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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Persistence Of Trigger, Allocation Disputes

Law360, New York (February 11, 2009) -- In today's financial turmoil, it is understandable that professionals writing on insurance coverage concentrate on directors' and officers' policies.

Anecdotally, though, when at a conference several years ago someone asked the Lloyd's representative what would be the asbestos of the 21st century, his reply was "asbestos."

Long-term injuries such as asbestos remain a steady drain on the resources of companies, and the creativity of the asbestos plaintiffs' bar guarantees that this potentially crippling liability will not disappear in the foreseeable future.

New insurance decisions by appellate courts in New York and California concerning asbestos and environmental claims reopen old issues of trigger and allocation, disputes that courts should have put to rest many years ago.

Continental Casualty Co. v. Employers Insurance Co. of Wausau, 2008 N.Y. App. Div. Lexis 9966 (1st Dept. Dec. 30, 2008); *State of California v. Continental Insurance Co.*, 2009 Calif. App.1 (4th Dist. Jan. 5, 2009).

Trigger and allocation concern which insurers pay, and how much each pays, when more than one insurance policy applies to a loss.

The decisions in *Continental Casualty* and *State of California* demonstrate that even after more than 30 years of coverage litigation, uncertainty as to basic parameters still exists concerning coverage for bodily injury and property damage that take place over the course of years, including such exposures as asbestos, silica and other industrial products, environmental claims, construction claims, and medical device and drug cases.

Moreover, case law differs dramatically, often dispositively, from state to state. This article examines the two new decisions, and more generally discusses the continuing

uncertainty concerning trigger and allocation issues that continue to plague insurance coverage for long-term injuries.

Prior to about 1980, very few reported cases addressed insurance disputes between major corporations and their insurers. Almost all of the case law concerned individuals and small businesses pitted against their insurers, often over life and auto insurance. In a stable world of risk, corporations and insurers could agree on and accurately measure potential liabilities, leading to few coverage disputes.

By 1980, though, the advent of asbestos and environmental liabilities dramatically broke up this state of affairs. These liabilities were huge, retroactive, and in many instances strict and joint and several.

Moreover, neither policyholders nor carriers had reserved for them. Environmental, asbestos and other long-term injury cases (such as DES and silica) raised new and evolving issues of "trigger and allocation," insurance concepts that did not previously exist.

Previously, almost all insurance disputes concerned accidents, such as slip-and-falls and auto accidents, which took place instantaneously, at a specific time and place. The new liabilities involved amorphous injury processes that did not fit into the existing paradigm.

Pulling the Trigger

"Trigger" involves which insurance policy or policies must respond to injury or damage. The general rule is that the policy in place when the injury or damage occurs must provide coverage. However, when a worker is exposed to asbestos from 1950 to 1970 and is diagnosed with asbestosis in 2000, when did the injury occur? This is the essence of trigger disputes.

Most all courts have addressed this issue through the legal fiction of "first exposure." These courts have accepted the medically suspect fact that bodily injury commences when a single asbestos fiber becomes embedded in the lung tissue.

These courts then make the entirely suspect jump of equating that first exposure to the commencement of the injury process that results in asbestosis decades later.

However, as set forth in *Continental Casualty*, it is impossible to know if the claimant actually inhaled an asbestos fiber at his first day on the job, much less whether the first inhaled fiber did indeed commence the process that terminated in an asbestos disease.

Continental Casualty concerns an altogether too familiar fact pattern. Keasbey was a distributor and installer of insulation materials, including the mixing and distribution of asbestos-containing cements. Keasbey had 17 consecutive primary insurance policies with CNA from 1970 to 1987. (*Continental Casualty* is a CNA company.)

Thousands of claimants brought claims against Keasbey for bodily injury caused by asbestos. Most of these claimants were bystanders who claimed injury arising from being in the vicinity of Keasbey insulators.

CNA defended and paid such claims under the product liability section of its general liability policies until exhaustion of those limits in 1992. No one ever questioned that these asbestos claims were properly categorized as product liability policies.

Keasbey was dissolved in 2001. However, in 2001, a group of asbestos claimants sent a letter to Keasbey stating that the remaining claims were not product claims but rather operations claims that have a separate aggregate policy limit.

Most comprehensive general liability ('CGL') policies do have separate limits for products and operations, and in most cases the operations coverage does not have an aggregate limit, but only a per occurrence limit.

Thus, if every asbestos claim constitutes a separate occurrence, as it does in many states, including New York, operations coverage provides for infinite coverage. Having exhausted the products coverage, the claimants were now asserting coverage under the operations coverage.

The court dismissed these claims on a variety of grounds, included laches. Ironically, a serious argument does exist that asbestos claims brought by third parties arising from actions by Keasbey personnel in installing asbestos insulation did constitute operations claims. This "product v. operations" issue is now being played out in many venues, particularly in bankruptcy court.

In dismissing the claims, the court in Continental Casualty also addressed and rejected the long accepted legal fiction adopted by the trial court, i.e., that companies are entitled to insurance coverage from the first date that the claimant asserts exposure asbestos.

In the context of operations claims, the court noted that the claimant must be injured during the actual operations. In Continental Casualty, the court found that even if the claimants were exposed during Keasbey operations, they could not show that asbestos injuries that manifested decades later were caused by the exposure during those operations performed by Keasbey.

The court reviewed the medical evidence before it, and found that a single exposure to asbestos generally did not result in asbestosis, but rather that complex issues surrounding the type and duration of exposure could at best provide a range of one the illness commenced.

"However, one indisputable fact to emerge from medical evidence in the plethora of asbestos cases litigated in many different jurisdictions is that actual injury generally develops over time depending on a range of circumstances and conditions, but does not occur upon exposure by inhalation."

The court based its conclusions on the facts of the case before it. It found that the operations performed by Keasbey were short, and that medical evidence demonstrated that it took years of exposure for a bystander to develop an asbestos-related injury. As a result, the court found that the barriers to coverage for these bystanders were "insurmountable."

While the court limited its holding to claims under the "operations" coverage part of the insurance policy. Its dicta apply to most long-term injury cases: "The only conclusion that can be reached is that injury did occur sometime before manifestation and after exposure."

Most if not all industrial diseases have a progression similar to asbestos and similar issues arise with most long-term injury cases. As an example, the same reasoning could apply to environmental claims.

If a polluter dumps pollutants on the ground, does the insurance policy in effect at that time respond? If the pollutants are in a sealed container, does the insured need to show when the first drop of pollutant escaped from the container and actually entered the environment? Or the moment when a critical mass of pollutants entered the ground, requiring remediation?

The court in *Continental Casualty* is correct that exposure as the commencement of the trigger was a myth. However, it is a useful myth. Without it, policyholders may indeed find the barrier to coverage insurmountable. It is impossible to know the precise moment when first exposure is transformed into bodily injury. Indeed, in this context, it is difficult to know what "bodily injury" means.

This problem is aggravated because insurance companies exclude classes of injury as they become known. Most insurance companies began to insert asbestos exclusions in 1986.

Assume that a worker who was first exposed to asbestos in 1960 was diagnosed with asbestosis in 2000. The insured must demonstrate that the worker's exposure actually resulted in bodily injury of some sort prior to 1986. This analysis is probably beyond evidentiary proof by today's standards.

Slicing the Pie

Allocation follows trigger: If an injury exists in more than one year, so that several different insurance companies potentially provide coverage, how much should each of those insurance companies pay? Two basic schools exist: "pro rata" or "all sums" (also known as joint and several).

Assume that the insured has 10 consecutive primary insurance policies of \$1,000,000 each, each with a deductible of \$10,000. Further assume that all of these policies apply to a claim of \$100,000 that has a "trigger period" of 10 years.

Pursuant to the pro rata theory, \$10,000 is applied to each of the 10 policy years. Pursuant to the all sums approach, the insured can select any one year that it chooses to provide coverage for the loss, and the insurer so chosen has the right to seek contribution from other insurers, but not from the insured for any uninsured period that may exist within the trigger.

Pro rata allocation places the responsibility to allocate on the policyholder, while all sums allocation places it on the insurer. The difference between the two approaches is usually huge.

In the prior example, where the insured has an annual deductible of \$10,000, the insured would not have any coverage. Under an all sums approach, the insured recovers the full amount minus one deductible, and the insurer that is chosen must seek contribution from other insurers, but not the insured. This is crucial.

Under a pro rata system, the insured is also responsible for any un-insured periods. In many cases, policyholders cannot locate their policies from many years ago, and their later policies have exclusions. In most pro rata jurisdictions, the allocation for those years falls on the insured.

There are uncounted variations of the basic principles of trigger and allocation law. One particularly persistent issue has resulted from a footnote in the seminal decision *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982), which first enunciated the all sums approach.

The court notes that under the all sums approach, the insured can collect only one policy. To return to our hypothetical, the insured can only access a single policy worth \$1,000,000 less a single deductible.

From the policyholder's view, it should be able to access \$10,000,000. The ability of the insured to access successive policies is known as "stacking." Obviously, this is a much litigated issue.

In State of California, the court agreed with the insured, and held that that it could access the full limits of all of the "triggered" policies. This case involved insurance coverage for the massive environmental cleanup at the Stringfellow site in California.

The insurance litigation had commenced in 1993. The court estimated the cleanup cost at between \$50,000,000 and \$700,000,000. The only insurers remaining in the case were seven excess insurers who had issued 10 multiyear policies. The trial court held that the insured, the state of California, could only recover under a single policy year. The appellate court reversed.

That court reviewed the large number of prior California cases, many decided more than decade ago, that already addressed this issue, and found support for both positions.

The court found that the insurance policy was ambiguous with respect to stacking, and therefore had to be interpreted to promote coverage.

The court further noted that some insurers had included explicit anti-stacking provisions in their policies. On this basis, the court found that the insured (in this case, the state of California could stack consecutive policies.

Conclusion

An insurer commenced the first modern asbestos insurance case in 1976. By 1981, three appellate decisions had set forth the three basic paradigms that still dominate trigger of coverage:

- 1) that coverage only exists during the years of exposure,
 - 2) that coverage only exists in the year of manifestation, and
 - 3) that coverage exists in all policies from first exposure through manifestation.
- Continental Casualty and State of California, decided decades later will not bring closure to these disputes.

As a consequence of federalism, the supreme court of each state has the ability to craft its own law on trigger and allocation.

Moreover, Continental Casualty and State of California guarantee further litigation. Continental Casualty may fully explode what had appeared to be an emerging trend that the continuous trigger was the most effective solution to the trigger issue.

Now, insurers can assert that in each individual case, they can compel the insured to establish the precise timeline of injury. State of California sets the stage for intra-insurer battles over allocation. If insurance coverage litigation was a movie, it would be entitled "The Never-Ending Story."

--By Robert D. Chesler, Lowenstein Sandler PC

Robert Chesler is chair of the insurance litigation practice group at Lowenstein Sandler in the firm's Roseland, N.J., office.

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