INTEROFFICE COMMUNICATION

Æ&CASUALTY

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TO E. P. Brady, Director, Commercial Insurance Claim

FROM J. S. Backer, Director, National Accounts Claim

DATE April 28, 1977

SUBJECT ASBESTOS

The analyses prepared by Charlie Piano and Bill Dumbauld are good appraisals of the asbestos problem. There are a few things that I think should be emphasized, and I will take the liberty of expanding the perspective somewhat beyond asbestos:

1. Asbestos is getting most of the attention, but is, from my viewpoint, just the leading edge of the health phenomena that we are starting to see in the product liability and workers' compensation areas.

The era of nationwide exposure to multiple claims has arrived. Tris, the cancer-causing flame retardant in children's clothing, is the latest example. We are also confronted with lung cases arising from coke ovens, vaginal cancer from DES, injuries ranging from abortion to deformed children from the IUD, lung cases related to lead pigments, allegations that fiberglas causes cancer, liver cancer cases related to vinyl chloride, etc., etc. The common denominator on all of these injury cases is that: (1) they have arisen in the past four years, and (2) no one, including medical science, previously made or publicized the connection between the exposures and the injuries. On a prospective basis, it is impossible to predict what the next problem will be. This places us in an extremely difficult position, since we are writing contracts today which will respond to exposures that are discovered tomorrow.

I think that Bill Dumbauld's observation that the "potential is enormous and unpredictable" applies not only to the known problem (asbestos), but to anyone engaged in manufacturing, distributing, or working with virtually any product or chemical that can be breathed, ingested, injected, or worn.

Meanwhile, as polyurethane and kepone have demonstrated, property damage exposures have likewise escalated in recent years, and the same prediction problem is involved.

MARKS

PLAINTIFF'S EXHIBIT WV-001868

PLAINTIFF'S EXHIBIT 05732.00

2. So far, payments on asbestos cases have been very limited. Yet, the potential for punitive damages is very real, since there is evidence that the asbestos industry knew of the hazards many years ago, yet failed to warn. OCF, for instance, put their first rather innocuous warning on their products in 1972, and there is a similar pattern in the rest of the industry.

   Evidence was introduced in the Karjala case in Minnesota (filed in 1971) that Johns-Mansville "knew by at least the 1930's that persons who worked at plants where asbestos products were manufactured were exposed to a substantial health hazard." It was admitted, in trial, that J-M "knew as early as 1942 that asbestos would cause asbestosis when inhaled by factory workers." There was no warning. The plaintiff was awarded $200,000.

   Obviously, plaintiffs can develop evidence to attempt to make a case for fraud and deception against the asbestos industry. If this leads to punitive damage awards, our limited payments to date offer no reassurance, since "occurrence" wording does not eliminate coverage, and most states allow recovery from insurance policies.

   Beyond asbestos, this "testing, warning" question is present to some degree in virtually in all of the health-type claims.

3. Last but not least, I want to emphasize the coverage dilemma. Health-type injuries normally occur at some indeterminable point in time. The question is when an exposure to conditions "results, during the policy period, in bodily injury." Ætna has stuck to the manisfestation argument, i.e. there was some known or ascertainable bodily impairment. Under our argument, which is shared by only some of the insurance industry, we expose only one policy. I believe that it is entirely possible, indeed probable, that this argument will not stand the test of time.

   What happens in 1980 when some twenty-year distributor realizes that claim payments have exhausted his 1974 policy limits, and he is without insurance? Isn't he likely to allege that a series of exposures extending from 1954 to 1974 added to the bodily injury each year? Let's face it, our present occurrence wording does not contemplate this situation, and the "results, during the policy period, in bodily injury" wording is indefinite enough to be construed as ambiguous, exposing the limit of every policy written over a twenty-year span.

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> Obviously, we cannot rewrite expired policies to eliminate the potential. But, if our exposure is ultimately spread across older policies, severe limitations of coverage on the most recent policies will not offer much solace to the insurance industry. The rise of health-type claims could ultimately prove to be a pandora's box for the insurance industry, i.e. no matter what we do currently to obviate exposure, it will prove to have little or no impact on our overall exposure.

The above concerns are well known to National Accounts. They have reacted quite well in recent years, and have written increasingly restrictive coverages. They have eliminated coverages, and have devised protective plans that were unheard of five years ago. I'm quite confident that Ætna leads the industry in this regard.

My prospective concerns suggest that: (1) we need to be extremely cautious about underwriting any risk, regardless of past history, which has the potential for claims over substances that can be breathed, ingested, injected, or worn; (2) whatever position the industry ultimately takes on punitive damages, Ætna must seriously consider eliminating punitive damage coverage; and (3) a re-draft of the "occurrence" definition to cope with the health injuries should be a priority item. All of the foregoing would, seemingly, make our ultimate exposure under current contracts more predictable, and predictability is our basic problem.

I hope that the foregoing unsolicited observations from someone who has been on the firing line since these shells started to explode are merely an indication that our flanks have been overrun, but we are still winning the battle. I pass these observations along for whatever they may be worth.

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