KEY INSURANCE ISSUES IMPACTING ASBESTOS COVERAGE

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Insurance Coverage for Asbestos Claims

• Disputes regarding insurance coverage for long-tail asbestos and environmental claims are decades old.

• Many companies’ insurance programs have developed their own “history.”
  – Some have been partially settled.
  – Some include insolvent insurers.
  – Some involve several now-unrelated companies seeking coverage under a policy issued to a corporate predecessor.
  – Combinations exist of all of the above.

• These factors raise a myriad of issues regarding coverage under an insurance program for asbestos claims.
KEY ISSUES THAT MAY AFFECT COVERAGE

• Trigger
• Allocation
• “Non-Products” or “operations”
• Number of Occurrences
• Policy terms: Exclusions, Deductibles, Self-Insured Retentions
TRIGGER

• What policies will be called to respond to asbestos loss?

• Unique problems of long tail claims:
  – Injury spread/developing over many years, potentially hitting many policies.

• Three theories for trigger of coverage:
  – Injury-in-fact: Requires demonstrating “bodily injury” during the policy period.
  – Exposure: Coverage triggered in each year with exposure. Less emphasis on injury.
  – Continuous Trigger: Coverage triggered in all years from first exposure to the earlier of death or unavailability of coverage (i.e., 1985).
How is asbestos loss spread—i.e., allocated—among multiple triggered policies over many years?

- **Pro Rata:** Each insurer’s respective share of indemnity (and sometimes defense) costs are allocated on a *pro rata*, time-on-the-risk basis, eliminating the need for contribution actions among insurers.
- **All Sums:** All triggered insurers are jointly and severally liable for “all sums,” up to policy limits, of the policyholder’s loss.
- **New Jersey uses hybrid approach:** proration on the basis of policy limits, multiplied by years of coverage.
Potential Issues

• Pro-Rata:
  – Who bears responsibility for uninsured or underinsured periods, or for policies issued by now-insolvent insurers?
  – Should allocation period end at the onset of asbestos exclusions – i.e., when coverage was arguably “unavailable”?

• All Sums:
  – Is spiked insurer entitled to contribution, and if so, should policyholder bear responsibility for uninsured/insolvent periods?
  – Setoff/credit for amounts recovered from other insurers
Summary of Jurisdictions

- Pro Rata Jurisdictions:
  Alabama, Arizona, Colorado, Connecticut, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New York, South Carolina, Utah, Vermont

- All Sums Jurisdictions:
Non-Products/Operations Coverage

- How an asbestos claim is classified has potentially significant economic ramifications.
- Claims arising out of exposure to products manufactured, sold, or distributed by a policyholder are subject to products/completed operations and/or aggregate policy limits.
- Claims arising out of exposure to asbestos during policyholder’s operations (i.e., installing insulation) or at the policyholder’s premises may not fall within the definition of products/completed operations, and thus may not be subject to those limits.
  - Policyholders contend that such “non-products” claims are subject only to “per-occurrence,” but no aggregate, limit.
  - Potential that insurance policies will never exhaust.
Operations vs. Completed Operations

• *Wallace & Gale* doctrine: completed operations and products hazard definitions apply where the bodily injury in a given policy period occurs *after* the operations have been completed or possession of the product has been relinquished. *Wallace & Gale Co. v. Liberty Mutual Ins. Co.*, 385 F.3d 820 (4th Cir. 2004)
  
  – This rule was recently adopted in *Plant Insulation Co. v. Fireman’s Fund Ins. Co.*, No. 06-448618 (Cal. Super. Ct. Apr. 8, 2013).
NUMBER OF OCCURRENCES

- Occurrence-based policies provide coverage for “occurrences” that take place during the policy period.
- How many occurrences do asbestos claims constitute?
  - Is each claim one occurrence?
  - Is each site at which claimants are exposed one occurrence?
  - Do all claims give rise to one occurrence?
No Uniform “Occurrences” Position

• Number of Occurrences can impact coverage in various ways:
  – Multiple occurrence ruling may maximize available coverage where policies have no aggregate limits or deductibles
  – Single occurrence ruling may maximize coverage when policies have high deductibles/SIRs, or where underlying coverage is exhausted and policyholder seeks to attach excess coverage
Determining Number of Occurrences

• Cause test:
  – Most jurisdictions apply this test.
  – “The court asks if there was but one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damage.” *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330 (3d Cir. 2005).

• Unfortunate events test:

• Effects test:
  – Rarely applied; one claim is one occurrence.
Limiting Coverage Through Asbestos Exclusions

• Policies contain exclusions that limit available coverage

• Absolute Asbestos Exclusion: Excludes claims directly or indirectly arising out of or resulting from asbestos

• “Asbestosis” Exclusion: Excludes claims for “asbestosis or any similar condition caused by asbestos”
  – Does “asbestosis” exclusion bar coverage for all asbestos-related bodily-injury claims, or only those claims where the plaintiff’s alleged diagnosis is asbestosis?
Policyholder Deductible/SIR Obligations

• Policies may contain deductible obligations or self-insured retentions
• Insurers contend that these obligations must be satisfied before coverage is available
• Do these obligations apply on a per-claim or per-occurrence basis?
• Must policyholder prove actual payment of deductible/SIRs before coverage becomes available?
Practice Pointers: Settlement

• “Settling” asbestos insurance coverage disputes can take many forms
  – Coverage-In-Place
  – Policy Buyback
  – Other settlements
Coverage-In-Place/Interim Funding Agreements

- Insurers and policyholder agree on terms for paying defense and/or indemnity costs for asbestos claims
- Often address claims handling issues
- Insurers and policyholder maintain ongoing relationship
Policy Buybacks

• In exchange for a lump sum or stream of payments by the insurer, policyholder and insurer fully and finally release each other from any further policy obligations
• Policyholder achieves the certainty of receiving cash and avoids the risk of insurer insolvency or non-payment
• Insurer benefits by capping and liquidating coverage obligations
Settlements In Between

- Payments in exchange for releases, but not as broad as full policy buyback
- Litigation settlement: only those claims currently at issue in pending dispute
- Known claims: all known products/mass tort claims (including any claims not at issue in pending dispute)
- Complete products/toxic tort buy-back: all claims (known and unknown) that would impact the products/mass tort coverage