

Guy Carpenter Views

Reprinted from www.guycarp.com

December 2003

Asbestos and Other Difficult Insurance Claims



After decreasing slightly in the mid-1990s, asbestos claims are flooding the courts again. Many property and casualty insurers and reinsurers are affected by this rising and seemingly endless tide of litigation, as well as by mounting pressure from Wall Street to disclose the magnitude of their potential liabilities and the effects on their long-term solvency. Further, insurers and reinsurers have had to significantly boost their reserves, while the value of their equity investments spirals downward.

Add to this crisis the inherent uncertainty of losses from such other complex issues as toxic mold, drugs/pharmaceuticals, and environmental pollution, then it is easy to see that assessing and expediting the collection of claims becomes critically important to an insurer's bottom line.

Guy Carpenter Views talks with Laird Criner, a Guy Carpenter Managing Director with 30 years of experience as an environmental claims consultant, about some of the issues generating difficult reinsurance claims and how he helps clients anticipate and resolve potential coverage disputes.

The Current Asbestos Liability Crisis

Guy Carpenter Views: Can you talk a bit about the current asbestos liability crisis? What are some of the reasons behind this new wave of asbestos litigation?

Laird Criner: Asbestos litigation has been a long-term problem in this country. With more than 600,000 claims and 8,400 defendants to date, asbestos claims have so far cost about \$45 billion to resolve. After waning slightly in the 1990s, the number of claims is rising again—overloading the courts, forcing companies into bankruptcy, causing insurance companies to significantly increase their reserves for related liabilities, and depleting resources with which to compensate victims that do become sick in the future.

A central issue this time is the huge influx of new claims being filed by people who are not currently sick. A large percentage of these claims seem to have originated with free x-rays—often conducted in mobile vans—offered by lawyers looking for new asbestos clients.

Most people exposed to asbestos will never develop a serious illness. However, if their screening x-ray detects any "lung abnormality" that may be associated with this material, they will need to file suit before statutes of limitations expire. These statutes, which vary by state, specify the time allowed between first receiving an injury and the date by which a related claim must be filed. If the suit is not filed within that time, the victim is prevented from seeking compensation for any future illness.

Fearful that they may become ill in the future and have no way of being compensated at that time, many people exposed to asbestos who show lung abnormalities on their x-ray—even if they are currently completely healthy—do file claims. The Rand Institute for Civil Justice study reports that between two-thirds and 90 percent of asbestos claims today are filed on behalf of people who are not currently sick and may never become sick. Asbestos lawsuits have bankrupted more than 30 U.S. companies; cost insurers about \$45 billion in claims so far, and are expected to cost a total of up to \$275 billion before this crisis ends.

Another clear trend contributing to the flood of new claims has been the broadening of the defendant group beyond those companies directly involved in asbestos production. Having spent billions of dollars settling asbestos claims, many such companies have gone bankrupt. As the possibilities for finding further compensation from this defendant group dry up, companies that are less directly linked with asbestos are being targeted. Businesses that never expected to be subject to asbestos suits now face ominous exposures because their plants or facilities may have contained asbestos—or still do.

Congress considered asbestos litigation reform legislation to help curb this seemingly endless stream of claims and to ensure that funds were available for those who did become ill. However, that initiative could not find sufficient support due to the competing interests of labor, trial lawyers, and industry. Asbestos reform legislation is still moving forward, although I am not optimistic about it being passed any time soon.

Rising Asbestos Nonproduct Claims

GCV: What are asbestos nonproduct liabilities, and how are they contributing to the current asbestos liability crisis? Can you discuss the reasoning behind the current trend toward refileing asbestos products claims as nonproduct claims?

LC: Unlike product liability policies, which generally had aggregate limits, nonproduct liability coverage was typically written on a per occurrence basis and without aggregate limits. Thus, many policyholders that have exhausted their product aggregates are trying to obtain additional coverage by submitting asbestos claims as nonproduct claims.

The impact of nonproduct claims on the current asbestos liability crisis is significant, adding hundreds of millions of dollars to the insurance industry's already massive liability exposures.

Government Response to Spiraling Asbestos Claims

GCV: What steps did the federal government take to reduce the volume and scope of asbestos claims?

LC: Legislation introduced in Congress was intended to set up a national no-fault trust fund of more than \$100 billion to compensate victims of asbestos-related diseases. The fund was to be financed by contributions by the insurance industry, defendants in asbestos lawsuits, and existing privately run asbestos funds. If these funds were depleted, defendant companies would have provided an additional \$10 billion in contingency payments.

As I mentioned earlier, there were too many competing interests for this legislation to gain the support it needed to be approved at this time.

Other Complex Reinsurance Claims Issues

GCV: Please describe some of the other issues creating claims that are particularly difficult to resolve.

LC: Current issues creating complex claims include those relating to breast implants, construction defects, drugs/pharmaceuticals, toxic mold, and sexual molestation. What all of these claims have in common is that they don't fit the standard notion of an occurrence and may involve multiple years of coverage. The complexity of the underlying issues often delays the collection of the claims.

GCV: What are some of the coverage questions that make asbestos and other complex reinsurance claims particularly challenging? For example, are such areas as occurrences and allocation generally the source of difficulties?

LC: The losses of insurers from such risks as asbestos, pollution, and health hazards are inherently uncertain due to the long-term nature of these exposures. This uncertainty is heightened by changes in legislation, an increase in related litigation, and the potential for new sources of claims to arise.

In this environment, assessing exposure and expediting the collection of reinsurance claims becomes critically important to an insurer's bottom line. Some of the complex issues that can hold up the process include:

- Occurrences. Determining the number of occurrences is critical, particularly when the settlement agreement between insured and insurer may not indicate whether it is based on a single or multiple occurrences, and reinsurers are then required to pay their share. Reinsurers may challenge settlements made on a single-occurrence basis that they feel should have been multiple-occurrence settlements.
- Allocation. Primary insurers may pay certain long-tailed claims with lump sums rather than allocating payments to particular years or losses. This can cause problems with the reinsurers' allocations of those losses to their own reinsurance coverages and years.

Commuting a Reinsurance Contract

GCV: When are clients likely to consider the option of commuting a reinsurance contract? What are some of the factors influencing this decision?

LC: Commutation is a method of terminating a reinsurer's obligation to an insurer for past, present, or future claims and is usually achieved through the reinsurer's payment of a lump sum to the insurer. Clients may view commutation as a desirable option for a number of reasons.

One reason—which has increased in importance with the new wave of asbestos claims—is to settle contentious claims on old contracts that may go back as far as 20 or 30 years. In these cases, the ceding company is looking for millions of dollars from the reinsurer, the reinsurer does not want to get hit again and again, and commutation is used to put finality on old business.

A second reason involves a general concern about the financial security of the reinsurer. Let's say, for example, that the insurer has long-tailed liability claims with a reinsurer from which it expects to

collect over the next 20 years. However, the reinsurer's financials are beginning to appear unstable, and payment on these claims is now in doubt. The insurer may want to commute as a way of getting money in the door today rather than taking on the risk that the reinsurer may not be around tomorrow.

A client may also decide to commute when reserves are well known and well established, as is the case with a workers compensation book of business. In this situation, the client may decide that it can improve its cash flow by commuting and then investing the lump sum that it receives.

Sometimes the decision to commute may simply come down to workload. Companies may no longer want to spend time, money, and resources handling the endless administration of claims that are 20 or 30 years old.

Guy Carpenter's Role

GCV: What are clients looking for when they turn to you for advice?

LC: The complexity of certain claims—for example, those involving asbestos, drug/pharmaceutical, environmental pollution, and other toxic torts—often delays their collection. Our clients look to us for advice on managing and collecting these claims.

In general, we help clients identify and resolve potential problem areas; present claims to reinsurers in a manner that expedites their resolution; and, if needed, aid in facilitating negotiations for reinsurance settlements that are satisfactory to all parties. We also assist clients involved in commuting reinsurance contracts to establish a value for incurred but not reported (IBNR) liabilities.

The client, of course, is always the ultimate decision maker, and we tailor our approach to the unique circumstances of each client's individual claims.

One of our greatest challenges with regard to asbestos claims in particular has been aiding in interpreting the wording of insurance policies and reinsurance contracts that date back decades and did not contemplate this exposure. Through the years, we have seen contract wordings evolve and have remained well versed in the most recent interpretations. This enables us to anticipate market concerns and skillfully set the stage for resolution of future claims. Our size, geographic diversity, and decades of experience provide Guy Carpenter with access to an abundance of industry information—information we use to provide clients with valuable analysis and perspectives on reinsurance markets.

GCV: Can you talk a bit about the process of resolving difficult claims issues? How do you get this process working?

LC: First, we develop an understanding of how the insurance claim was settled and confirm that the presentation of the claim to the reinsurer complies with the logic of that settlement. We pay particular attention to the correct identification of years of coverage and number of occurrences involved and the appropriate allocation of claims over the years of the insurance and reinsurance contracts. Using the claims information available, we also pinpoint potential problem areas and advise clients based on how we've reached resolution in similar situations.

Next, we make sure that senior management of both the insurer's and the reinsurer's claims departments are involved. Senior claims management's involvement frequently is essential for

reaching a prompt resolution of the issues. We get a dialogue going between the principals and always work to keep the discussion businesslike. As part of this process, we try to establish general guidelines and statements of understanding between the parties that will address and help expedite the resolution of future claims issues.

Our experience with clients having difficult reinsurance claims goes back to Guy Carpenter's beginnings in the 1920s. As a result, we thoroughly understand the general market reaction to complex claims issues and can provide guidance that will significantly improve a client's cash flow. Our proactive approach involves anticipating problems early on rather than waiting until a dispute ensues.

Future Outlook

GCV: What are likely to be the next hot topics in the area of difficult insurance and reinsurance claims? How is Guy Carpenter preparing to assist client with the new crop of complex claims issues?

LC: I expect that the next big issues will relate to construction defects and equity market losses. The myriad claims that can arise, along with the creativeness of the plaintiffs' bar, makes the future very difficult to predict. I've been in this business for a long time, and I'm still amazed. Whatever new type of loss may arise, our long history dealing with complex claims and the expertise we've developed in addressing emerging areas of litigation will be very helpful to clients looking to expedite claims collection.

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