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No Time Like The Present:
Current Insurance Recoveries for Present Liabilities that Include Future Costs and Claims

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Insurance is supposed to protect against uncertainty, but these are remarkably uncertain times. Recent decisions from California, the Rhode Island Supreme Court, and the Seventh Circuit show that companies can protect against the uncertainty of long-tail liability through current recoveries for future liabilities under existing insurance policies. These recoveries not only address legitimate concerns regarding long-tail liability, they also help protect against the potential impact of insurance company insolvency.

Concerns Regarding Long-Tail Claims

Companies face an array of claims that were unheard of in earlier times. Newly-developed facts and legal theories have expanded the existing universe of "long-tail" liabilities to include Fen-Phen and other pharmaceuticals, various medical implants and devices, tobacco-related injuries, mold, and even long-delayed sexual molestation claims. The financial impact of existing and projected claims can be overwhelming, as is clear from the bankruptcy reports.

Liability insurance policies often protect against such exposures. Prudent executives know they have rights under their historic insurance policies for these long-tail claims, and are prepared to enforce their rights.

Concerns Regarding Insurance Company Solvency

Today's insurance market presents additional uncertainties concerning the long-term viability of many insurance companies, including the London market. The losses and claims resulting from last September's terrorist attacks, the collapse of Enron, the rise in D&O losses, the new explosion of asbestos claims, newly-emerging mold claims, and constant environmental claims have put pressure on an insurance industry already weakened by a previous economic downturn.

> ***"Today's executives can protect their companies against the uncertainty of long-tail corporate liability"***

How badly these losses will affect insurance industry solvency is yet to be seen. Some observers believe that last year's losses have had a profound impact on the insurance industry. *See, e.g.*, *Sky-High Risks*, The Economist, March 23, 2002 (noting "devastating effects on the insurance industry"). On the other hand, others see the attacks as a catalyst which accelerated the hardening of the insurance market and now predict "a likely boom in profits at commercial insurance companies." Joseph B. Treaster, *Citigroup Raises $4 Billion In Travelers Stock Offering*, N.Y. Times, March 22, 2002, at C2 (noting "doubling or even tripling [of] prices for many lines of coverage" since the September terrorist attacks).

Recent judicial decisions recognize a simple solution to this uncertainty: *the policyholders' right to collect the insurance now*.

Current Insurance Recovery For Present Liabilities That Include Future Costs and Claims

Three recent decisions illustrate this solution. While two involve asbestos bankruptcies, bankruptcy protection is not necessary to obtain current benefits.

"No Time Like The Present" continued page 2

RECENT DEVELOPMENTS

Massachusetts High Court Says Prevailing Policyholder May Recover Fees. *Hanover Insurance Co. v. Catherine Golden.* Hanover Insurance Co. ("Hanover") commenced a declaratory relief action against its policyholders, Martin and Catherine Golden, in connection with its duty to defend a motor vehicle accident action. Hanover defended the underlying action but sought a declaration that the duty to defend terminated upon payment of the policy limits. The Middlesex County Superior Court ruled that the obligation did not end upon exhaustion of the policy limits. It also ruled that Hanover was not liable for attorneys' fees incurred in the defense of the declaratory relief action because Hanover had not engaged in conduct constituting breach of contract. On appeal, the Massachusetts Supreme Judicial Court ruled that the policyholder does not have to demonstrate breach or bad faith to recover attorneys' fees incurred in litigating the duty to defend. The Massachusetts High Court held: "It is immaterial whether the insurer proceeds in good faith or bad faith to avoid the duty to defend under a liability insurance policy because '[t]o impose upon the insured the cost of compelling his insurer to honor its contractual obligation is effectively to deny him the benefit of his bargain.'" The High Court also held: "The entitlement of an insured to attorneys' fees and costs incurred in establishing contested coverage depends exclusively on

"Recent Developments" continued from page 3

"No Time Like The Present" continued from page 1

Fuller-Austin

In *Fuller-Austin Insulation Company v. Fireman's Fund Insurance Company, et al.*, a California trial court decided on February 26, 2002, that a bankrupt policyholder facing present liabilities for present and future claims had a right to prove and recover all such liabilities from its insurance companies now. The policyholder faced numerous claims and expected additional asbestos-related claims for years to come. Its liability for those claims, and the damages to which the claimants were entitled, were established now through confirmation of a "pre-packaged" bankruptcy plan pursuant to Section 524(g) of the Bankruptcy Code. The insurance companies argued they were obligated to pay the policyholder only when particular individuals claims were submitted, seeking to delay their payments for decades.

The *Fuller-Austin* court held that the policyholder could present evidence regarding its current liability to pay pending and future asbestos claims. This decision, though hotly disputed by the insurance companies, simply applied a fundamental rule that there is a right to establish and recover future damages in a contract or tort action as part of a present liability. The key is presenting satisfactory methods to determine the present liability for present and future claims. The *Fuller-Austin* policyholder offered expert witnesses to calculate the present liability for future claims, using methods recognized by numerous courts across the nation for proving lost future profits, future earnings, and future medical costs in contract and tort cases.

UNR

Similarly, the Seventh Circuit held in *UNR Industries, Inc. v. Continental Casualty Co.*, that a liability insurance company is obligated for a policyholders' present liability for pending and future asbestos claims based on present liability established in a bankruptcy proceeding. The Seventh Circuit found that that bankruptcy reorganization itself constituted a judgment or settlement and immediately triggered the excess insurance companies' obligations, regardless of when they were to be paid. The Seventh Circuit remanded the case back to the trial court to allow an opportunity for the policyholder to demonstrate, through statistical evidence or otherwise, the exact number of asbestos claims that would fall within the insurance companies' policy periods.

"No Time Like The Present" continued page 3

"The insurance company has the right to be wrong—as a debatable issue was present."

Answer on p. 3

UNR was decided prior to the 1994 enactment of Section 524(g) of the Bankruptcy Code, which deals with certain unique aspects of asbestos bankruptcies. Therefore, the *Fuller-Austin* and *UNR* holdings can apply outside the asbestos bankruptcy context. *UNR* was decided prior to the enactment of Section 524(g), on legal principles applicable to any types of liability, not just asbestos.

Kayser-Roth

In *Insurance Company of North America v. Kayser-Roth Corporation* the policyholder was responsible under the federal "Superfund" law for cleaning up environmental contamination. Pursuant to EPA findings, the property and groundwater cleanup was expected to take more than thirty years.

The Rhode Island Supreme Court affirmed that the policyholder was entitled to a $5.4 million judgment despite insurance company arguments that it was premature, based on speculation, and that there was no evidence that the policyholder had paid or was found legally obligated to pay that amount. The Supreme Court noted the policyholder had offered a damages expert at trial and that payment would be required under an administrative order.

Nothing New to Insurance Companies

This is not a novel or untested approach. Courts regularly award damages for present liabilities including future costs. In tort cases, plaintiffs regularly receive awards for present liabilities based on future medical costs, lost future earnings, future pain and suffering, etc. In employment cases, courts award "front pay." Insurance companies are quite familiar with these concepts and commonly defend against bodily injury cases involving future medical costs, future pain and suffering, etc.

Applying these familiar concepts in the insurance context should not be controversial. The insurance industry hires actuaries to perform this very analysis. Insurance actuaries use "IBNR" - Incurred But Not Reported claims – every day to calculate their policyholders' liability and then the insurance companies' liability. Insurance companies do this regularly for corporate accounting purposes, for reporting to the government, for reserves, and for commuting (or settling) the insurance companies' claims against their reinsurance companies. Second, insurance companies every day buy annuities to provide to claimants who have won damages awards including future costs.

Where present liability for future claims or costs is fixed, and there is expert testimony, a record of decision for future environmental costs, or some other basis for projecting the future liability stream, courts should not hesitate to award a present-dollar judgment against the insurance companies who insure that liability. ■

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RECENT DEVELOPMENTS

whether that coverage is ultimately determined to exist. It does not depend on whether the denial of coverage by the insurer was reasonable or unreasonable, justified or unjustified, a close question of fact or a matter not even subject to legitimate dispute. The focus is exclusively on the bottom line."

S.C. Appeals Court Says Insurance Company Must Indemnify. *L-J, Inc. v. Bituminous Fire and Marine Insurance Co.* L-J, Inc., the parent company of Eagle Creek Construction Co., Inc. ("Eagle Creek"), brought a declaratory judgment action against Bituminous Fire and Marine Insurance Co. ("Bituminous"), claiming that Bituminous should indemnify Eagle Creek in a construction defects case brought against it by the Dunes West Joint Venture. A Special Master found that under Bituminous' policy with L-J and Eagle Creek, the allegations of negligence set forth in the Dunes West complaint met the definition of "occurrence." The Special Master also found that the failure of the road, which was the source of the Dunes

"Recent Developments" continued page 4

a WHO SAID WHAT?

St. Paul Fire & Casualty Insurance Co., Reply Memorandum in Support of Defendant St. Paul's Motion for Summary Judgment Striking Claims for Extra-Contractual Damages, dated Feb. 11, 1994, *Richland Valley Products v. St. Paul Fire & Casualty Co.*, No. 92-CV-149 (Wis. Cir. Ct.).

"Recent Developments" continued from page 3

West complaint, did not constitute damage that was "expected or intended." The Special Master ruled that Bituminous must indemnify Eagle Creek for a portion of a construction defect settlement. Bituminous appealed. The Court of Appeals said that because L-J did not improperly construct the sub-road or have knowledge of the improper construction, there is no evidence that L-J expected or intended that the pavement would fail and held: "Under the plain and unambiguous language of the policy, there is an 'occurrence.'" Therefore, on June 3, The South Carolina Court of Appeals affirmed the Special Master's ruling. —*Claudia Ilie*

HOW MANY OCCURRENCES?

The tragic events of September 11th are likely to spawn numerous insurance coverage disputes. An existing dispute between the leaseholder of the Twin Towers and a consortium of 22 insurance companies involves whether destruction of the two Towers constitutes one occurrence or two. The answer could be the difference between recovering $7 billion or only $3.5 billion which, in turn, could have a dramatic effect on the rebuilding effort.

Both liability and property damage insurance policies generally are based on the happening of an occurrence or liability-inducing event and have per-occurrence limits on available coverage. The leaseholder's recent motion for summary judgment to have the destruction of each tower deemed a separate occurrence was denied on June 3, 2002, but no final determination on the issue likely will be made until the trial scheduled for September. Disputes over the number of occurrences are not unusual and often depend on the potential impact of limits and deductibles upon insurance recovery as well as the facts giving rise to liability. This case is complicated by the fact that the insurance policy had not yet been issued in final form. As a result, the brokers involved in obtaining the coverage are being required to testify. It likely will be sometime before these coverage issues are resolved. —*John G. Nevius*

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