The Economics of Product Liability & Mass Torts
Our team of experts offers an unmatched combination of economic credentials, industry expertise, and testifying experience.
The scope and complexity of product liability and mass torts litigation continues to expand, with companies facing ever-growing exposure. The magnitude and complexity of these disputes are fueled not only by increasingly creative and challenging plaintiff claims, but also by the complications inherent in product manufacturers and sellers expanding their businesses around the world. Potential mass tort liability can create financial uncertainty that can damage a firm’s stock price, its future earnings, and even its prospects for survival.

Consequently, corporations are under intense pressure to increase awareness of their liability exposure. They need to determine where the greatest risk lies for mass torts litigation—and which products, services, or processes are most vulnerable. Correctly assessing the magnitude of a company’s exposure is a critical issue for senior managers charged with:

- Managing risk
- Unlocking valuable transactions held up by issues of fraudulent conveyance
- Structuring and pricing liability insurance
- Assessing when an insurance policy would likely be exhausted
- Correctly sizing a possible trust settlement
- Setting aside appropriate reserves

For half a century, NERA experts have been central to client success in some of the world’s highest-profile cases related to litigation, regulation, and business challenges. Our experts employ economic theory and cutting-edge quantitative techniques, grounded in a thorough understanding of market facts, to provide practical approaches to, strategies for, and analyses of the product liability challenges facing our clients.
NERA’s Mass Torts and Product Liability Practice

NERA has developed one of the largest in-house teams of economists in the economic consulting world. Our Mass Torts and Product Liability Practice assists clients with projects ranging from valuing liabilities in multi-billion dollar bankruptcies to assessing potential exposure before products have been marketed. Our experts bring together the required disciplines—including economics, statistics, epidemiological modeling, computer programming, actuarial analysis, accounting, and insurance allocation—to address complex valuation problems that arise in mass tort and product liability matters.

Retained by defendants, plaintiffs, insurers, and companies engaging in mergers or acquisitions, we have provided consulting services and expert testimony in a variety of settings, including:

• Bankruptcy hearings
• Consumer class actions
• Forecasts for financial reserves
• Fraudulent conveyance actions
• Insurance allocation disputes
• M&A due diligence

Our experts quickly synthesize available resources to provide the critical information companies need to assess their present and future liability.
Our expertise has been developed across a range of different products and industries, including:

- Aircraft and other transportation
- Asbestos, silica, and mixed dust
- BPA
- Building products, including drywall, joint compound, hardboard siding, and polybutylene pipe
- Contaminated ground water
- Firearms
- Food additives, including diacetyl
- Industrial chemicals, including manganese, benzene, and beryllium
- Lead
- Mold
- Oil spills and other environmental hazards
- Pharmaceutical and medical device
- Tobacco

Experts in NERA’s Mass Torts and Product Liability Practice have been analyzing issues arising in these areas for more than 30 years. We have submitted expert reports and offered economic testimony in US state and federal courts, before Congress, and in international courts and arbitrations.
In mass torts and product liability, as in all of NERA’s work, our experts focus on the key areas where the rigorous application of economics provides the most value to our clients. Our work in these areas is grounded in a set of core principles that have always guided our efforts: focus, independence, rigor, defensibility, and clarity. NERA economists have experience consulting and testifying on a variety of product liability matters, including personal injury claims, property damage claims, consumer class actions, and high-profile product recalls. Through our extensive experience, we have developed proprietary resources, including claims databases and forecast programs. We have analyzed publicly available data, estimated the likelihood of recalls, and, when a product recall occurs, modeled product failure rates and anticipated uptake rates. We have also compiled historical information on labor statistics and turnover in numerous occupations that allows us to estimate the potentially affected population in cases involving personal injury claims.

### Claim Forecasting

Mass tort and product liability projects frequently involve estimating the number and value of claims likely to be brought in the future against a defendant, as well as valuing claims that are already pending. Combining scientific analysis with behavioral economics, NERA experts have developed rigorous models to forecast product liabilities. Among other applications, NERA experts use such forecasts to establish the size of bankruptcy trusts, assess the value of insurance coverage, or help companies establish financial reserves. Estimating future product liability is not merely a matter of extrapolating recent claims filings and recent dollars paid into the future. Instead, NERA’s approach to forecasting recognizes that it is important to understand and model the processes that generated those claims. In doing so, we are able to identify and incorporate the impact of changes in a wide range of critical factors, such as legislative reform, workplace screenings, and smoking habits. This approach also allows us to tailor our forecast to the many varied situations that companies may face, such as historical variation in their product sales by region or a change in their own litigation strategy. We also advise clients on how to manage their risk once it is quantified, including estimating the size and costs of a class for medical monitoring purposes.

### Claim File Coding and Analysis

Our experts have mastered all aspects of capturing, coding, and organizing information from claims files to generate electronic databases. It is often the case in mass tort and product liability cases that relevant data are available in hard copy (paper) files only. Proper analysis of these data may require that the data first be manually coded to convert the information into an electronic database. NERA has extensive experience with coding of this type.
Bankruptcy Trust Consulting
Over the past 30 years, companies with large mass tort liabilities have increasingly filed for Chapter 11 protection. NERA experts work with companies that enter bankruptcy reorganization to resolve pending and future mass tort liability claims, as well as for insurers and other parties affected by the bankruptcy. In connection with bankruptcy proceedings, we provide assistance in the design of proof of claim forms and more detailed survey forms intended for a representative sample of claimants. To forecast claims likely to be filed against bankruptcy trusts, NERA experts develop claims forecasting models that rely on epidemiological models or product failure rates, as well as behavioral economics. NERA economists manage proof of claim data and provide analyses that range from simple summaries of the claim population to liability valuations under alternative trust distribution plan structures.

Statistical Sampling
NERA has designed samples for use in class actions, construction defects, product liability, insurance disputes, asbestos, and other claims. Examples include developing samples of houses to test building products, samples of food products to test for contamination, samples of windows to test for leakage, samples of sales records to estimate total sales, samples of health injury claims to estimate the rate of correct documentation of claims, and samples of potential class members to conduct surveys.

Asbestos and other Toxic Torts
Unquantified toxic tort liability can create financial uncertainty that can damage a firm’s stock price, its future earnings, and possibly its prospects for survival. NERA’s experts have been analyzing issues related to toxic torts for more than 30 years. We bring together the required disciplines—including economics, statistics, accounting, epidemiological modeling, computer programming, and insurance modeling—to address complex valuation problems that arise in mass tort and product liability matters. We have developed claims forecasting models, which often rely on epidemiological studies or product failure rates, as well as behavioral economics. We have experience projecting newly emerging torts as well as more mature torts. With respect to an established tort such as asbestos, our experience with estimation across many different industries and geographic areas allows us to monitor current trends in filing and settlement patterns and adjust our forecast assumptions accordingly.

Use of Census Tract Data to Quantify Potential Claimants
Consumer Class Actions and Class Certification

NERA experts provide assistance at each stage of consumer class actions alleging misrepresentation, fraud, product failure, or diminution of value. We are often asked, at an early stage of a class action, to assess data requirements and assist clients with data management issues. In cases where data from business records relevant to the litigation are unavailable, NERA experts have conducted surveys to fill the data gap. Our empirical analyses have been used at the class certification stage to provide an evidentiary basis for properly delineating a class consistent with the requirements of Rule 23(b) or rejecting class certification altogether. If the class has already been certified, our experts help by quantifying potential exposure, as well as developing rigorous estimates of any potential damages. For parties engaged in the development of structured settlements, NERA assists by modeling the expected liability and administrative costs of settlement proposals. We determine the best settlement structure by estimating the effect of alternative payment and qualification criteria. We also model cash flows, funding needs, and related insurance recoveries.

Survey Research and Design

NERA economists use quantitative research, choice models, and other survey techniques to reach conclusions in a range of issues—such as market definition, claiming rates and product defects analysis in mass torts, alleged theft of trade secrets, and Lanham Act claims of alleged trademark infringement or false advertising. Our surveys can help identify how consumers choose among service or product configurations, which attributes sway purchase decisions and whether certain names or designs have achieved meaning in the marketplace. Our expert statisticians and economists combine a deep knowledge of sampling techniques, survey administration, and analyzing complex sets of data with a firm grounding in econometric principles and practice. We help clients in industries including automotive, health care, entertainment, consumer products, software, and food products, among others.

Predatory Lending and Unfair Practices

NERA experts analyze allegations related to predatory lending behavior, including allegations that the loan-generating process itself was fraudulent or that certain types of loans or loan characteristics were unsuitable for the borrower. NERA develops models to test allegations of discriminatory practices related to disparate treatment of groups based on race or other demographic characteristics. We use econometric analysis to understand the causes of differences in loan prices and terms, including the credit history, education, and income of the borrower, as well as the borrower’s preference for risk (or discount rate). Our experts also consider the competitiveness of the market in which the loan was arranged and other macroeconomic factors.

Legislation Impact Analysis

NERA experts have analyzed the impact of existing and proposed legislation on companies, industries, and nations. We have estimated the effect of legislation on claim filing rates, settlement values, and the broader economy. We have analyzed how past tort reforms have affected filings rates and modeled the ways in which high levels of claim filings can lead to tort reforms. NERA’s multi-disciplinary expertise, including macroeconomics, behavioral economics, econometrics, and experience pinpointing relevant data, makes us uniquely qualified to conduct such studies.
Quantifying Medicare Section 111 Costs
NERA’s statistical and epidemiological analysis can help companies comply with the Medicare reporting standards under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA). We can estimate the portion of aggregate indemnity payments that are paid to claimants who are also eligible for Medicare reimbursement, and the likely amounts of this Medicare reimbursement. Such analyses incorporate disease progression and mortality. The analysis can be done for payments that have already occurred, as well as for projected future payments. The results of these modeling efforts can allow companies to set aside appropriate reserves.

Insurance Coverage and Allocation Consulting
Mass tort and product liability claims give rise to a number of issues for insurance companies, lawyers specializing in insurance law, and companies with insurance assets. NERA experts bring together the required disciplines—including economics, statistics, epidemiological modeling, computer programming, accounting, and insurance modeling—to address the complex insurance allocation and valuation problems that arise in these matters. NERA’s experts have extensive experience in allocating the historical as well as projected liabilities to appropriate insurance policies and have developed computer programs to value insurance assets and forecast insurance recoveries quickly and efficiently. We have testified in such matters for parties including insurers, reinsurers, and policy holders.

Expected Insurance Exhaustion Under Alternative Allocation Rules

- **All Sums Allocation**
- **Pro Rata Allocation**
- **Probability Weighted**
Case and Project Profiles

NERA’s experts bring to bear a passion for finding the right answer. Our economists have consulted on a variety of liability-related matters, ranging from the highest profile, multi-billion dollar product liability case, to a quick assessment of potential exposure prior to an acquisition, to a projection of the path by which a current trickle of claims might escalate. The following case and project profiles illustrate the breadth of our experience in the area of mass torts and product liability.

Congressional Testimony in Conjunction with FAIR Act
NERA’s experts were asked to provide testimony during Senate hearings related to the Fairness in Asbestos Injury Resolution (FAIR) Act, which proposed a $140 billion trust fund to compensate victims of asbestos exposure. NERA estimated that asbestos litigation has cost the US economy more than $300 billion to date, significantly impacting the nation’s productivity and competitiveness, and that the trust fund would save more than $70 billion in future administrative and legal costs alone. Our testimony, which was cited by the Congressional Budget Office, also refuted assertions that the fund would quickly go bankrupt.

Pharmaceutical-Insurance Dispute
For a dispute between a pharmaceutical company and an insurer, NERA experts presented statistical analysis, supported by coding information found in the universe of claims files, demonstrating that rates of side effects from a pharmaceutical product were similar to rates warned of on the product’s label. The arbitrators agreed with NERA’s analysis, concluding that as a result, the claims were not covered under the insurance policy.

Dow Corning
Dow Corning Corp. filed for Chapter 11 federal bankruptcy protection because of lawsuits over silicone breast implants. The Chapter 11 reorganization plan proposed to establish a settlement facility and a litigation facility to pay compensation to personal injury claimants. The financial obligations of these facilities had to be estimated to determine the adequacy of the proposed funding of the plan. NERA estimated the liquidated value of all present and future product liability claims under the proposed plan including settlements and opt-outs. In deciding that the proposed Bankruptcy Plan was adequately funded, the Court adopted NERA’s analysis in full, finding it to be “thorough, logical, well-documented and credible.”
In RE: W.R. Grace & Co., et al

W.R. Grace & Co. (“Grace”), a global specialty chemicals and materials company that mines, produces, and markets vermiculite products, voluntarily filed for reorganization under Chapter 11 of the US Bankruptcy Code. Historically, the company produced Zonolite Attic Insulation (ZAI), which may contain trace amounts of a naturally occurring asbestos. At the time of the filing, the company faced more than 129,000 personal injury claims. During the bankruptcy proceedings, NERA was retained by Grace to assess whether the company was likely to be subject to substantial future property damage (PD) demands, arising out of the same or similar conduct or events that allegedly gave rise to PD claims covered under Grace’s bankruptcy reorganization plan. In testimony based on studies conducted by the EPA and the Canadian government concerning the amount of ZAI that had been installed historically, along with NERA’s own estimates of the number of buildings constructed that might have used a Grace asbestos-containing product, the NERA expert concluded that Grace was likely to be subject to substantial future PD demands for payment arising out of the same or similar conduct or events that gave rise to the ZAI and other PD claims. The NERA expert also identified a variety of factors that would introduce risk and uncertainty into any forecast of such claims, rendering indeterminate their amounts, numbers, and timing. The court found Grace’s reorganization plan to be consistent with the best interests of creditors—citing NERA’s testimony regarding the likelihood of demands—setting the company on a path towards emergence from Chapter 11 after nearly a decade under court protection.

Predicted Claiming Rate by Age and Perceived Cause of Injury
Fraudulent Conveyance Analysis in Lyondell Bankruptcy

Lyondell Chemical Company ("Lyondell"), a chemicals manufacturer and petroleum refiner, and Basell AF S.C.A. ("Basell") entered into a merger agreement. When the all-cash merger closed, Lyondell became a wholly owned indirect subsidiary of LyondellBasell Industries AF S.C.A. ("LBI"), creating one of the world’s largest polymers, petrochemicals, and fuels companies. In order to facilitate the merger, Lyondell and some of its affiliates and subsidiaries (the "Debtors") entered into debt facilities representing a maximum of $22.6 billion in financing. A little more than a year later, Lyondell and certain of its affiliates and subsidiaries filed for Chapter 11 protection in the Bankruptcy Court in the Southern District of New York. Following the bankruptcy, the plaintiff, the Official Committee of Unsecured Creditors, filed a fraudulent conveyance lawsuit against LBI and its financing parties, alleging that, at the time of the merger, LBI was insolvent because the stated value of its liabilities exceeded the fair value of its assets; that LBI was insufficiently capitalized to fund its operations through a downturn; and that the bankruptcy was foreseeable. NERA was retained by LBI to conduct an independent review of the Committee’s claims and to conduct an independent evaluation of the findings filed by the plaintiff’s and defendants’ experts. Specifically, NERA was asked to evaluate the reasonableness of EBITDA projections offered by Basell and Lyondell management and relied upon at the time of the merger; the solvency and capital adequacy of LBI at the time of the merger; and the foreseeability of certain global economic, market, industry, and LBI-specific events that preceded LBI’s bankruptcy. LBI subsequently agreed to settlement terms with the Committee, paving the way to LBI’s emergence from Chapter 11. NERA’s work aided LBI substantially in consensually resolving a major dispute in one of the most contentious recent Chapter 11 cases.

UK Solvent Scheme in Insurance Dispute

Fifteen insurance and reinsurance companies proposed a solvent scheme of arrangement, called the WFUM Pools Scheme, to terminate the run-off of these insurance policies. The 15 companies were seeking sanction of the WFUM Pools Scheme from the High Court of Justice in London (UK). The proposed scheme was one of the largest and most complex schemes of arrangement proposed to date. A NERA economist served as an expert witness on behalf of the insurance companies. The NERA expert presented evidence to the High Court at the creditors’ class definition stage as well as the sanction stage. NERA’s evidence covered several topics including the estimation methodology for claims related to toxic torts, and large corporations’ risk management strategies. The WFUM Pools Scheme was sanctioned by the High Court relying in part on NERA’s evidence.
Babcock & Wilcox Fraudulent Conveyance
In a fraudulent conveyance action, NERA economists testified on behalf of Babcock & Wilcox regarding the reasonableness of its historical forecast of asbestos liability. Our experts conducted statistical analysis that showed the assumptions underlying the forecast were valid and demonstrated that the avalanche of claims subsequently received by the company could not have been anticipated. The court was persuaded by NERA’s analysis and testimony and concluded that B&W was not insolvent at the time the forecasts had been made.

Handguns Litigation
The NAACP sued handgun manufacturers, distributors, and importers claiming that their negligent sales and distribution practices had an effect on the use of guns in crime. On behalf of the NAACP, NERA analyzed the number and source of handguns used in crime as well as the relationship between guns used in crime and the practices of manufacturers and dealers. Judge Weinstein accepted the analysis presented by NERA, calling NERA’s findings “robust, adequate, accurate, and reliable.”

Historical Variation in Tort Costs Per Capita by Country
About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA’s economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world’s leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA’s clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world’s largest economic consultancies. With its main office in New York City, NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

For more information about our capabilities and services in Mass Torts and Product Liability, please visit www.nera.com/masstorts.