Ready, Fire… Aim!

The Effect of Asbestosis Exclusions

Introduction

Since the late 1970s, the insurance industry has almost universally sought to exclude coverage for asbestos-related illnesses from insurance policies. Unfortunately for some insurers, the "asbestos" exclusions used in policies during the late 1970s and early 1980s have proven to be less comprehensive than intended, leaving insurers potentially vulnerable to unintended asbestos exposures.

One of the earliest asbestos exclusions commonly used in policies drafted prior to the mid-1980s excluded coverage for bodily injury claims arising from exposure to "asbestosis" or "asbestosis or similar diseases." While asbestosis is the name of a particular disease caused by exposure to asbestos, during the early years of the insurance industry's reaction to the flood of asbestos litigation, the term was often used generically to describe *all* diseases caused by exposure to asbestos.

Over the last few decades, insureds under policies containing "asbestosis" exclusions have challenged the scope of those exclusions, arguing that an exclusion for "asbestosis" does not exclude claims related to other diseases, such as mesothelioma or cancer. This article examines how U.S. courts have treated "asbestosis" exclusions, as well as reinsurance implications for an insurer that ultimately pays asbestos-related claims it thought were excluded at the time of underwriting.

History Of Asbestos/Asbestosis Exclusions In The Insurance Market

Asbestos was widely used in a variety of products from the late 1800s through much of the twentieth century. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973) at 1083, n.3; Obremski, Cynthia M., *"Toxic Tort" Litigation and the Insurance Coverage Controversy, Federation of Insurance Counsel Quarterly*, Vol. 34, No. 1, p. 11-12 (Fall 1983). Although the dangers of asbestos were known as early as the 1930s, it was not until decades later that a significant number of plaintiffs injured as a result of asbestos exposure sought to hold manufacturers legally accountable. *See id.* at 12; Gallo, A. Andrew, *Asbestosis: Assessing Insurer Liability for Indemnification and Defense Costs, Federation of Insurance & Corporate Counsel Quarterly*, Vol. 37, No. 1, p. 43 (Autumn 1986).

The onslaught of asbestos-related litigation during the 1970s and 1980s was prompted by the Fifth Circuit's landmark decision in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973). *See* Gartland, Peter (ed.), *Lloyd's Prepares for Asbestosis Claims, Reinsurance, The Monthly Reinsurance Magazine*, Vol. 12, No. 6, p. 336 (Oct. 1980). In *Borel*, an industrial worker brought suit against several manufacturers of insulation materials that contained asbestos, alleging that he had contracted the diseases of asbestosis and mesothelioma due to exposure to the manufacturers' products. The jury found the insulation manufacturers jointly and severally liable for the asbestos-related diseases that developed from the use of their products. *Borel*, 493 F.2d at 1095, 1106-7. The jury's verdict was upheld by the Fifth Circuit Court of Appeals.

In the ten years following the *Borel* decision, 20,000 new asbestos lawsuits were filed, prompting underwriters and brokers to act quickly to exclude bodily injury claims arising from asbestos exposure from future liability policies. Gallo at 43, n.2. While, generally, the Insurance Services Office (ISO) – a New York-based trade organization that drafts standard insurance policy language and files it for approval with state regulators – institutes changes in insurance policy language to ensure uniformity amongst its member insurers, underwriters in the late 1970s and early 1980s, observing the high volume and potential costly nature of asbestos claims, did not wait for ISO to craft standard exclusions. *See* ISO's Policy Language and Rules (visited Dec. 6, 2013) http://www.iso.com/Products/Overview-of-ISO-Products-and-Services/ISO-s-Policy-Language-and-Rules.html. Instead, underwriters and brokers began drafting *ad hoc* exclusions using varied language. Significantly, some of the

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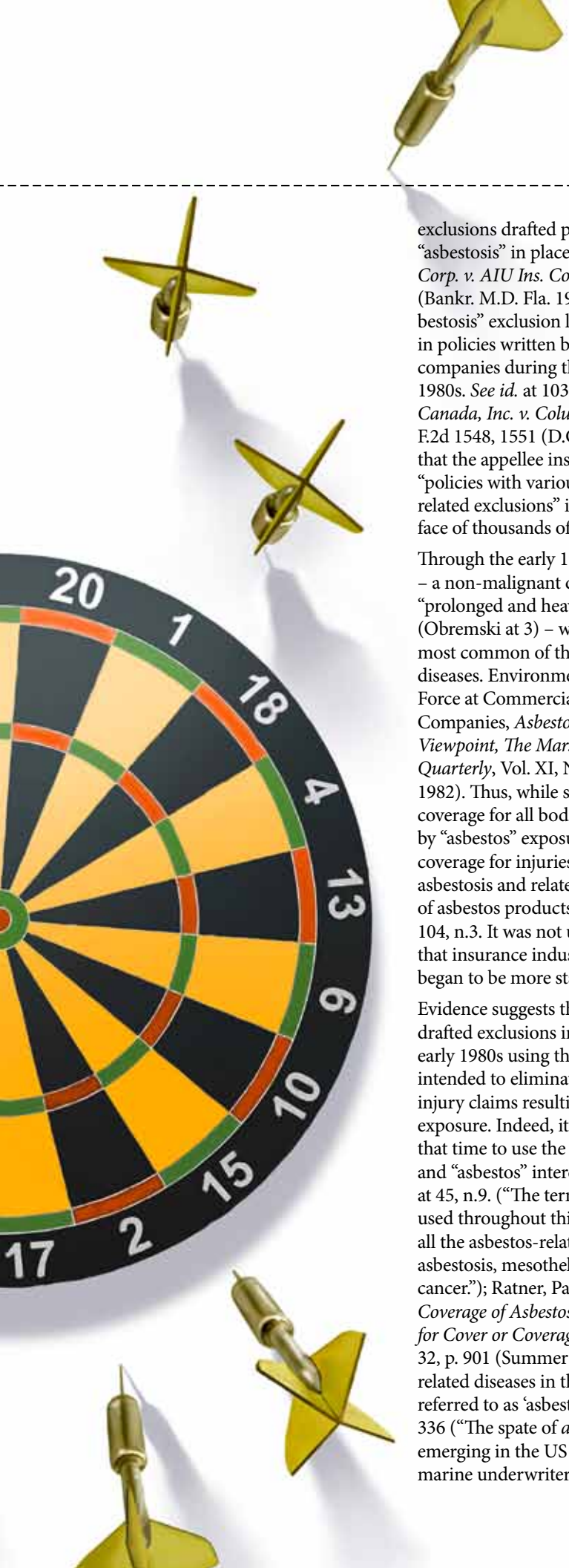

exclusions drafted post-*Borel* used the term "asbestosis" in place of "asbestos." *Celotex Corp. v. AIU Ins. Co., et al.*, 175 B.R. 98 (Bankr. M.D. Fla. 1994) provides the "asbestosis" exclusion language that appears in policies written by various insurance companies during the late 1970s and early 1980s. *See id.* at 103, n.1-2. *See also Carey Canada, Inc. v. Columbia Casualty Co.*, 940 F.2d 1548, 1551 (D.C. Cir. 1991) (noting that the appellee insurers began issuing "policies with variously worded asbestos-related exclusions" in October 1977 "in the face of thousands of lawsuits").

Through the early 1980s, asbestosis – a non-malignant disease caused by "prolonged and heavy asbestos exposure" (Obremski at 3) – was thought to be the most common of the asbestos-related diseases. Environmental Issues Task Force at Commercial Union Insurance Companies, *Asbestos—A Social Problem, Viewpoint, The Marsh & McLennan Quarterly*, Vol. XI, No. 1, p. 31 (Spring 1982). Thus, while some policies excluded coverage for all bodily injuries caused by "asbestos" exposure, others excluded coverage for injuries "arising out of asbestosis and related diseases arising out of asbestos products." *Celotex*, 175 B.R. at 104, n.3. It was not until the mid-1980s that insurance industry asbestos exclusions began to be more standardized.

Evidence suggests that underwriters who drafted exclusions in the late 1970s and early 1980s using the term "asbestosis" intended to eliminate coverage of all bodily injury claims resulting from asbestos exposure. Indeed, it was common during that time to use the terms "asbestosis" and "asbestos" interchangeably. *See* Gallo at 45, n.9. ("The term 'asbestosis' will be used throughout this paper to describe all the asbestos-related diseases including asbestosis, mesothelioma and lung cancer."); Ratner, Patricia E., *Insurance Coverage of Asbestosis Claims-Running for Cover or Coverage*, Emory L.J., Vol. 32, p. 901 (Summer 1983) ("All asbestos-related diseases in this comment will be referred to as 'asbestosis.'"); Gartland at 336 ("The spate of *asbestosis* claims now emerging in the US has led Lloyd's non-marine underwriters to set up a working party to examine their future effect on the market.") (emphasis added). *But c.f.* Neild, Peter, *Asbestos: A Problem for Liability Insurers, Journal of the Chartered Insurance Institute*, Vol. 71, p. 114 (1974) ("Because of the legal significance of the difference between asbestosis and mesothelioma the use of the word asbestosis to describe the mere presence of asbestos bodies should be avoided.").

Interpreting Asbestos/Asbestosis Exclusions

The use of the term "asbestosis" in place of "asbestos" in exclusions during the late 1970s and early 1980s has given rise to disputes between insurers and their policyholders. *See id.* at 102-03; *Carey Canada*, 940 F.2d at 1552-3; *UNR Industries, Inc. v. Continental Ins. Co.*, No. 85 C 3532, 1989 WL 265493, at *2 (N.D. Ill. Jan. 11, 1989); *The American Insurance Co. v. American Re-insurance Co.*, No. C 05-01208 JSW, 2006 WL 3412079, at *6-7 (N.D. Ca. Nov. 27, 2006). Policyholders have argued that "asbestosis" exclusions preclude coverage of only those injuries arising from the singular disease asbestosis, and that insurers are obligated to reimburse losses arising from other diseases caused by asbestos inhalation, such as cancer. Insurers have argued that the intent of "asbestosis" exclusions was to exclude *all* claims related to diseases caused by exposure to asbestos. Courts that have addressed this issue have reached different conclusions about the merits of these arguments.

Celotex Corp. v. AIU Ins. Co., et al., 175 B.R. 98 (Bankr. M.D. Fla. 1994), involved a policy that excluded liabilities resulting from "asbestosis and other diseases that result from asbestosis." *Id.* at 111-112. The policy holder argued that the plain language of the policy unambiguously excluded only "asbestosis" claims. The insurers sought to introduce considerable evidence showing that the intent of the parties at the time of underwriting was to exclude all asbestos bodily injury liability. *Id.* at 103. Ultimately, the court held that the term "asbestosis" is unambiguous and refers to "a singular disease," finding that the "only reasonable interpretation" was

Asbestosis Exclusions (continued)

that the exclusion precluded "asbestosis" claims and refused to consider any extrinsic evidence. *Id.* at 110.

By contrast, other courts have been willing to consider extrinsic evidence to analyze the meaning of the an exclusion for "asbestosis." In *UNR Industries, Inc. v. Continental Ins. Co.*, No. 85 C 3532, 1988 WL 121574 (N.D. Ill. Nov. 9, 1988), for example, the court initially found that the "asbestosis" exclusion unambiguously excluded only claims arising from the disease asbestosis and issued a summary declaratory judgment on that basis. *UNR Industries, Inc. v. Continental Ins. Co.*, No. 85 C 3532, 1988 WL 121574 (N.D. Ill. Nov. 9, 1988) at *14. The insurers moved to amend the judgment and presented parole evidence demonstrating that there were "many instances in which medical, legal experts, and other insurance companies (Continental, in this case) have used the term asbestosis to mean 'asbestos-related' even though it can be shown to be incorrect from a technical point of view." *UNR Industries, Inc. v. Continental Ins. Co.*, No. 85 C 3532, 1989 WL 265493 (N.D. Ill. Jan. 11, 1989) at *2. The court granted the insurers' motion and vacated the declaratory judgment, concluding that an issue of fact existed as to the meaning of the term asbestosis, such that summary judgment was not appropriate. *Id.* at *2.

Other courts have similarly allowed insurers to present extrinsic evidence as to the intent and/or understanding of the parties at the time of underwriting. *See AstenJohnson, Inc. v. Columbia Casualty*, 562 F3d. 213, 219-222 (3d Cir. 2009) (holding that the court could properly consider extrinsic evidence regarding trade usage of the term "asbestosis" and that the insured was not entitled to summary judgment on its declaratory judgment claims); *Highlands Insurance Co. v. The Celotex Corp.*, 743 F. Supp. 28, 31-32 (D.D.C. 1990) (finding that the court was required to consider extrinsic evidence of the parties' intent where the "asbestosis" exclusion at issue was ambiguous on its face).

Finally, at least one court has held that an "asbestosis" exclusion excludes coverage for all asbestos-related diseases.

Finally, at least one court has held that an "asbestosis" exclusion excludes coverage for all asbestos-related diseases. In *Carey Canada, Inc. v. Columbia Casualty Co.*, 940 F.2d 1548 (D.C. Cir. 1991), the District of Columbia Circuit Court, relying on evidence of the parties' subjective intent, upheld the district court's factual finding "that all parties knew and understood that the 'asbestosis' exclusions [at issue] applied to all asbestos-related disease claims." *Carey Canada, Inc. v. Columbia Casualty Co.*, 940 F.2d 1548, 1553 (D.C. Cir. 1991). With respect to the first policy at issue, which excluded claims arising out of "all asbestosis operations," the court concluded that the exclusion was ambiguous on its face and found that the district court had properly considered the extrinsic evidence of the parties' intent to exclude asbestos-related diseases aside from asbestosis. Thus, the court enforced the insurer's broader interpretation of the "asbestosis" exclusion. *Id.* at 1554-1555. As to the other two policies at issue, however, the court remanded the case "for further findings to determine whether the term 'asbestosis' was used ambiguously in the public record and the insurance industry" at the time the parties entered into those policies. *Id.* at 1558.

Reinsurance Implications

In light of the inconsistency with which courts have interpreted "asbestosis" exclusions, it is possible that an insurer could be called upon to pay asbestos-related bodily injury claims that it believed at the time of underwriting were excluded from coverage. In such a situation, it is important for the insurer to understand whether its reinsurance, where applicable, will respond to such losses. Although there have been no reported cases addressing this issue, the first place an insurer should look to determine its reinsurance coverage is the terms of the relevant reinsurance agreements.

Indeed, if the reinsurance agreement contains its own, broadly-worded asbestos exclusion, depending on the other relevant terms, it is possible that the loss, while otherwise properly billed, will be excluded from reinsurance coverage. Many reinsurance agreements, however – in particular facultative certificates – do not contain their own exclusions, but instead provide that they are governed by the "terms and conditions" of the reinsured policies. In such a case, if the underlying policies contain only an "asbestosis" exclusion, then the reinsurance agreement would only be viewed as having an "asbestosis" exclusion, and not a broader exclusion.

In addition, most reinsurance agreements contain follow-the-fortunes and/or follow-the-settlements clauses, which broadly provide that the reinsurer is required to follow the loss payments and/or settlements of the reinsured. Although determining whether asbestos losses paid in the face of an "asbestosis" exclusion are properly billed under a reinsurance agreement is a fact-intensive process, the absence of a broad asbestos exclusion and the presence of a follow-the-fortunes and/or follow-the-settlements clause in the reinsurance agreement would likely support such a reinsurance billing. ●

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