EXPOSURE THEORY APPLIED IN ASBESTOSIS CASES

In *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,[1] a declaratory judgment was sought by an insurance carrier against its former insured (Forty-Eight) and four other insurance carriers to determine which carrier had the duty to defend or indemnify Forty-Eight.

In the underlying actions, construction workers claim to have suffered injury or death from asbestos-caused lung diseases as a result of being exposed to Forty-Eight's asbestos-containing products from a few to up to 48 years. Although the particular facts are complex, it is sufficient to say that, over the years, Forty-Eight was insured by at least five carriers who, sometime after 1955, each stood as a primary. For prior years, Forty-Eight was uninsured.

The controversy centers around when coverage arises. Is it at the time of exposure to the asbestos dust? Or is it when a lung disease is manifested?

After boiling down the policy language in the host of policies used within the period, the court stated that in each policy the insurer has agreed to pay on behalf of the insured such damages as are determined because of "bodily injury" caused by an "occurrence" during the policy period. "Bodily injury" includes injury, sickness and disease.[2] "Occurrence" includes a continuous or repeated exposure to conditions which result in bodily injury.[3] Most of the carriers contended that, in lawsuits alleging lung disease, coverage is provided by Forty-Eight's insurer on the date on which the condition became known or should have become known to the plaintiff or the date on which the plaintiff's condition was medically diagnosed, whichever comes first. The insurers argued that, although there is tissue damage long before manifestation, a person cannot be considered injured or diseased until symptoms are noticeable or a diagnosis is made. They pointed out that exposure is not necessarily related to injury. The correlation between the onset or progression of the disease with specific incidents, the extent of damage at any particular date, or the time at which bodily function begins to be impaired cannot be determined with any accuracy.

But, Forty-Eight and one insurer contended that the liability policies are "occurrence" or "accident" policies, not "discovery" or "claims made" policies. They pointed out that the uncontroverted medical evidence indicates that the tissue damage occurs shortly after inhalation. The asbestos-caused diseases involve cumulative minute injuries and are progressive, constituting a "continuing tort." All insurers on the risk from the time of alleged initial exposure through manifestation, they contended, are jointly and severally obligated to defend and to indemnify Forty-Eight if liability is found.

The court held that the exposure theory applied.[4] One reason given for the holding was that some insurers did not begin to espouse the manifestation theory until after *Borel v. Fiberboard Paper Products*.[5] *Borel* held that all manufacturers of asbestos products to which a plaintiff was exposed were jointly and severally liable. The shift from an exposure theory, the court found, was instructive on how the parties themselves had interpreted the contracts. Second, the court found, the evidence established that each tiny deposit of scar-like tissue from the fibers causes injury to the lung; each deposit resulted in an occurrence, the pattern constituting a continuing tort.

The court noted that a plaintiff must show exposure to the asbestos products of an asbestos manufacturer and the existence of disease in order to make out a prima facie case of injury. The inability to fix the exact time when each injury occurred does not preclude liability, where such injuries are cumulative and progressive, and cannot be apportioned among given points or periods of time. By being on the risk during an indivisible, injurious process, each insurer is jointly and severally liable to defend and indemnify. Any other theory of coverage, the court held, would render Forty-Eight's insurance coverage illusory.

The court reviewed the implications of adopting the exposure theory. It concluded that, since the insurers covered Forty-Eight for differing periods, the obligation to indemnify should be apportioned on the basis of the relative lengths of their respective coverage periods. But no insurer, the court said, should be liable in any one case to indemnify Forty-Eight for judgment liability for more than the highest single yearly limit in a policy that existed during the period of the claimants' exposures for which judgment was obtained. The court expressed confidence that when other questions arise, insurers would resolve them, exercising their settlement and compromise skills.

Fearing unequal treatment from a rule that would require the insurer on the risk at the time suit was brought to defend, the court opted for a rule that made the duty to defend coextensive with the duty to indemnify, with an apportionment of the defense costs. This includes Forty-Eight's responsibility to bear costs in direct proportion to the years it was uninsured. The triggering mechanism will be the dates of

[1] __ FSupp__, Civ Action No 7-71654 (ED Mich May 4, 1978). The "occurrence" and "duty to defend" aspects of this decision are considered in Houser & Gordon, Practical Considerations in Determining the Duty to Defend, in DRI monograph, INSURER'S DUTY TO DEFEND at 50-51 (Vol 1978 No 3, May 1978).

[2] For the sake of accuracy, it should be noted that (based on the court's synopsis) many of the INA policies referred only to "sickness and disease"

[3] Again, for the sake of accuracy (and again based on the court's synopsis) it should be noted that the INA policies (with one possible exception) did not include this definition. The "repeated exposure" language applied to property damage only.

[4] The court took a different view when considering the statute of limitations. It is at the time an asbestos-caused disease manifests itself in a way that implicates a causal relationship to the manufactured product that the public interest in limiting the time for asserting a claim attaches and it is then that the statute of limitations begins to run. (Slip opinion, Page 12.)

[5] 493 F2d 1076 (5 Cir 1973)

exposure to asbestos alleged in the complaint. If more than one insurer was on the risk during the dates or period alleged, their obligation to assume the defense will be joint and several. If no specific dates are alleged, then the insurer providing coverage on the date of suit must assume the defense. Under this analysis Forty-Eight would be treated as an insurer for the years it was, or will be, without insurance.

There are several aspects of this case worthy of note. First, each insurer stood in turn as a primary as the exposure progressed. Thus, issues concerning primary-excess, other insurance and even stacking, although briefly mentioned in the case, do not arise. Second, the case deals with the manufacture of a product alleged to produce the disease, a point the court relied on when distinguishing this case from one in which a suit was brought against the manufacturer of a respirator under the claim that the use of a defective respirator caused the asbestos worker's asbestosis. There, the manifestation theory was held to apply.[6] The court also distinguished this case from those workers' compensation cases in which the manifestation theory has been applied, reasoning that Congress had altered the common law.[7] Lastly, the resolution of the defense costs issue can be distinguished from a situation in which two insurers insure the identical risk and both policies provide for the furnishing of a defense. It has been held that, absent a contractual relationship, the insurer which undertakes the defense cannot require contribution from the other for defense costs where the other denies liability and refuses to defend.[8]

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[6] Porter v. American Optical, __ FSupp __, Civ Action No. 75-2202 (ED La November 23, 1977)

[7] General Dynamics Corp. v. Benefits Review Board, 565 F2d 208 (2 Cir 1977) (Longshoremen's and Harbor Workers' Compensation Act)

[8] See, Sloan Constr. Co., Inc. v. Central Nat'l Ins. Co. of Omaha, 236 SE2d 818 (SC 1977)

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NEW BRIEF AVAILABLE: The DRI Brief Bank has briefs in the case of *Chicago, R. I. v. Pacific R. R. v. Rediker* (discussed on page 126 of this issue), in which the U. S. Supreme Court granted certiorari. Issues include defendant's right to establish impact of income taxes on projected future lost wages. Briefs are available to DRI members for a $20 handling fee. Request Case File 78-58.

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