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Brobeck Crafts the Story of Success in Product Liability

By Nina Martin

Daily Journal Contributing Writer

Fibreboard Corp. is about twice the size of Mentor Corp., but its litigation problems were 10 or 20 times worse.

That's why, if the deal Brobeck, Phleger & Harrison worked out for Mentor is an example of smart lawyering — extricating the Santa Barbara implant maker from all breast implant litigation for a mere \$28 million — what it accomplished for Fibreboard is little short of a miracle.

So far, Fibreboard is the only major asbestos company to solve its litigation mess without filing for bankruptcy — one reason an investment group offered to buy the company for about \$189 million last week. Brobeck did it by persuading plaintiffs lawyers to agree to the unheard-of: helping to finance part of Fibreboard's long and bitter fight with its insurers.

The result is a \$3.2 billion to \$3.5 billion settlement among Fibreboard, insurers and injured workers to be finalized in the summer, by far the largest deal ever to resolve product liability claims against a single U.S. company. Of that, more than \$1.5 billion is already in the bank, collecting interest and paying out interim claims.

"There have been settlements that have been wins for everybody, but nothing of the scope of this," said William Levin, a Brobeck partner who is a 12-year veteran of the asbestos wars.

And, perhaps most miraculous of all, those same plaintiffs lawyers fall over themselves to say nice things about the Brobeck team — led by product liability specialists Stephen Snyder and Levin and civil litigation partners William Irwin and Kelly Wooster.

"They [Fibreboard] have faced over 150,000 asbestos claims," said Harry Wartnick of San Francisco's Cartwright, Slobodin, Bokelman, Borowsky, Wartnick, Moore & Hams Inc., who helped negotiate the settlement. "Yet the Brobeck firm has managed to keep Fibreboard solvent. Given how small the company is, and given the fact that Fibreboard was without their insurance coverage [because of litigation] for much of this time, that's a pretty remarkable result."

"Not so many years ago, you could have bought the whole company for perhaps \$10 million on the stock market," said Steve Kazan, of Oakland's Kazan, McClain, Edises & Simon, noting that in 1991, Fibreboard's shares sank to around \$3. Yet on Wednesday, the Walnut Creek-based company announced that a group led by investor Carl Pohlad has offered to buy it for \$45 a share cash — more than \$189 million — after Fibreboard turned down Pohlad's \$178 million unsolicited bid last month.

Company spokesman Steve DeMaria said that a new management team put in place three years ago has played a major role in the company's turnaround from a \$43.9 million net loss in 1991 to an \$11.7 million profit last year. But he also credits the "extremely successful resolution" of the asbestos litigation.

"I have to say, the folks at Brobeck really did a superb job," Kazan added. "They saved the company for their shareholders. They're the only ones in asbestos litigation that have ever done that."

Indeed, the decades-old asbestos litigation is littered with the ruins of battered and broken corporations. "Most of these were companies that burned the furniture

on the ship just to keep afloat," said Brobeck partner Snyder, "and when they ran out of furniture, they burned the timbers . . . and as they ran out of timbers, just before they went under, each filed a petition for protection in bankruptcy court."

Fibreboard — which once had as much as 40 percent of the asbestos market in California and 5 percent to 10 percent of the market nationwide — could easily have ended the same way. "It's been a 'Perils of Pauline' story," Snyder said. "This company came close to the brink many times."

But Fibreboard had something those other companies did not have: fabulous insurance coverage, at least on paper. "It potentially had enough insurance coverage to solve its problem, but it needed time to confirm that coverage in the courts," Snyder said.

It also was determined to avoid bankruptcy, especially as it saw what happened to other asbestos makers, notably industry leader Johns Manville Corp., which filed for Chapter 11 protection in 1982 to resolve its litigation problems even though it was not technically insolvent. Twelve years later, most attorneys agree that the move was a fiasco for Manville and injured workers alike — insurers got off easy, the Manville trust was so underfunded and poorly managed that it, too, filed for bankruptcy, and plaintiffs now control the company.

"The plaintiffs felt betrayed by the Manville bankruptcy," Snyder said. "The codefendants felt they got the short end of the stick [too]. The plaintiffs went into the bankruptcy with a vengeance to protect their interests. . . . The thing went on forever." One group did very well. "I'll tell you one thing — a lot of bankruptcy

lawyers got rich on the Manville bankruptcy,” Snyder added.

The key to Brobeck’s success is that it was able to convince plaintiffs attorneys that they would gain much more for their injured clients if they worked with the company to force the insurers to honor the policies than if they forced Fibreboard into bankruptcy. “If you sold off every asset Fibreboard has, you wouldn’t get \$200 million,” Kazan pointed out. “They were very forthcoming. They opened their books to us. They said, if we can’t work this out, we will give you the keys to the front door.”

Not that Brobeck, which has a bankruptcy practice, would not have benefited from Fibreboard’s insolvency. “The global settlement saved Fibreboard. [But] I’s counter to the law firm’s interests. The law firm, of course, would be better off defending Fibreboard till the end of time,” Levin said.

But the law firm also has a long and unusually friendly relationship with the company dating to before 1917, when founding partner William Brobeck was the outside lawyer for the merger that formed what was then known as the Paraffine Companies and sat on its board until his death.

Brobeck thus was there at critical junctures in Fibreboard’s history: when the company purchased the disputed insurance in the late 1950s; when it got out of the asbestos business in 1972; when Louisiana-Pacific Corp. acquired it in 1978; and in 1988, when the deluge of asbestos litigation prompted Louisiana-Pacific to spit out Fibreboard, which now makes wood products and insulation and runs resorts in Lake Tahoe, to fend for itself. “Our representation of Fibreboard has been one of the most challenging and satisfying professional [endeavors] that you could have,” Levin said.

Through much of the 1970s, when the asbestos cases were still a relative trickle, Fibreboard’s insurers honored their policies. But by 1979, the number of cases had become quite large, a coverage dispute erupted, and Brobeck’s lawyers sued. The litigation grew into a many-headed monster, with five manufacturers suing dozens of insurers; the culmination was a 29-month, six-phase trial before San Francisco Superior Court Judge Ira Brown in a school auditorium that had been renovated to accommodate more than 33 teams of lawyers.

Fibreboard prevailed over the insurers on

virtually every issue. In 1985, it and most of the other asbestos makers settled with several of the insurers and used the money to establish a creative joint approach to slash litigation costs and beat back plaintiffs lawyers.

But in 1988, the group — known as the Asbestos Claims Facility — fell apart because of the rapid growth in asbestos claims and conflicts among the members. Fibreboard again was on its own, without money and still litigating its coverage dispute with two insurers, Continental Casualty Co. and Pacific Indemnity Co.

At this point, Brobeck and Fibreboard figured they could not save the company alone. They had to enlist the help of the very plaintiffs out for the company’s hide.

To accomplish this, Brobeck devised a novel strategy. First, it launched a national campaign, known as the Structured Settlement Program, to persuade plaintiffs lawyers to extend credit to Fibreboard — settle now, get most of the money later. In turn, Brobeck assigned the plaintiffs its interest in its lawsuits against the insurers.

“We said to [them], if you will just bear with us, we may be able to deliver this coverage and actually pay you, but if you don’t [Fibreboard may have to file bankruptcy],” Snyder said. “I was out with my hat in my hand, crawling around on my hands and knees [to plaintiffs lawyers] around the United States, saying, ‘Look, guys, we have our differences, but this is not one of them.’”

Second, Brobeck and Fibreboard hammered out a series of interim funding agreements whereby they persuaded Continental Casualty and Pacific Indemnity to make partial payments to some plaintiffs as a good-faith gesture that also helped Fibreboard stretch out its quickly dwindling funds.

The turning point came in January 1990, when Judge Brown issued a ruling that amounted to complete victory for Fibreboard over its insurers. He ruled that for all workers exposed for even one day during the years when the policies were in effect — 1957-1959 — or before Continental and Pacific Indemnity were liable for up to \$500,000 for each individual bodily injury claim, and up to \$1 million for each “occurrence,” with no aggregate limit.

With this tremendous leverage; Fibreboard and plaintiffs lawyers worked for the next two year to hammer out a global settlement that would resolve all the claims.

Not that it was always smooth going. “Everyone has gotten up, yelled and stormed out of meetings on multiple occasions,” Kazan said. “Everyone has made suggestions that were not only anatomically implausible but fascinating, to say nothing of the horses people rode in on.”

Eventually the insurers “looked at the totality of this and realized that Fibreboard’s lawyers and their little carpet-bags and frequent-flier miles had [made] over \$1 billion of these assignment settlements,” Snyder said. Last year, they decided to join the negotiations, too.

Of the deal announced last August and set for a fairness hearing late in the summer before U.S. District Judge Robert Parker in Beaumont, Texas, Fibreboard’s contribution is just \$10 million. The rest will be put up by the insurers — including around \$1.5 billion to settle all future claims against the company, which is already in a bank in Chicago drawing interest and paying the most severely stricken workers, and up to about \$2 billion to resolve current claims, to be paid on an ongoing basis.

In present value terms, that makes the deal bigger even than the \$4.7 billion breast implant settlement, which will be funded over the next 30 years.

Plaintiffs lawyers say the fund is equally praiseworthy for the way it protects claimants — three nationally prominent trustees; a trust distribution process that assures money will be available for 60 years; speedy claims procedures that mean plaintiffs will get their money in a matter of weeks, rather than years; and the right to sue if victims believe the settlement is too low. “I am incredibly proud” of these provisions, Wartnick said.

So far, only one lawyer has filed a formal complaint against the proposed settlement. Attorneys said no one wants to be responsible for killing the settlement and risking the possibility that the often pro-insurer California Supreme Court will declare in the future that Continental Casualty and Pacific Indemnity’s liability is far less than Brown ruled.

“From the victims’ viewpoint, it’s a remarkable result,” Wartnick said. “If this succeeds, Fibreboard becomes the first asbestos company to walk away with no liabilities and no bankruptcy. The insurance companies get certainty. It’s a win-win-win situation.”