

April 2, 2012

Practice Group:
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Employers' Liability for Mesothelioma Claims in the UK – Are You Covered?

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The United Kingdom Supreme Court recently handed down a decision in what is known as the EL Trigger case, wherein the Court has finally decided which Employers' Liability ("EL") policy or policies should respond to indemnify an employer for mesothelioma claims by employees who were exposed to asbestos at the employer's premises. This issue has been hotly disputed by some insurers for a number of years and has led to great uncertainty and additional risk for UK companies. In short, the decision of the Supreme Court is that EL policies that are written on an "injury sustained" or "injury contracted" basis will respond to mesothelioma claims by reference to the date of the employee's exposure to asbestos in the workplace, rather than the date that the employee's tumor is deemed to have begun—as previously had been decided by the Court of Appeal. Significantly, the date of exposure will be many years, and likely many decades, prior to the date of the deemed commencement of the tumor.

While the Supreme Court judgment gives more certainty about which EL policy should respond than existed previously, it potentially increases the prospect that a UK company facing such claims will be uninsured because it cannot locate the old EL policies in force during the period of the employee's exposure to asbestos, or because no such policies were purchased back then (EL insurance was not compulsory in England until 1972) or because the EL insurer is now insolvent.

For corporate groups that include English companies whose employees may have been exposed to asbestos in the workplace, those companies are subject to claims brought by employees diagnosed with mesothelioma, or by the estates of such employees who are deceased. Under English law, defense of such claims is very difficult, even if the exposure occurred only for a short period of time—although it may be possible to bring contribution claims against other companies for which an employee also worked and where that employee was also exposed to asbestos. In view of the timescales involved, those companies may no longer be in existence or, even if they are, may themselves be uninsured.

Given this recent decision by the Supreme Court, it is all the more important that historical records be maintained about particular premises where employees had worked, going back many years for all group companies, even if those premises are now sold or rebuilt, if there is any suggestion that there may have been asbestos in those premises at some period in the past to which employees could have been exposed.

In addition, UK corporate groups should maintain, or if necessary recreate by use of insurance archaeologists, records of their group historical EL insurance, policies, and particularly the EL policies purchased by group companies that have been acquired in M&A deals over the years. These old policy records are critical to collect, because there have been many cases where a plaintiff's exposure to asbestos was many decades ago and the plaintiff's mesothelioma has only recently manifested itself.

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In the case of corporate group restructurings, care needs to be taken to ensure that the history of individual companies is understood, including which company operated out of which particular premises location and the types of operations undertaken in the past. Often that knowledge resides within individuals who have been employed in the workforce for a long time, as well as in paper records. Such historical information about company operations should be gathered while it is still available.

Additionally, the recent Supreme Court judgment makes it even more important, in the context of due diligence on corporate acquisitions in the UK, to examine whether there could be contingent liabilities of the target company or its subsidiaries for mesothelioma claims that may be uninsured. The fact that a corporate group does not currently operate any premises where asbestos is present is no guarantee that the same condition was true decades ago when the approach to health and safety was less stringent. This is a risk which can be overlooked by the unwary when analyzing the desirability of acquiring a new company that has been in operation for many decades. Thus, corporations planning acquisitions of companies that have operated in the UK—particularly those which are or were involved in manufacturing and heavy industry—should take particular care during due diligence to avoid acquiring unexpected, and uninsured, employers' liabilities. Moreover, such corporations should consider this issue carefully in the context of warranties and indemnities sought from the sellers.

Once a corporate group has identified all historical insurers that potentially may be called upon to respond to liabilities for employees' mesothelioma claims, those insurers should be monitored to determine whether any of them have entered—or are likely to enter—some solvent or insolvent Schemes of Arrangement. If so, it is important to seek counsel so that rights to coverage under such policies will be protected in the Scheme.

Finally, it should be noted that, if a mesothelioma claim has been made by an employee (or former employee) against a UK company, it is essential that the company act swiftly both in the defense of the claim (as the English courts typically do not tolerate delays, and judgment on mesothelioma cases is often given within a matter of a few months) and in making a request for coverage to the appropriate EL insurer.

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