Anderson Kill & Olick, P.C.
POLICYHOLDER ADVISOR
The Policyholder Law Firm
Volume 19 Number 5 www.andersonkill.com November/December 2010

It Can Happen to You

10 Tips for Corporate Counsel Faced with Asbestos, Silica and Mixed-Dust Lawsuits

By Robert Y. Chung


Robert Y. Chung

Would readers working for companies that are subject to no conceivable risk of asbestos litigation please step forward? Dear reader, not so fast . . .

The number of companies targeted by asbestos claimants continues to rise, with lawsuits currently involving about 10,000 different companies. Lawsuits remain pending against a range of companies far wider than the manufacturers of asbestos products. Defendants include companies that used asbestos in any way, whether directly in their products or incidental to their operations. The mere existence of asbestos on a company's premises has subjected it to lawsuits. In one suit filed in Texas in November 2009, a truck driver who had contracted lung cancer sued more than 100 companies whose premises he claimed to have visited regularly. Furthermore, even if a company didn't deal with asbestos directly, dealing with another company that did use asbestos can subject it to liability based upon allegations of conspiring to hide the danger of asbestos or failing to provide adequate advice on safety procedures.

Despite more recent indications that claims filings have declined slightly, the cost to resolve those claims show no signs of abating and are estimated to potentially exceed $250 billion. As a result, over 90 companies have filed for bankruptcy protection thus far.

Asbestos-related litigation differs greatly from other forms of litigation and presents unique challenges for companies forced to defend asbestos claims. Here are some basics tips we recommend that will help you navigate the insurance component of what one United States Supreme Court Justice has called the "elephantine mass" of asbestos litigation.

Notify the Insurance Companies

The first and most important step is notifying your insurance company that you have been named in an asbestos lawsuit. Insurance funds are vital to defending asbestos claims, and placing your insurance company on notice as soon as possible is essential to recovering the money necessary to adequately defend asbestos actions. If you rely upon your broker to provide notice, make sure to follow up and keep updated on all correspondence. Reliance upon your broker is not always a defense to late notice.

> "The cost to resolve those claims show **no signs of abating** and are estimated to potentially **exceed $250 billion**."

Develop Partnerships Among Your Allies

Experienced liability defense counsel is necessary to provide you with assistance in preparing and coordinating your efforts to successfully defend what often is a deluge of claims. Handling this unique and complex litigation, however, only begins there. In addition to defense counsel, insurance coverage counsel, risk managers and in-house counsel are all natural allies with unique contributions to a comprehensive solution to your asbestos problems. For example, recent legislation in connection with Medicare reporting

"It Can Happen to You" continued p2

"It Can Happen to You" continued from p1

requirements present a novel issue to asbestos personal injury defendants in order to avoid a "self insurer" designation.

Locate Documents

Just as asbestos litigation often turns on documents that date back at least 40 or 50 years, the coverage available to you does as well. A review of your historical insurance portfolio may uncover specific coverage issues such as the existence of "missing policies" that require special attention.

Consider Alternative Sources of Insurance

Investigate other sources of insurance that potentially cover your asbestos liabilities. For example, in addition to "products liability" coverage, general liability policies often provide "premises" coverage which may apply depending upon the specific facts underlying your case. Likewise, "other people's insurance" also may be a resource. This can include being an "additional insured" under a subcontractors' liability policy or bringing a direct action against the insurance company of a potentially responsible third party.

Don't Give Up on Coverage From an Insolvent Insurance Company

Mounting asbestos liabilities have not only placed defendants in bankruptcy, but also have helped to place an increasing number of insurance companies in insolvency proceedings as well. Insurance coverage counsel can help navigate the myriad state laws surrounding insurance liquidations and receiverships and, with respect to foreign insurance companies, laws governing insolvent "schemes." As a preliminary matter, it is essential to file a timely proof of claim as a creditor and consider filing a claim against the state guaranty fund in one or more possible jurisdictions.

Evaluate Your Insurance Assets

Despite insurance companies' claims of "seamless" coverage, different policies, even follow-form policies, can have markedly different characteristics. For example, multiyear policies often provide annualized coverage, which multiplies the stated policy limits by the actual number of years for the entire policy period. Likewise, even a single extra month of coverage provided under a "stub" period can provide an additional set of full policy limits. Reading each policy carefully is the only way to fully maximize the insurance available to you.

Anticipate the Insurance Companies' Defenses to Coverage

Don't wait for the insurance companies to assert a defense — they consistently have been denying coverage for asbestos liabilities over decades and those defenses can be anticipated. For example, insurance companies will look for any aspect of the investigation, defense and settlement of claims to allege the policyholder failed in its "duty to cooperate." Anticipating the defense at the start of the underlying litigation will help to preserve coverage and decrease costs in the long run.

Develop an Insurance Recovery Strategy

It is no secret that insurance companies will often test their policyholders' resolve by issuing an initial denial of a claim whenever there is any remotely plausible basis for doing so. When that happens, the policyholder should undertake an independent evaluation of its insurance claim. If litigation becomes necessary, considerations include whether or not to initiate a lawsuit and, if so, choosing an appropriate forum. Discovery management also should be an early consideration. For complex matters, this can mean meeting with a company's front- and back-office

employees to establish the appropriate protocols to locate and preserve key documents. Once those protocols are in place, maintaining open lines of communication is critical to quickly resolve any unanticipated issues with easy access to the right parties.

Develop an Insurance Settlement Strategy

A litigation strategy simultaneously should include pursuing meaningful settlement negotiations not only among the lawyers, but also with the active participation of principles from both the policyholder and the insurance company.

With respect to any eventual settlement, considerations should include:

- avoiding "buybacks";
- carefully identifying "carve outs";
- recognition of the net settlement amount;
- understanding allocation and exhaustion consequences with respect to non-settling companies;
- having a long-term view on any requests for indemnification; and
- an awareness of potential pitfalls in acquiescing to confidentiality provisions.

Maintain Proactive Communication With the Insurance Company and Broker

As a general rule, when responding to an insurance company information request never say no. This does not mean a policyholder has to fulfill every request exactly as it is presented. Look for creative ways to satisfy the insurance company's needs, while maintaining all necessary confidentiality and minimizing costs. Expect the same from your insurance company and do not accept no for an answer. Challenge the insurance company's denial of coverage. Determination and persistence often mean the difference between coverage and no coverage

Following these tips will greatly prepare you and your company, and help your counsel in maximizing insurance coverage for your asbestos, silica and mixed-dust liabilities.

Robert Y. Chung is a shareholder in the New York office of Anderson Kill & Olick, P.C. Mr. Chung has extensive experience in insurance coverage litigation, exclusively on behalf of policyholders.
(212) 278-1039 **rchung@andersonkill.com**

When Coverage is Denied Under Health Reform, the Ground Rules for Appeals No Longer Apply

By Rhonda D. Orin and Pamela D. Hans

Editor's Note: At Anderson Kill's Policyholder Advisor Conference on September 23, one of the liveliest sessions was "Changes in the Wake of Health Care Reform," chaired by Rhonda Orin. A focal point of the session was the still-uncertain impact on existing practice of the new requirement that health plans establish an external review process for denied claims. Below, Ms. Orin and Pamela Hans outline the new requirements and the legal questions they raise.

When health reform took effect on September 23, 2010, in the form of the Patient Protection and Affordable Care Act and the Reconciliation Act (collectively PPACA), the ground rules changed immediately for the process of appealing claims denials by employer-run health plans.

Under PPACA, group health plans now are required to establish an internal claims appeals procedure that includes an external review process. The external review will be done by an independent entity and the health plan will be required to pay the costs.

Significantly, the external review will be on a *de novo* basis, which means that the reviewer will not be restricted in any way by the underlying evidence or the coverage determination. Until now, except in cases of conflicts of interest, both external reviewers and courts were limited to discretionary reviews, in which they could consider only the evidence that was before the plan at the time of the coverage determination and could decide only whether the evidence was sufficient to support the plan's determination. If their answer was in the affirmative, they were obligated to affirm the determination even if they would have decided the claim differently.

At least for now, the new rules regarding the claims review process do not apply to grandfathered, self-funded plans. They do apply, however, to insurance companies for plans that are fully insured.

"When Coverage is Denied" continued p4

"When Coverage is Denied" continued from p3

Under the new rules, plan participants will have a two-part review process. First, the internal review process is intended to provide a quick and objective review of a claim decision. In addition, participants are entitled to receive a detailed explanation of the reason for the group plan's denial of a claim. A participant who remains unsatisfied by that explanation may demand an external review.

This change in the rules has created a new array of questions, particularly about the implications for existing precedent. Outstanding questions include when external reviews will be subject to appeal to the courts and, during such appeals, what legal standards will be applied.

Notably, the judicial precedent that currently limits courts to discretionary reviews arises out of the principle of according deference to decisions made by plans. There is no such precedent with regard to decisions made by external review organizations.

Recently issued interim regulations modify existing Department of Labor regulations regarding claims and appeals procedures for employee benefit plans. Most significantly, if a plan fails to comply with the new requirements regarding the claims appeals procedure, the claimant will be deemed to have exhausted his or her administrative remedies and be permitted to seek judicial review.

On another front, the new rules provide that external reviews must comply with the requirements of the applicable state, provided that the state standards meet minimum federal standards established by the National Association of Insurance Commissioners (NAIC) in the Uniform External Review Model Act. If the state review standards do not meet the minimum protections established by the NAIC Uniform Model Act, then the group health plans must implement an external review process that meets the minimum standards and procedures that are established by that Act.

For states whose standards do not meet the minimum standards established in the NAIC Uniform Model Act, the Department of Health and Human Services (HHS) will work with the states so that their review process provides the consumer protections mandated in that Act. There is a transition period until July 1, 2011, during which time the HHS will work with states to help them make the changes that may be necessary for the state's review process to comply.

Rhonda D. Orin is the managing partner of the firm's Washington, D.C. office and a member of the firm's insurance recovery group. Ms. Orin has extensive experience in recovering insurance proceeds for policyholders across the country.
(202) 416-6549 **rorin@andersonkill.com**

Pamela D. Hans is the managing shareholder of the firm's Philadelphia office. Her practice concentrates in the area of insurance coverage exclusively on behalf of policyholders.
(267) 216-2720 **phans@andersonkill.com**

AKO Policyholder Advisor

Anderson Kill Policyholder Advisor is published bimonthly by Anderson Kill & Olick, P.C. The newsletter informs clients, friends and fellow professionals of developments in insurance coverage law. The articles appearing in the ***Anderson Kill Policyholder Advisor*** do not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations. If you require more information, legal advice or an opinion with respect to a specific situation, please contact our editorial board:

Editorial

Mark Garbowski, Editor-in-Chief
(212) 278-1169 or mgarbowski@andersonkill.com

Finley T. Harckham, International Editor
(212) 278-1543 or fharckham@andersonkill.com

Insurance Recovery Group Chairs

Robert M. Horkovich, Chair
(212) 278-1322 or rhorkovich@andersonkill.com

William G. Passannante, Co-Chair
(212) 278-1328 or wpassannante@andersonkill.com

The firm has offices in New York, NY, Newark, NJ, Philadelphia, PA, Ventura, CA, Washington, DC and Greenwich, CT.