g., a final judgment is just a piece of paper that give you the right to go attempt to collect the damages). As such, domestic guarantors, letters of credit at domestic banks, and/or contractual holdbacks are some company tactics.

E. **Conclusion:** Despite the general rule of non-liability for asset purchase, successor companies are often faced with liabilities for injuries caused by their predecessor's defective products. However, successor company from each of the items mentioned above, as well as from certain defenses that would have been available to their predecessor (e.g., the statute of repose, the statute of limitations, lack of standing, modification, misuse, and assumption of risk).

F. **Addendum:** To facilitate our discussion, we offer the real world example of MacMillan Bloedel acquisition of American Cemwood Corporation. The basics of that ill fated acquisition are summarized below:

AMERICAN CEMWOOD: A CAUTIONARY TALE

American Cemwood Corporation ("American Cemwood") was a small, privately held forest products company (e.g., lumber, etc.) based in Oregon. In the late 1980s it developed and began selling a new composite cedar shake (roofing shingle) called the "Cemwood Shake". The Cemwood Shake was made from an admixture of wood fiber particles and rubber. The design gave the Cemwood Shake the appearance of traditional cedar roof shingles, yet it was marketed as more durable, longer lasting, and more fire resistant than traditional cedar roof shingles. American Cemwood backed up its marketing of the Cemwood Shake with a 50-year warranty against manufacturing defects in which it guaranteed repair or replacement of any defective Cemwood Shakes.

American Cemwood aggressively marketed the Cemwood Shake as an attractive and cost-effective alternative or replacement for traditional cedar shakes and asphalt shingles. As a result of the desirable

combination of features and benefits, along with aggressive marketing, the sales of Cemwood Shake were very strong in the western United States, particularly California which had recently banned wooden shingles in many areas due to fire risk. Sales increased year over year as the product became more widely known. Given the market for a cost-effective and attractive wood shake-like product, the potential worldwide market for the Cemwood Shake was substantial, especially if the sales, manufacturing, and other aspects of the operation could be better capitalized.

The Cemwood Shake's claimed longevity and durability were supported by the fact there had been very few warranty claims and customer complaints during the first few years of sales. Moreover, the few warranty claims made were cost-effectively resolved based on arguments of improper installation or inadequate maintenance. That said, American Cemwood records showed that customer complaints and warranty claims had begun to move up in the early 1990s, particularly in cold and wet areas. Since American Cemwood was a fairly small operation its testing of the long-term performance and durability of Cemwood Shake had been limited. There had been no actual testing which showed the Shake would last 50 years.

In early 1993, MacMillan Bloedel (sometimes referred to in the industry as "MacBlo") was a very large international forest products company (e.g., lumber, engineered lumber, corrugated containers, etc.) based in Vancouver, British Columbia. Tracing its origins back to mergers in 1951, MacBlo had operations across Canada, the United States, and the United Kingdom with revenue of approximately $3 billion.

MacMillan Bloedel viewed the Cemwood Shake as an attractive and profitable product with a growing market. Further, MacMillan Bloedel's superior capitalization and more sophisticated management would allow it to more efficiently and effectively market and produce a product like the Cemwood Shake. For a company with the resource of MacMillan Bloedel the price to acquire American Cemwood was modest.

All the same, before it went forward with the acquisition American Cemwood, MacMillan Bloedel undertook and completed its standard due diligence of American Cemwood, including laboratory testing of the Cemwood Shake by MacBlo's in-house wood scientists (the "In-House Scientists") and retaining expert consultants to evaluate the product.

This testing by MacMillan Bloedel's In-House Scientists identified some concerns about potential issues that might impact the long-term durability of the Shakes. Nevertheless, when pressed by the company's executive – who were eager to move forward with the acquisition – the In-House Scientist opined that the Shakes seemed to be reasonably durable, based on the testing performed. However, the due diligence testing could not establish that the product's lifespan was 50 years and suggested the Shakes would, at minimum, need a new protective coating every 10 years. The consultants gave a more guarded prognosis.

The other due diligence on American Cemwood included inspections of American Cemwood's operations and interviewing company principals and key employees, such as personnel in the company's warranty claims department. This due diligence did not identify any major warranty claim problems or

threats of lawsuits relating to the Cemwood Shakes. That said, several people on MacMillan Bloedel's acquisition team felt they were not getting the full story with respect to product quality, warranty claims and lawsuits from American Cemwood's principals. Unfortunately, given the enthusiasm by MacMillan Bloedel's executives about the product, these due diligence concerns were not effectively communicated to the management in charge of the acquisition. MacMillan Bloedel purchased American Cemwood in April 1993, with American Cemwood becoming a wholly-owned subsidiary of MacBlo.

Following the acquisition, MacMillan Bloedel parachuted in a few of its management and financial people to assist with integrating American Cemwood into the bigger operation. These MacMillan Bloedel boots on the ground quickly ascertained that American Cemwood's finances were not as they appeared during due diligence and that there were real problems with product quality and consistency due lax manufacturing processes. Likewise, they determined that there significantly more warranty claims arising from the Cemwood Shakes. MacMillan Bloedel realized it had not been given an accurate representation of the field history of the product or the warranty claims to date. MacMillan Bloedel considered suing American Cemwood's former principals for negligent misrepresentation, fraud, etc., but decided against it.

Unfortunately, the product quality issues were just beginning. During the remainder of 1993 the number of warranty claim increased substantially. The first warranty claims lawsuits were filed in 1994 and continued until there were dozens across the US and Canada. Most of the lawsuits were product defects and warranty claims resulting in property damage yet some claims also alleged fraud and negligent misrepresentation.

The lawsuits were reported to MacMillan Bloedel's primary insurer under a vague coverage agreement and defended by the carrier's appointed counsel in various states. There was no one law firm or lawyer handling all of the claims to see the forest for the trees. As a result, MacMillan Bloedel failed to fully appreciate the scope of the escalating claims and neither informed its excess carrier nor its reinsurers.

As the warranty claims and lawsuits continued to increase, MacMillan Bloedel worked to develop and improve the American Cemwood product through further testing and analysis. These efforts identified additional deficiencies with the Shakes relating to its design and manufacture. MacMillan Bloedel's internal findings from post-acquisition testing and analysis of the Cemwood Shakes were set out in a series of stark and detailed memos which made it clear the products in the field would never last 50 years and probably not even 10 years in cold and wet environments.

Ultimately, MacMillan Bloedel modified both the design and the manufacturing process in effort to make the Cemwood Shakes more consistent in quality and more durable. It also shortened the warranty term and excluded sales in states and jurisdictions where there were significant freeze-thaw cycles. Despite these efforts, the number of warranty claims and lawsuits continued to increase. Most of these new claims related to sales which occurred before MacBlo acquired American Cemwood in 1993. Numerous Plaintiffs delivered expert reports which articulated the underlying design and manufacturing problems with the pre-1993 Shake.

By 1995 the warranty claims on the pre-1993 Shake continued to surge. In an effort to get a better understanding of the nature and magnitude of the future warranty claim exposure, in 1996 MacMillan Bloedel commissioned an expert to conduct a statistical analysis of the potential future warranty claims. By examining available data, the expert projected approximately 10,000 additional future warranty claims with an estimated exposure in excess of $25 million. MacMillan Bloedel tried to obtain special insurance coverage for warranty claims but the effort failed. Thus, MacMillan Bloedel continued to pump money into the American Cemwood to pay warranty claims and resolve lawsuits in an effort to ride the storm out.

In 1997 and 1998, class actions lawsuits were filed in California and other states against both American Cemwood and MacMillan Bloedel seeking punitive damages as well as other relief. The class actions were later consolidated to multi-district litigation proceeding California known as the Richison action.[1] The consolidated litigation included essentially all owners and purchasers of Cemwood shakes in the US with claimed damages of almost $1 billion. In addition, the Oregon Attorney General brought a regulatory proceeding against American Cemwood for consumer fraud.

After the Richison class action was filed MacMillan Bloedel retained new counsel and took a more aggressive position with its insurers. It claimed its primary and excess insurers were obligated to provide coverage and a defense for the class actions and for all warranty claims. However, MacMillan Bloedel's insurers denied coverage on the basis of material misrepresentation and other grounds, alleging American Cemwood and MacMillan Bloedel had failed to timely disclose the nature and scope of the warranty claims and lawsuits arising from the Cemwood Shakes. As a result, coverage litigation ensued in California and British Columbia, but competing venue disputes ultimately resolved in California's favor.

In 1999, the Richison class action was certified and the presiding judge made a series of unfavorable rulings related to the assessment of class wide damages. The damages evidence estimated the range of class-wide damages to be between $500 million and $900 million. Defenses on liability were weak.

In 2000, MacMillan Bloedel stopped selling the Cemwood Shakes and shut down its subsidiary American Cemwood. Due to the ongoing financial drain from the American Cemwood litigation and other unrelated problems and issues, MacMillan Bloedel put itself up for sale and was ultimately acquired by Weyerhaeuser (via a stock swap), an international forestry company located in Washington State.

Between 2000 and 2003, in a series of complex settlements, the Richison class action and the coverage action were settled for a total of $140 million with MacMillan Bloedel (now owned by Weyerhaeuser) paying $65 million and the primary and excess insurers paying $75 million. In 2003,

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[1] *Roy Richison v. American Cemwood Corp. et al,* Superior Court of California No. 005532. *The class action Plaintiffs alleged the Defendants failed to design, formulate, and test roofing shakes manufactured by American Cemwood Corporation adequately before selling them as durable and suitable roofing products. The Defendants alleged should have known that the shakes failed prematurely, but did not take them off the market. The Defendants denied all allegations.*

MacMillan Bloedel's primary and excess insurers sued their reinsurers, who had also denied coverage, in British Columbia. The reinsurance litigation lasted another 15 years culminated in a 2018 settlement.[2]

In sum, the disastrous Cemwood Shakes which MacBlo acquired as a small essentially sideline business spawned over 25 years of litigation in the United States and Canada, costing American Cemwood, MacMillan Bloedel, Weyerhaeuser and their insurers and reinsurers hundreds of millions of dollars in time, expenses, legal fees and settlement monies.

[2] *Swiss Re Insurance Company v. Camarin Limited*, 2015 BCCA 466, leave to appeal to Supreme Court of Canada denied.