Risk Manager's Corner: *The Asbestos Predicament*



William A. Mahoney, insurance consultant to Clayton and a Vice President with Marsh & McLennan, Inc., presents the first in a series of articles for our newest column--Risk Manager's Corner. Mr. Mahoney and other risk management experts will provide insight into risk management issues affecting the environmental field.

Mr. Mahoney has over 30 years of experience in the insurance industry with claims management and account executive responsibilities. He has closely followed the shift from occurrence to claims-made policies within comprehensive general liability coverage, and other insurance developments as they affect the environmental field.

Mr. Mahoney has authored several publications. Most recently, he coauthored an article for The National Underwriter on chemicals in the workplace. He has lectured extensively on the risks and liabilities of environmental impairment.

The presence of asbestos-containing materials in a building can be a risk manager's most complex dilemma because the decisions about dealing with that carcinogen have far-reaching ramifications. The pressure is on from all segments of society to do something about the potential exposure of office workers, school children, and plant personnel to asbestos.

For example, the federal government, under the Asbestos Hazard Emergency Response Act (AHERA), already requires schools to establish asbestos management programs in their buildings. Pending legislation could require similar action in *any* public building containing asbestos. At the state and local levels, governments have mandated specific actions such as New York City's tough new requirements. The lack of clear guidelines within some jurisdictions, however, makes the decisions about asbestos abatement methods confusing and difficult.

Despite the uncertainty, judicial precedence has established the ultimately liable party. A U.S. District Court decision in New Jersey (Lac D'Aminate DuQuebec v. American Home Assurance Company) held that the insurance company's limits of $103 million were available to an asbestos manufacturer. In another case involving four asbestos producers, a California Superior Court decision probably will allow the producers to recover tens of millions of dollars in asbestos liability claims (California Asbestos Insurance Coverage Cases--Judicial Council Coordination Proceeding, San Francisco, No. 1072, May 29, 1987).

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As recently as September 1987, another court decision granted broad insurance coverage for the manufacturer of an asbestos product (Zurich Insurance Company v. Raymark Industries, Inc., Illinois Supreme Court).

The effects of asbestos liability cases have been felt by the general product liability insurance industry. For example, in the case of Beshada v. Johns-Manville Products Corporation [447 A2D 539 (1982)], the New Jersey Supreme Court held that the "state-of-the-art"--the manufacturer's actual or constructive knowledge of the danger at the time the product was sold--is irrelevant in a strict liability claim, based on failure to warn of the danger. Although Beshada was an asbestos case, the court did not limit its finding to that product.

What do these court decisions mean to risk managers? Clearly, the manufacturer of asbestos-containing products is being identified as the "deep pocket" or the party best suited to absorb the costs. Nevertheless, the insurance carrier providing "product liability" is cushioning that deep pocket. The prospect for enlarging that pocket is worrisome.

Risk managers of companies with asbestos in their buildings or those with indirect association with asbestos-containing premises and risk managers for asbestos abatement contractors are worried. They wonder if the search for deep pockets will widen and reach further back in time. This possible retroactive responsibility would mean that more parties would share the risks.

Risk managers need to evaluate the situation at each property. They will need professional help from legal

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Toxic Tidbits: "Creatures in the Carpet"

by Alice C. Farrar, C.I.H.
Director
Atlanta Laboratory

A few years ago, the laboratory that I directed was asked to analyze insulation samples for asbestos content. The samples had been collected from inside air ducts in a private residence.

A binder had been placed on the house with purchase contingent on the buyer's satisfaction with an engineering inspection, including an asbestos materials survey. Analysis of the samples by polarized light microscopy (PLM) with dispersion staining indicated the presence of chrysotile asbestos.

Based on the analytical results, the homeowner, a widow who had lived with her family in the house since the 1940s, became concerned that the heating/ventilation/air conditioning system might have dispersed asbestos fibers throughout the house, exposing her children to asbestos while they were growing up.

She decided to have the laboratory perform some additional analyses. It was suggested that the contents of the household vacuum cleaner be analyzed to determine if airborne asbestos fibers might have settled in the carpet.

The microscopist proceeded with stereoscopic examination of the vacuum cleaner sample and then mounted representative fibers in 1.55 refractive index liquid, examining the slide under the PLM at 100x magnification. Within minutes, a gasp and then a giggle from the microscope room was heard throughout the laboratory. Everyone ran to see what triggered the response.

The sample was negative for asbestiform material, but *positive* for lifeform material! There, in the field of view, we all observed a microscopic eight-legged creature trying to swim its way out from under the cover slip.

A month later, a survey of the lab staff showed that most had given up their evening habit of lying on the carpet in front of the television!

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counsel to assess property leases and industrial hygienists to conduct asbestos surveys. Moreover, each risk manager should review his or her company's past and present insurance program.

Equally as important as an insurance review is the selection of an asbestos abatement contractor. Managers should evaluate contractors based on experience, employee training and certification, and available insurance coverage. Some risk managers will need to demonstrate all of the above to an underwriter who may accept the contractor into the company's insurance program.

An asbestos abatement contractor may find insurance coverage through one of the following insurance companies:

- The American Safety Insurance Group in Bermuda. It writes claims-made limits of $1,000,000.
- United Coastal Insurance Company. It provides $2,000,000 in general liability and $500,000 in errors and omissions coverage for architects and engineers involved in asbestos abatement projects.
- United Capitol Insurance Company. It offers $2,000,000 for claims-made contractor liability and professional liability for asbestos abatement consultants with a limit of $2,000,000. It can also write a five-year completed operations extended coverage.
- The National Union Fire. It can provide up to $4,000,000 aggregate on a claims-made basis.
- The American Empire Surplus Lines Insurance Company. It can provide limits of $3,000,000 with a $10,000,000 policy aggregate.

Asbestos removal or management will receive greater attention in 1988, largely because state and local governments have already enacted or proposed legislation requiring remedial action in commercial buildings. This is in addition to the school abatement programs (Asbestos Hazard Emergency Response Act) already in place.

The asbestos puzzle will get more complicated before it gets easier. The question for risk managers is straightforward: should the asbestos be removed or left in place but managed carefully on a day-to-day basis?

The answer, however, is hardly as straightforward; the health risks are uncertain but frightening, the financial stakes potentially enormous, and the litigation seemingly endless.

Moreover, conventional risk transfer mechanisms are essentially unavailable. Thus, the prudent risk manager will rely on well-known loss control practices and seek guidance from environmental experts.

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