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March 18, 1974

Re: Insured: Standard Asbestos Manufacturing & Insulating Co.

Mr. Pete Hanlon
Commercial Union Insurance Company
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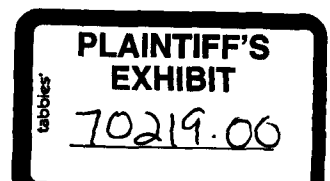
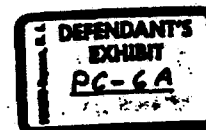
Dear Pete:

You asked me to write to you concerning the procedure which has been followed in these asbestosis cases insofar as the defense of Standard Asbestos Manufacturing & Insulating Company is concerned.

The problem is a difficult one, and the procedure which has been followed is by no means perfect. The problem arises from the fact that Standard Asbestos has, throughout the years, had its coverage with various insurers. This, of course, is not at all unusual. In the ordinary case, it would be relatively easy to determine which insurer should defend and pay. In the ordinary case, the tort involved could be tied down to a specific date, and likewise the date of the injury could be ascertained, as well as the date of the manifestation of the injury. It would then be a relatively simple matter to review the policies involved and determine which of the companies had the coverage.

The problem here arises because of the peculiar nature of these lawsuits. I am going to use the term asbestosis as an all inclusive one, although, as a matter of fact, we are actually dealing with other conditions produced by the inhalation of asbestos fibers. Asbestosis, used in this broad sense, is a disease which is produced by the cumulative effect of the inhalation of asbestos fibers, and the symptoms of the disease may not appear for many, many years. In all of these cases, each plaintiff alleges that he was exposed to the products manufactured by these various defendants over a long period of time, sometimes as long as 40 years. Each such exposure,

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according to the expert testimony, contributed to the condition. From a practical point of view, it is almost impossible to determine whether a given plaintiff was exposed to a given manufacturer's product at any specific time. This is particularly true in a case of the larger defendants, such as Johns-Manville or Fibreboard. In the typical situation, a plaintiff will allege that he has been working around insulation containing asbestos for many years, and that he worked around a given product throughout the entire period. Thus, insofar as the allegations of any one petition are concerned, the allegations would be to the effect that the plaintiff was exposed to the products of all defendants during each year of the long period of time involved. It is only after the facts of each particular case are carefully developed that any information can be ascertained which would help to pinpoint the date of the exposure.

This was the situation which confronted us when the first lawsuit was filed. Obviously, someone should defend Standard, but, based simply upon the allegations of the plaintiff's petition, it was impossible to determine which of the companies should undertake the defense, nor could it be determined at that point in time which company (or companies) should be responsible for paying the judgment, since it could not be ascertained when the exposure or exposures took place.

There is a further complicating factor here, in that there might well have been differences in the language of the various policies, and we were aware of the fact that some of these policies might have provided coverage based upon when the injury manifested itself, while other policies might have covered the period of time when the injury was originally inflicted.

When the first case was filed, it happened that three of our regular clients were the companies insuring Standard during the period of time involved in that case. These were Hartford, American Mutual, and Employers Insurance of Wausau. All three of these companies realized the difficulty of the problem, and the matter was discussed at great length by the respective claims managers of the three companies.

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It was finally decided that the only feasible solution would be for the companies to agree that each would assume responsibility based upon the proportion of the time involved in the particular suit during which each company had the coverage, regardless of the particular language of the policy and regardless of what the evidence subsequently disclosed as to the times of exposure. I might add, insofar as the question of the form of the policies is concerned, that the policies themselves were in many instances no longer available because of the long lapse of time.

One of the advantages of this arrangement was that it permitted the trial lawyer representing Standard to represent that company in the same manner as if Standard itself were his client, and without regard to what the evidence might subsequently show as to the exact time of exposure. From an attorney's point of view, this is certainly important. For example, if this agreement had not been made, it would have put me, or any attorney representing Standard, in a very difficult position indeed if there had been some question in the evidence as to when the exposure to a Standard product had taken place. For example, let us assume that the evidence raised an issue that a plaintiff was exposed to a Standard product in 1943 and also in 1951, and that different companies had the coverage for those two years. If the trial lawyer, by trial tactics, including cross examination, were to successfully attack the evidence concerning exposure on one date, he would, in effect, be damaging the company he represented having the coverage on the other date. Further, there is no practical way, particularly in the Federal Court, to obtain a jury finding as to when the exposure to any one product took place, since the plaintiff's theory in each case is that the time of exposure makes no difference.

As you can see, this arrangement was arrived at simply because there was no other feasible alternative.

From the beginning, all three companies have recognized that this method is far from perfect.

The first objection is perfectly obvious. Standard was and is a fairly small producer, and in each case, the exposure to Standard's products will almost certainly be limited to a

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fairly short period of time. Thus, in each case, by the time the investigation and discovery has been completed, it is entirely possible that one or more of the companies may have been eliminated. Let us assume, for example, that we have a case involving a man who has been exposed to asbestos products over a period of 30 years, from 1940 to 1970. To simplify the matter, let us further assume that Hartford had the coverage in the 1940's, American Mutual in the 1950's, and Employers Insurance of Wausau in the 1960's. Let us further assume that after depositions, interrogatories and other discovery, the evidence finally shows that the only possible time the plaintiff could have been exposed to Standard products was in 1945. Under the terms of the agreement which was made, this would mean that two of the companies would be contributing to the defense of the case, or to a settlement or judgment, when they really did not have any coverage at the time of the commission of the tort.

The difficulty, of course, is that this can never be ascertained at the beginning of any particular lawsuit, and can only be determined, if at all, after the facts have been fully developed.

There are other problems. One of them would be the position of a reinsurer. By entering into such an agreement, it might be said (but only at the end of the road) that one particular carrier had exposed its reinsurer to liability unnecessarily.

Another criticism of the arrangement, as indicated above, would have to do with the form of each carrier's policy throughout the years.

There are, of course, other objections to the arrangement. Nevertheless, from a practical point of view, it seems to me that this is about the only feasible method of handling this difficult problem.

I confess that I might have entirely different feelings if Standard were the only defendant in these cases. However, I do not think that it is likely that Standard will ever be named as a single defendant in any of these cases, and I would anticipate

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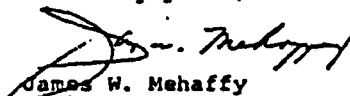
that in every case to be filed in the future, the situation will be as it has been in the other cases - that is, that there will be a great many defendants. It is true that in a particular case, one defendant may escape for reasons peculiar to that defendant. In one of these cases for example, the evidence disclosed that the only exposure a plaintiff had to one defendant's product was when he was employed by that very defendant, and that defendant was protected because of the Workmen's Compensation Act. Nevertheless, I think that it will ordinarily be true that there will still be many defendants, and any amount paid in settlement or judgment will be spread fairly thin. This in no way changes any of the principles we have considered, but it is a practical consideration to take into account.

It is my feeling that there simply is no really feasible alternative. When we were discussing the situation at the beginning, some consideration was given to some sort of agreement by which the companies would share pro-rata up to the point where it became apparent that the exposure fell within the identifiable term of one or more policies. It was the feeling of the three companies then, and I still feel, that this simply is not a very workable alternative.

In conclusion, it was our feeling when this arrangement was first made that it was one which was far from perfect, but under the circumstances the best practical solution to a problem which was really insoluble.

I hope that this information has been of some benefit to you, and if you need any additional information or further views, please let me know.

Sincerely yours,


James W. Mehaffy

JWM:jg

cc: Mr. Joseph P. Lombardino
(American Mutual No. 276-197200)

Mr. John Crozier
(Employers of Wausau No. H48-11416)

Mr. Don Knight
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Mr. J. A. Harvey
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