Developing Exposures

Report by: - American Re

This report introduces various types of claims exposures that have a large potential impact on the insurance industry at large.

Asbestos

Overview

Asbestos is a naturally occurring mineral whose insulating properties have been known since the time of the ancient Egyptians. From the early 1 900s through the late 1 970s, asbestos was widely used for its insulating abilities where heat and/or high pressure were a factor (i.e., gaskets, seals, brake linings, and building and electrical insulation.) In addition to its insulating qualities, asbestos is noncombustible. The combination of these two qualities made it highly desirable in the building construction and ship building industries. Because its fibers could be easily incorporated into material, it was used in the weaving of fire retardant clothing used by firefighters, steam fitters, welders, and steel workers. When mixed with vinyl, it produced a material that was long-wearing and held its shape. Its most popular use was as vinyl floor tile, which resisted furniture (marks.)

As a result of numerous medical studies linking asbestos fibers to respiratory occupational diseases, the use of asbestos in almost all of its forms was banned by the USEPA in the late 1970s and early 1980s. The first asbestos litigation was filed in the 1960s and has, so far, generated over 250,000 cases with a price tag of between $15 billion and $20 billion. Unfortunately, the anticipated decline in the filing of new cases has not occurred. In fact, 55,000 new cases were filed in 1995, which is more than in any previous year. The exact number of cases pending is hard to establish, as it varies from defendant to defendant.

Recent Developments

Many of the traditional (First and Second Tier) defendants, the major manufacturers and distributors of asbestos-containing products, are continuing to use their resources to pay and/or defend these cases. A few of these (First and Second Tier) defendants have already gone
bankrupt or are seeking bankruptcy protection through the courts while they address these issues. As a result, the less traditional (Third and Fourth Tier) defendants, such as small wholesaler distributors and the larger retailers, are being named with greater frequency and are beginning to find their way into the morass of asbestos litigation. Also, the traditional mix of plaintiffs is changing, moving away from the shipyard workers and certain building construction trades, to the mechanical trades (electricians, plumbers, auto mechanics, etc.) and maritime employees.

Types of New Claimants

- Merchant seamen
- Electricians (IBEW)
- Plumbers (union and non-union)
- Auto mechanics

Types of New Defendants

- Auto manufacturers
- Auto parts wholesalers and retailers
- Plumbing supply houses - wholesale and retail
- Hardware and electrical supply stores - wholesale and retail
- Manufacturers and suppliers of maritime equipment
- Steamship lines

Lead

Overview

Lead is present everywhere in our environment. The strength and malleability of lead has resulted in its use in a wide variety of products, currently and historically, including paints, solder, cans, crystals, cosmetics, plumbing fittings and fixtures, batteries, construction materials, pesticides, fertilizers, ceramic glazes, electronic circuitry, gasoline, and a wide variety of other products. The use of some of these products, such as leaded gasoline, paint, solder, and plumbing, has added greatly to soil, water, and air contamination.

Physical injury complaints relating to lead usually involve ingestion, but to a lesser extent may involve inhalation or absorption through the skin in certain cases. Once absorbed into the body, lead is stored in bone, and is periodically re-released into the blood. The toxic effects of lead on certain body organ systems including the brain, kidneys, bowels, sexual organs, nervous system and blood are well documented. The neurotoxic effects are most devastating and the severity of symptomatology generally bears a direct relationship to total body lead load. The neurologic effects can range from anxiety, irritability, insomnia, headaches, tremors, and diarrhea, through disorientation, memory loss, impaired visual-motor function, speech impairment, encephalopathy, autism, peripheral nervous system damage, and mental retardation. While drug therapies to remove lead from the body exist, damage to the body, especially the nervous system, may not be reversible in most instances. Lead poisoning is measured by referral to micrograms per deciliter of blood. The CDC has established the base level for lead poisoning at 10 micrograms per deciliter.

While the sources of lead are widespread, the predominant modalities of human contamination involve lead paint and water pipe sources. Lead has been referred to as a major environmental threat to children, with lead paint in approximately 57 million homes and apartments. Studies have estimated that 1 .7 million children have more than 10 micrograms of lead per deciliter of blood.

The Federal Government banned most applications of lead paint in 1977, but there was no restriction on lead in water pipes and solder until 1986. Government estimates are that up to 20 percent of childrens exposure to lead is derived from drinking water.

The litigation to date has predominantly involved individual and class action suits brought by urban tenant parents and, to a lesser extent, occupationally exposed individuals, against building owners, plumbing manufacturers, paint manufacturers, and distributors.

The actions proceed on theories of product liability, negligence, and several state and local statutes as well as traditional property law theories, including breach of implied warranty of habitability, breach of covenant to repair, and nuisance. The plaintiffs seek the costs of medical testing and treatment, compensation for injuries suffered, the costs of future medical monitoring, and the costs to test and abate lead existing in buildings. The predominant defensive responses to these actions involve lack of causation, statute of limitations, and state-of-the-art defenses.

Recent Developments

A 1996 survey of verdicts indicates that average awards dropped from $834,387 to $730,297, mainly as a result of a slight increase in defense verdicts and a decrease in the number of plaintiffs verdicts over $1 million. However, mid-range verdicts between $50,000 and $1 million experienced a 4% increase.

Adding to the scope of the lead scenario is a patchwork of federal, state, and local statutes reaching various environmental and occupational aspects of the situation, including the required testing and abatement of lead paint in the nations older housing stock built prior to the late 1970s.

Federal Legislation under Title X requires disclosure of lead paint hazards to the purchaser or lessee of property built prior to 1978. In addition, federal guidelines may suggest implementation of alternative liability methodologies for state action resembling no-fault structures.

Types of Claimants

Tenants Homeowners Painters Plumbers Auto mechanics Ceramic industry workers Battery industry workers Steel welders/cutters Printers Electronics industry workers (PC board) Gasoline station attendants Lead miners Lead smelters and refiners U Construction workers

Types of Defendants

Primary

- Building owners
- Paint and pigment manufacturers
- Plumbing manufacturers
- Paint and plumbing distributors

Secondary

- Realtors
- Property managers
- Municipalities
- Health organizations
- Contractors
- Manufacturers of lead related products
- Lead mining companies

Breast Implants

Overview

Breast implants have been on the U.S. market since the early 1960s. There are four basic types of breast implants: saline filled (a silicone envelope filled with saline solution); silicone gel filled (a silicone envelope filled with jelly-like silicone gel); double lumen (two silicone envelopes, one inside the other, the inner envelope filled with saline, the outer envelope filled with silicone gel); and foam-covered (silicone gel in a silicone envelope coated with polyurethane foam).

While the more serious health concerns are allegedly associated with the gel-filled and foam-covered implants, there are compthat allegedly involve all types of breast implants, such as hardening of the scar tissue around the implant (called (capsular contracture)), hardening of the breast, localized pain, and temporary or permanent changes in breast sensation and/or appearance. Breast implants are also reported to interfere with x-rays of the breasts, and may rupture during the examination.

The more serious complications allegedly associated with the gel-filled and foam-covered implants include auto-immune disorders, such as lupus, scleroderma, rheumatoid arthritis, etc., as well as an increased risk of cancer. There are also concerns that these conditions may be transmitted to unborn babies of implant recipients. These more serious complications are chiefly related to silicone gel that allegedly escapes from the implant due to a rupture or tear or by (bleeding or sweating) through an intact implant, and allegedly migrating to distant parts of the body. There are also allegations that suggest that the polyurethane foam covering of certain types of implants can break down in the body, releasing small amounts of toluene diamine (TDA), a suspected carcinogen.

It should be noted, however, that the FDA has found no conclusive evidence that women with breast implants, gel-filled or otherwise, or their unborn babies, have an increased risk of developing these conditions. The Mayo Clinic Study released in June 1994 concluded that there was no association between silicone breast implants and connective tissue diseases. Until further studies prove or disprove the safety of implants, the FDA has sharply limited the use of gel-filled implants and has required the makers of saline-filled implants to prove that these types of implants are safe and effective.

Recent Developments

The most notable activity has been the collapse of the $4.25 billion global settlement approved by Judge Pointer in 1994, who presides over the federally consolidated implant litigation venued in Birmingham, AL. This followed the Dow Corning filing of voluntary bankruptcy protection under Chapter 11. A revised settlement program was developed and approved involving some, but not all, of the manufacturers and suppliers involved in the original settlement.

The more recent medical studies have also attracted their share of controversy. A 1995 Harvard study utilizing questionnaires did not find an association between implants and connective tissue disease, while another 1995 study by a radiologist at the University of California at San Diego reportedly found that, on average, 31 percent of silicone gel and 91 percent of polyurethane-coated implants ruptured. A 1996 Harvard study found no large hazard of connective-tissue disease with breast implants, but found that current data suggest a small but statistically significant increased risk. To address the often conflicting and confusing scientific research relating to the breast implant litigation, in May 1996 Judge Pointer ordered the formation of a national panel of scientific experts to review and evaluate the literature, research, and publications on silicone gel breast implants, particularly on the issue of general causation.

Types of Claimants

It is estimated that 1-3 million women have received breast implants. Reportedly, 80 percent of these women received implants for cosmetic or augmentation purposes, while the remainder received implants for reconstructive purposes following breast cancer surgery.

Types of Defendants

Primary

- Breast implant manufacturers
- Component parts manufacturers and suppliers

Secondary

- Medical professionals and/or hospitals

ElectroMagnetic Fields

Overview

Electromagnetic fields (EMF) are invisible fields produced by power lines and anything that uses electricity, as well as by the earth itself. They continue to receive a great deal of publicity due to the alleged association of EMF exposure and cancer.

Numerous studies have been and continue to be conducted, trying to determine if there is a relationship between cancer and EMF and, if so, what is that relationship. Generally, the earlier studies yielded contradictory results. It is believed that while electric fields can be shielded fairly easily, the magnetic fields cannot, and that distance from the fields reduces their strength.

While there is no biological evidence of a relationship between cancer and EMF, some scientists feel that EMF is not a cause, but a promoter that causes cancer cells to grow and multiply abnormally. It also remains unknown if decreasing exposure to EMF decreases risks. With the universal presence of EMF, it is impossible to find a control group or to isolate the cause and effect.

While the use of electricity has increased 2500 percent in the last 40 years, there has been no corresponding increase in the number of childhood cancers reported.

Despite the fact that the weight of the scientific evidence and case law do not support the theory that EMF causes cancer, many states have adopted a policy of prudent avoidance in the building or modifying of power lines. Adverse publicity has caused delays and cancellation of new transmission lines, as well as relocation of proposed new schools. The Office of Technology Assessment estimates the costs of the EMF controversy for the public is $1 to 3 billion per year in the form of litigation, higher utility bills, relocation of lines, and lost property value.

Recent Developments

The findings of numerous studies since 1983 have varied widely. One-third were done in the U.S., one-third by Scandinavian countries, and the rest worldwide. The Scandinavian studies have found no statistical significance, while some U.S. studies have suggested some relationship.

It should be noted that the National Research Council issued a report in October 1996 based on a three-year review of over 500 studies completed since 1979, which concluded that there is (no clear and convincing evidence) linking EMF with cancer or any disease. It is not expected that this will completely stop the media attention or lessen the public awareness of this issue.

Based primarily on the causation issue, the litigation results have favored the defendants. Two highly publicized personal injury suits alleging cancer as a result of EMF exposure against utilities both resulted in defense verdicts due to plaintiffs failure to prove proximate cause. A 1996 personal injury suit found no causal connection between EMF and cancer, but did award damages of approximately $750,000 for nuisance and negligent infliction of emotional distress. Plaintiff had purchased land from a railroad to develop it and built over a 69,000 volt underground transmission line, which was not on the easement. The case is on appeal by both sides.

While there have been some awards for diminished property values, the first jury trial of EMF for inverse condemnation resulted in a defense verdict. In another lawsuit, the California Supreme Court issued a ruling in August 1996, which is expected to bar homeowners from suing for alleged loss of property value due to EMF exposure, stating that the power lines are the domain of the California Public Utilities. Other states, such as Florida and New York, are allowing these types of claims to be filed and go forward.

While the plaintiffs have not been successful in any of the major cases tried to date, it is not expected that litigation on the issue of cancer related to EMF will completely cease.

Types of Claimants

- Anyone who lives or works near a transmission line or substation
- Electrical workers
- Owners of property for decreased value due to the location of the transmission lines
- Primarily claimants are children with cancer

Types of Defendants

Primary

- Electric utility companies

Secondary

- Manufacturers of appliances
- Designers of electric systems
- Employers of Workers Compensation claims
- Boards who approve construction of new transmission lines, etc.
- Schools

Tobacco

Overview

Tobacco products including cigarettes, cigars, smokeless tobacco, snuff, and pipe tobacco have existed for centuries. It has been alleged by tobacco company critics that as early as the 1940s tobacco companies to realize that tobacco is a main contributor to many types of cancer and respiratory ailments. Individuals have been filing lawsuits against tobacco companies for years with virtually no success. Tobacco companies have aggressively defended these claims. More recently, however, more information has been presented, including information from people within the industry, that may indicate that the industry was aware of the addictive qualities of nicotine and the adverse health effects related to tobacco use.

Recent Developments

Recently, a new wave of litigation has begun, including class action suits on behalf of individuals addicted to nicotine, secondhand smoke suits, and actions brought by various states against the tobacco industry seeking reimbursement of Medicaid funds.

The Fifth Circuit recently overturned the trial judges decision inCastano v. The American Tobacco Company. et al. No. 95-30725, 5th Cir., May 23,1996,1996 U.S. App. LEXIS 11815, ruling that all smokers (nationwide) who claim sickness due to addiction to cigarettes, cannot join in one class action against the tobacco companies. Shortly thereafter, a number of class actions were filed in individual states.

In March 1996, The Liggett Group settled with the Castano plaintiffs and broke ranks with the rest of the industry, which has steadfastly opposed private lawsuits.

Other states have joined Mississippi in the crusade to be made whole in the face of rising Medicaid costs and an aging population by filing lawsuits based in equity against tobacco companies. These suits claim that tobacco related illnesses have grossly increased Medicaid costs and the illnesses are ultimately due to the tobacco industrys willful failure to advise the public of the known dangers of tobacco use.

A $750,000 award was handed down in August 1996 to a Florida plaintiff seeking recovery against a tobacco manufacturer for tobacco related illnesses. An appeal is likely.

Types of Claimants

- Smokers
- Users of smokeless (chewing) tobacco
- Those exposed to secondhand smoke (virtually everyone)

Types of Defendants

- Tobacco product manufacturers
- Manufacturers of component parts of cigarettes other than tobacco (i.e., rolling papers, filters, etc.)
- Advertising agencies and public relations firms
- Tobacco industry special interest groups (CTR)
- Law firms

Employment Practices Liability

Overview

While anti-discriminatory laws have been in place since the Civil Rights Acts of the 1800s prohibiting discrimination based on race and color, employers paid little attention to these claims until the 1980s, with real concern in the 1990s when monetary damages were awarded in significant amounts. Historically, claims arose out of contract disputes or employee benefits. With the enactment of new laws expanding employer liability (Title VII of the Civil Rights Act of 1964, amended in 1991, and the Americans with Disabilities Act, or ADA), along with a more sophisticated plaintiffs bar, there has been an increase in both frequency and severity of losses. This has caused employers to look to insurance for protection due to the complexity and uncertainty of the potential outcomes. There are a number of other federal statutes under which employment practice claims have been presented, such as the Equal Pay Act, Age Discrimination in Employment Act, Rehabilitation Act of 1973, 42 U.S.C. Sections 1981, 1983, and 1985, Fair Labor Standards Act, National Labor Relations Act, Workers Adjustment Retraining and Notification Act, and Family Medical Leave Act.

Sexual harassment, considered by some to be the most pervasive discrimination in the workplace, was brought to the forefront of the publics attention during the congressional confirmation hearings for Supreme Court Justice Clarence Thomas, and by the award against Baker McKenzie in California. These two situations have caused a tremendous growth in the number of claims filed with the Equal Employment Opportunity Commission (EEOC).

Sexual harassment claims and claims made under the ADA are two areas where most of the future litigation against employers is expected.

The 1991 Amendment to Title VII expanded remedies for discrimination based on race, color, sex, religion, or natural origin to mandatory hiring or promotion, back pay, attorney fees, and punitive damages of up to $300,000 for each employee (the amount of the award can vary depending on the number of employees). This act also entitles the employee to a jury trial.

ADA went into effect in 1992; however, the statute has not clearly defined (disability) or (reasonable accommodations.) Remedies are similar to Title VII, but also allow for front pay (payment of future income benefits if the claimant is not reinstated to the position) awarded at the discretion of the judge. If an employee is collecting or has filed for workers compensation or Social Security Disability Income, no remedy is available under the ADA. The trend of the courts appears to be to expand ADAs applicability to a growing number of allegations.

The applicability of coverage is allegation specific, and may rest on the question of disparate treatment (e.g., an employment decision based on some characteristic other than performance or realistic employment qualification, which discriminates against a particular class of employees) versus disparate impact (e.g., when a policy or procedure which is facially neutral in the treatment of different groups, but which in reality falls disproportionately on a particular group or class of employees, such as a reduction in the work force of a company that results in a loss of jobs, for example, by workers over the age of 50

and/or female employees, or a height and weight requirement). An allegation of disparate treatment requires proof of discriminatory intent, and if proven, coverage is not available. Another coverage issue involves the question of when an employment problem becomes a claim as defined in the policy. In a situation that falls under the jurisdiction of the EEOC, a specific series of hearings and/or administrative procedures must be conducted before an employee has the right to file a claim. To avoid a potential claim, it is critical for the employer to provide a prompt appropriate response to the initial charge filed with the EEOC or Human Rights Commission at the state level. The employers success at this level would obviously inure to the benefit of the insurers. The duty usually falls upon the employer to disprove the allegations and the evidence/documentation submitted will be admissible as the claim proceeds through the system.

It is estimated that, on the average, each *Fortune* 500 company loses $6.7 million annually based on decreased productivity caused by lost time and medical costs, in addition to the cost of claims. Each employer must consider the cost of responding to these claims.

Recent Developments

A survey published in the May 8,1996 BNAs Employment Discrimination Report dealing with age, race, sex, disability, and pregnancy discrimination, including sexual harassment, stated that awards from 1988-1995 reached a new high in 1995 at a median of $204,310, which represented a 56% increase in one year. The survey also found that the rate of recovery by plaintiffs decreased 48% from 1994 to 1995, and that while race awards were increasing, the chance of prevailing was decreasing. An award for attorneys fees can be greater than the amount of compensation awarded to the plaintiff. The average cost to defend an employment practice claim ranges from $20,000-$200,000. Class actions cost much more.

For years, policyholders have sought coverage under the standard CGL Occurrence form for wrongful termination, discrimination, sexual harassment, and other related workplace torts. Carriers consistently resisted coverage for these claims under the CGL forms based primarily on the lack of coverage for intentional acts derived from the Insuring Agreement, the Personal Injury definition, and Employment/Workers Compensation exclusionary language. This situation has led to a demand for a product that would respond to the liability created by these employment related exposu.

Many carriers are trying to develop a product that, while offering this coverage, will provide reasonable limits and will include a number of restrictions and exclusions. Some of the more prevalent exclusions included are:

- Injuries or damages that are expected or intended
- Retaliation by an insured against an employee
- Claims resulting from the insureds insolvency, bankruptcy, etc.
- Claims for bodily injury and/or property damage
- Claims against a subsidiary involving wrongful practices predating any affiliation with the insured.

Most products being offered provide coverage for Wrongful Employment Practices first occurring on or after the inception and/or retroactive date of the policy. The policy responds to only those claims first made against the insured and reported to the Company during the policy period (to include the Extended Reporting Period).

Although an All Risk Policy is on the market, most EPL policies provide coverage for claims arising from specifically defined perils such as:

- Wrongful termination
- Discrimination
- Sexual harassment
- Workplace torts
- Retaliatory discharge
- Defamation
- Intentional/negligent infliction of emotional distress
- Interference with contractual relations

- Interference with prospective economic advantage
- Invasion of privacy
- Negligent hiring and supervision

While this EPL product is, for the most part, in its infancy, it is quickly being adapted to clients needs and concerns as insurers attempt to develop and/or increase their market share.

Types of Claimants

- Current employees
- Prospective employees
- Former employees

Types of Defendants

- All employers
- Boards of directors
- Supervisors
- Management
- Co-workerS

Advertising Liability

Overview

Prior to 1973, Advertising Liability coverage was offered as an endorsement to a number of umbrella policies. In 1973, this coverage became available as an ISO (Insurance Service Organization) endorsement for the CGL (Comprehensive General Liability) policy.

The 1973 ISO endorsement defined (Advertising Injury) as (injury arising out of an offense committed during the policy period occurring in the course of the named insureds advertising activities, if the injury arises out of libel, slander, defamation, violation of privacy, piracy, unfair competition or infringement of copyright, title or slogan.)

In 1976, iSO described Advertising Liability coverage to the New Jersey Department of Insurance as providing coverage for (various types of injury such as piracy, unfair competition, infringement, etc. arising out of the insureds advertising, promotional and publicity activities.)

In 1986, Advertising Liability coverage was included within the CGL policy form as Coverage B, Advertising Liability. The 1986 policy changed the definition of Advertising Injury by eliminating the offenses of defamation, piracy, and unfair competition.

Advertising Injury coverage under either the 1973 or 1986 ISO policy forms generally requires:

1. an injury arising out of an offense enumerated in the policy; and
2. committed during the policy period; and
3. occurred (in the course of advertising,) i.e., was causally connected to advertising.

Since (Advertising) and the enumerated offenses are not specifically defined in the endorsement, the case law has been inconsistent.

The most widely publicized advertising liability case is The Bank of the West, a 1992 California Supreme Court decision. This case arose from a consumer fraud class action wherein the plaintiff was asking The Bank of the West to return monies previously paid to the defendant at usurious rates. The underlying case was settled by The Bank of the West, who then sought coverage under the 1973 coverage form to recover the indemnity and expenses paid to resolve the loss. The California Supreme Court held that the damages claimed were not insurable, therefore coverage did not apply. Further, the court stated that

(advertising activities) must be provided to a broad base of the insureds customers and must be more extensive than forms submitted to distributors.
Related coverage issues which have received considerable attention by policyholders and courts are:

1. What constitutes Advertising Injury?
   (a) Misappropriation of a customers list: Generally, the courts have supported an expansive interpretation of the phrase (Misappropriation of a customers list) and held this to be covered.
   (b) Style of doing business: Several cases have held a trademark is an advertising idea, as is style of doing business, and the misappropriation of same is an advertising injury.
   (c) Infringement of copyright, title or slogan: Generally, the courts have held that title does not refer to real property title. Title refers to (mark, style, or designation.)

2. What constitutes Advertising Activities?
   There is case law that has found various forms of distribution as advertising activities. For example,The Bank of the West case and other case law required distribution to the insureds (general public.) If the insured has a small clientele, a small distribution to the clients may qualify as an advertising activity. However, some cases have held that (one on one) oral presentations constitute advertising activities.
3. The (Occurring in the Course of) policy language.
   Courts have generally held that coverage requires a direct relationship between advertising and the loss. Most courts have found no coverage if there was no causal connection between advertising activities and loss.

Recent Developments
Policyholders continue to pursue coverage for false advertising, patent infringement, copyright infringement, trademark infringement, and other related losses. The courts have interpreted advertising coverage to furnish protection for trademark infringement, copyright infringement, and false designation. Since The Bank of the West decision, related claims have included:

1. (Unfair Competition) claims. (Unfair competition) is listed in the policy among other common law torts, and the term should be construed under common law definitions and not under statutory definitions as provided in The Unfair and Deceptive Practices Acts.
2. (Patent Infringement) claims. Most courts have held that coverage does not exist, as the loss did not occur (in the course of) advertising and that the advertising activity was incidental to the cause of the loss, i.e., patent infringement.
3. (Anti-Trust) claims. Most courts focus on the lack of a causal connection between advertising and the offense. However, courts have held there is a duty to defend an anti-trust claim arising from a wrongful advertising claim when the complaint alleged a common-law business tort.
4. (Misappropriation of Trade Secrets) claims. Courts generally focus on the factual allegations to determine if the harm was due to advertising or due to the insureds misappropriation of secrets.

A potential source of advertising liability claim activity in the future may arise from the burgeoning electronic media, such as the Internet, whose basic activity is advertising. Those organizations providing the means to infringe may be liable, as well as those actually infringing on the plaintiffs copyright.

Types of Claimants

- Any large or small business

Types of Defendants

- Insureds from small businesses to *Fortune* 500 companies