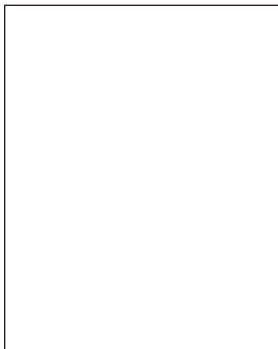


Stipendiatresa till England **Allocation of Asbestos Claims**

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The name asbestos covers six silicate minerals. Three of these are used industrially. Because of its unique combination of qualities, the utility of asbestos fibres was recognized in ancient times. Besides being inextinguishable and heat resistant, it is highly flexible and resistant to acids and alkalis.

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Historical Background

Many lives have been saved by the fire retarding effect of asbestos. It is however a known fact that the inhalation of large quantities of asbestos fibres may lead to asbestosis, lung cancer and mesothelioma.

Asbestosis is a disease which resembles silicosis. Mesothelioma is a form of malignant lung cancer. The average latent period for asbestosis from exposure to outbreak is 17 years, lung cancer 20-23 years, and mesothelioma, 30-40 years. There is no method of treatment for asbestos fibres encapsuled in lung tissues.

In the 60's a large number of men who had been employed in building warships during World War II died of a serious lung disease.

It was later proven that they had inhaled asbestos fibres during their work in the shipyard.

By the end of 1983 about 25.000 individuals had claimed compensation for a disease which they attributed to exposure to asbestos at their work place.

Since 1982 the Asbestos Claims Council has been meeting to discuss the problems associated with asbestos related claims. The council consists of six insurers and six producers. At this Council the conditions of the Wellington Agreement were negotiated. A settlement agency, The Asbestos Claims Facility organized and operated by producers and liability insurers jointly will handle claims by asbestos victims and allocate them to the respective policies held by asbestos producers.

(Producers = persons that are or were engaged in the mining, manufacturing, production processing, fabrication, distribution, installation, sale or use of asbestos or asbestos containing products or that may have a liability with respect to asbestos related claims.)

The Asbestos Claim Facility and membership of the Wellington Group of Insurers was beneficial to the industry as a whole in that the costs of asbestos related claims both in terms of legal expenses and indemnity payment were significantly reduced.

Scope and Focus

When considering asbestos related claims, one must take into consideration bodily injuries and property damages.

Victims suffering from bodily injuries are usually those coming into contact with asbestos through its mining, its manufacture, its transformation into products themselves. These include construction workers, shipyard workers, and insulators.

Property damage refers to asbestos products such as structural fireproofing or acoustical plaster present in buildings. Buildings affected are usually schools, municipal buildings, colleges and universities.

The magnitude of the asbestos property damage problem can be assessed by the results of a recent US Department of Energy study which found that there are about 750,000 public and commercial buildings containing asbestos insulation.

In property damage claims the date of loss has usually been accepted as the date of installation of the asbestos. In respect of bodily injury claims, the US courts have held the reinsurers liable on a continuous trigger basis, that is, the entire period between the first exposure to asbestos to manifestation of the illness, date of the claim for damages and finally date of death.

The "trigger" issue concerns what must

take place during the policy period in order for policy coverage to be implicated. This revolves around the policy definition of "occurrence".

There are several "trigger" theories. These are exposure trigger, manifestation trigger continuous trigger and the injury-in-fact trigger.

The Exposure trigger. Coverage is provided only by the policy or policies in force at the time of exposure to a harm causing agent.

The Manifestation trigger. Coverage is provided only by the policy or policies in force at the time a harm is first detected.

Continuous trigger. Coverage is provided by all policies in force during the period from and including first exposure through ultimate manifestation.

The Injury-in-fact Trigger. Coverage is provided only by the policy or policies in force at the time of the onset of the actual harm (can be either bodily injury or property damage.)

When considering whether claims can be presented for collection under reinsurance treaties, one must scrutinize the contract language, paying particular attention to the limits, definition of loss occurrence, definition of loss adjustment expenses and the presence of an aggregate extension clause.

The aggregate extension clause may apply where certain losses both individually and collectively are covered under a policy which is subject to an aggregate limit. If the clause applies those losses will be treated as one occurrence with one retention, one limit and one date of loss.

Allocation issues are perhaps the most important for reinsurers with long tail claims exposure. Not only are they important, they are also very complex.

Will expenditures be allocated only to insurers or must the insured share in the allocation on some basis?

On what basis will expenditures be allocated – time on the risk, time on the risks plus limits or some other manner?

Will expenditures be allocated vertically in one policy period, or must all primary coverage be horizontally exhausted before any other layers of coverage be impacted?

Cedents might choose to allocate a loss to minimize their retention and thus maximize their reinsurance recovery.

Loss adjustment expenses is another important issue to consider. A reinsurer must scrutinize his contract wording to determine whether the cedent has allocated the expenses among all underlying policies and to the reinsurers of those policies.

Declaratory Judgment (DJ) expenses are expenses incurred by an insurer when he seeks an interpretation from a court concerning the underlying insurance policy and the insurer's responsibilities. These expenses are often lumped together with other legal costs.

Costs of defence. The reinsured has a duty to its reinsurers to defend claims and only by reading the contract will one know whether or not defence costs are recoverable.

Conclusion

These are only few of the many problems confronting the reinsurers when dealing with the allocation of asbestos and asbestos related claims. Many court cases have been held both in the US and the UK to determine whether or not costs allocated to these and other types of latent claims should be paid by the reinsurer.

There are substantial numbers of asbestos cases still unresolved. The insurance industry in the USA have not yet reserved for the potential future claims.

We will obviously have to live with the asbestos insurance and reinsurance problems for many years to come.