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CONSUMER TECHNICAL AFFAIRS

Gentlemen:

The United States Sixth Circuit Court of Appeals has decided INA v. Forty-Eight Insulations, Inc. Each of the carriers who provided liability insurance to Forty-Eight Insulations issued an occurrence contract, and the problem faced by the court was which policies applied to asbestosis claims. The court in a preface states that in discussing liability it will be discussing asbestosis, not lung cancer or mesothelioma.

The court states that it, in coming to its conclusions, will follow the law of Illinois and New Jersey, the states which control the applicable contracts since all of the policies were issued in Illinois, except the Liberty Mutual which was issued in New Jersey.

INA and other carriers adopted a manifestation theory. That is when the symptoms of the condition became obvious, coverage attaches. The other carriers adopted the exposure theory (actually there is more than one exposure theory advanced by the different insurance companies).

Judge Keith for the majority states that in each case a hearing could be held to determine at which point the build up of asbestos resulted in the body's defenses being overwhelmed and at that point asbestosis could truly be said to occur. From then on all companies who insured the manufacturer would be treated as being on the risk. The court rejects this theory for practical reasons such as cost and states that there is a need to arrive at an "administratively manageable interpretation of the insurance policies."

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The court finds that cumulative disease cases are different from ordinary accidents or diseases; that the underlying theory of tort liability is that the asbestos manufacturers continually fail to warn the asbestos workers and therefore continuous breathing of asbestos particles allowed asbestosis to progress to the point of injury or death; that the contracting parties to the insurance policies would expect coverage to parallel the theory of liability.

The court affirmed the decision below that injury occurs and coverage attaches upon the inhalation of asbestos fibers during the policy period. If three carriers were on the risk for three years each during a nine year period of exposure, each insurer would be liable for a 1/3 pro rata share of the costs.

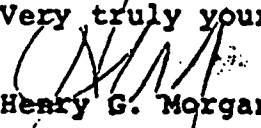
As to the obligation of Forty-Eight, to indemnify for the years that it had no insurance and as to the proration of the costs of defense the court held that proration should apply both to indemnity and expenses.

As to those years in which a plaintiff was not exposed to the product of Forty-Eight the obligation will be on the insurance carrier to show that no exposure to asbestos manufactured by its insured took place during those years.

The court concedes that its solution creates problems with "stacking", but concludes that this problem is caused by the insurance industry which adopted a standard policy which is inadequate to deal with the problems of asbestos.

In a dissent Judge Merritt adopts the rule that a carrier's coverage should begin with the discoverability stage and arbitrarily selects ten years from the date of the first exposure. There seems to be little legal support for the position of Judge Merritt.

Very truly yours,


Henry G. Morgan

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