The Crashing Wave of Asbestos Claims: Practical Suggestions for Staying Afloat

By Lori L. Siwik

Lori L. Siwik, "The Crashing Wave of Asbestos Claims: Practical Suggestions for Staying Afloat," *ACCA Docket* 20, no. 4 (2002): 42–56.

In the last two years, increased numbers of asbestos claims have caused several major companies to seek bankruptcy protection. Among them are Babcock & Wilcox (February 2000), Pittsburgh Corning (April 2000), Owens Corning (October 2000), Armstrong World Industries (December 2000), Burns & Roe Enterprises (December 2000), G.I. Holding (fka GAF Corporation) (January 2001), W.R. Grace (April 2001), USG Corporation (June 2001), United States Mineral Products (July 2001), and Federal Mogul Corp. (October 2001). With these major manufacturers of asbestos products in bankruptcy, asbestos plaintiff lawyers are now pursuing new defendants that had either nominal or no asbestos liability in the past. They include companies that either manufactured or used small quantities of asbestos in their products or those that had insulated their facilities with asbestos. Even companies that used contract workers are being swept into the courtroom because the contractors are not covered by workers compensation.

The financial implications behind the asbestos-related bankruptcies and expansion of corporate targets are enormous. Experts predict that remaining solvent companies that mined asbestos or manufactured, distributed, or installed large quantities of asbestos-containing products will seek bankruptcy protection in the next two years. As a result, more defendants will be targeted, and higher settlements and judgments will be sought. If more than half of all U.S. industries are already facing asbestos claims, is any company safe?

To avoid the financial risks of the asbestos-claim wave, in-house counsel need a life raft, techniques to maximize insurance coverage. This article will help you as in-house counsel use insurance to fund the high cost of defending and settling asbestos claims.

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HOW ASBESTOS IS CAUSING FINANCIAL DISTRESS

Several factors have caused financial distress for companies facing asbestos claims.

Volume of Asbestos Claims

The most significant factor causing financial distress is the unexpected volume of asbestos claims. Asbestos claims caused, for example, the Johns-Manville Corporation, the world's largest asbestos company, with 25,000 employees and more than 50 factories and mines in the United States and Canada, to file for bankruptcy in 1982.[1] In 1988, the Manville Trust was created to settle asbestos personal injury claims resulting from exposure to products mined or manufactured by the Johns-Manville Corporation. Experts initially projected 78,000 new claims for the Manville Trust from 1995 to 1999.[2] Instead, 179,000 claims were filed, twice what was estimated and 75 percent more than from 1990 to 1994.[3] Overall, major asbestos defendant companies have had 20,000 to 40,000 new lawsuits brought against them each year, from more than 400,000 plaintiffs, with no realistic end in sight.[4]

The number of recently filed asbestos claims is higher than anticipated because the previous projections were based on estimates of the total population exposed to asbestos. When the Manville Trust completed its first study at the time of the Johns-Manville Corporation bankruptcy, the number of workers exposed to asbestos was assumed to be 18 million to 20 million. Other experts believed that the total number of workers exposed to asbestos (including deceased) was closer to 28 million. In hindsight, both exposure estimates were too low. The Manville Trust now believes that the exposed population is more than 80 million.[5]

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LITIGATION COSTS SIGNIFICANTLY AFFECT ASBESTOS CLAIMS

Historically, legal defense costs have been steep for asbestos defendants. A.M. Best, for example, has estimated that defense costs during the first half of the 1990s was 40 percent to 50 percent of total loss and loss adjustment expenses.[1] In response, asbestos defendants banded together and created the Center for Claims Resolution ("CCR") to streamline defense costs.[2] As a group, they developed administrative procedures to allocate liability, to predict cash flows, and to eliminate or reduce litigation costs.

Although the attempt to expedite compensation while simultaneously controlling litigation costs was successful at first, it later unraveled because of member company disagreements over cost and liability allocation formulas, underestimated liabilities (frequency and severity issues), and a thinning of member ranks due to bankruptcies and higher than expected opt-outs by participants.[3]

As a result, CCR was forced to reevaluate its mission. In February 2001, CCR announced that it was changing its method of operation from one of settling claims and apportioning shares among members to that of acting as a servicing center.[4] The CCR now assists members in areas of processing, litigation support, and claims negotiation.[5] Whereas the CCR had previously functioned to reduce defense costs, huge increases in indemnity payments have more than offset any savings in that area.

As a result of the diminishing role of the CCR, increased targeting by plaintiff attorneys, and a more aggressive defense posture by member companies and their insurers against perceived frivolous filings, defense costs will continue to rise.[6]

1. A.M. Best Company, Inc., *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, May 7, 2001, at 1.
2. Deborah Hensler, Asbestos Litigation in the U.S.: A New Look at an Old Issue 25 (Rand 2001).
3. A.M. Best Company, Inc., *supra* note 1, at 4.
4. *Id.*
5. *Id.*
6. *Id.*

AGGREGATION INVOLVES THE GROUPING OF UNIMPAIRED CLAIMANTS WITH THE IMPAIRED CLAIMANTS, INCREASING THE AWARDS FOR UNIMPAIRED CLAIMANTS AS A RESULT OF THE SYMPATHY FACTOR THAT FLOWS FROM ASSOCIATION WITH THE TRULY SICK.

Bankruptcies of Major Asbestos Defendants

The unanticipated volume of asbestos claims has triggered the second causative factor: bankruptcies of many of the major asbestos defendants. Many of the bankrupt defendants, which are asbestos manufacturers, producers, and distributors, are following the Manville model of establishing trust funds to pay asbestos claimants.[6] With the establishment of trust funds to pay asbestos claims, corporations in bankruptcy can effectively seal off their exposure to ongoing asbestos claims. Other bankrupt companies do not have sufficient funds to pay any asbestos claims.

Higher Settlements and New Defendants

Because existing funds available to compensate claimants have been depleted and/or stayed because of bankruptcies, a third factor causing financial distress has emerged. To make up for compensation shortfalls, plaintiff lawyers are demanding higher settlements from the solvent defendants. Additionally, plaintiff lawyers have cast their net wider to include new defendant companies (see sidebar on asbestos litigation costs on page 44). The defendant pool has increased to more than 2,400 companies from a level of 300 in the mid-1980s. The new defendants include companies that made products with only trace amounts of asbestos, such as electrical wire, cable, and welding rods,

Experts Foresee Continued Rise in Asbestos Claims

The significant increase in asbestos claims and resulting corporate bankruptcies over the last several years have prompted the following three separate and well-respected experts to undertake studies of the asbestos problem and its effect on corporations involved in asbestos litigation: Rand Institute for Civil Justice, a Santa Monica, CA-based think tank; A.M. Best, an insurance rating agency; and Tillinghast-Towers Perrin, an actuarial and management consulting firm to the financial services industry.

THE RAND STUDY

In an August 2001 study prepared by the Rand Institute for Civil Justice ("Rand"), the authors came to the following conclusions:

- All major U.S. asbestos makers are likely to be bankrupt within the next two years as people with asbestos-related ailments continue to file injury and compensation claims.[1]
- Defendants have not yet seen even half of all potential plaintiffs, according to the study. With more than 500,000 claims filed thus far, defendants may be forced to defend nearly 500,000 to 2.5 million more suits, the report states.[2]
- U.S. insurers have paid out about $21.6 billion to date, and five corporations alone have spent more than $1 billion apiece on asbestos litigation.[3]

A.M. BEST STUDY

In a May 7, 2001, special report, "Asbestos Claims Surge Set to Dampen Earnings for Financial Insurers," A.M. Best came to the following conclusions:

- Changes in asbestos litigation will result in increased losses for both insurance carriers and companies facing asbestos liabilities.[4]
- Several factors have worked together to cause the "storm surge" in asbestos claims, including these: (1) increase in the number of companies filing for bankruptcy as a result of asbestos liabilities, (2) spreading of asbestos-related litigation to lower tier defendants, (3) rising number of plaintiff attorneys developing an "asbestos practice," (4) recent peaking of more cases of plaintiffs alleging mesothelioma and lung cancer as a result of asbestos exposure resulting in higher medical costs, and (5) policyholders seeking to reclassify their older asbestos claims under the nonproducts portion of their general liability policies in order

companies that had asbestos insulating their facilities (chemical companies, steel companies, utilities, and railroads), companies that used contract workers, construction companies, auto part makers, retailers, textile mills, installers and distributors of asbestos, and other industries not traditionally associated with asbestos litigation.[7]

Aggregation

Besides adding new defendant companies to asbestos litigation, plaintiff lawyers have also won court approval to aggregate claims. Aggregation involves the grouping of unimpaired claimants with the impaired claimants, increasing the awards for unimpaired claimants as a result of the sympathy factor that flows from association with the truly sick. Because courts have allowed claim aggregation, plaintiff lawyers have begun to file claims in venues that are friendly to asbestos plaintiffs. For example, at the end of 2000, approximately 16 percent of the open cases of one asbestos defendant were pending in Mississippi, a forum that is considered sympathetic to plaintiffs, although the number of plaintiffs who lived or worked in Mississippi is a mere fraction of 16 percent.[8]

Is there an end to the asbestos claim wave in sight? Not in the near future, according to three independent studies, which are summarized in the accompanying side bar.

USING INSURANCE TO MITIGATE ASBESTOS COSTS

In-house counsel facing asbestos claims should look to insurance to help pay defense costs, settlements, and judgments. This section explains what policies to look for, how to find the policies, and practical aspects of obtaining coverage under the policies for asbestos claims.

to avoid aggregate limits in the insurance policies for product claims.[5]

- The outlook for the future of asbestos claims has become very perilous, and companies will have more than $33 billion in unfunded asbestos liabilities.[6]
- Insurers have paid $22 billion for asbestos liabilities and may end up paying another $43.4 billion during the next 20 years, for a total of $65 billion.[7]

TILLINGHAST-TOWERS PERRIN STUDY

A study by Tillinghast-Towers Perrin made the following predictions:

- Asbestos claims are expected to increase through 2004.[8]
- More than 450,000 claims have been filed to date, and close to 1 million claims will be filed before the litigation ends.[9]
- Settlements to individuals exposed to asbestos in the United States and related expenses will ultimately reach $200 billion. Of this amount, Tillinghast estimates that 39 percent of the costs will fall on the asbestos defendants, such as manufacturers and distributors of asbestos and the owners of premises where people were exposed to asbestos. An estimated 30 percent of the cost of claims will be borne by the U.S. insurance industry, and 31 percent will be borne by overseas insurers, including those in London, Europe, Asia, Australia, and South America.[10]
- Reserves remain inadequate with insurers needing to add between $21 and $41 billion to their reserves to cover future losses.[11]

1. Deborah Hensler, Asbestos Litigation in the U.S.: A New Look at an Old Issue 25 (Rand 2001).
2. *Id.* at 12.
3. *Id.* at 8–9.
4. A.M. Best Company, Inc., *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, May 7, 2001, at 1.
5. *Id.*
6. *Id.*
7. *Id.* at 3–6.
8. Mark E. Ruquet, *Expect Asbestos Claims to Rise: Tillinghast Study*, National Underwriter Property & Casualty/Risk & Benefits Management Edition, June 4, 2001, at 1.
9. "U.S. Insurers Spend 200 Billion on Asbestos Exposures (2001)," at www.namic.org/aajune/061901c.htm.
10. *Id.*
11. *Id.*

What Coverage to Look For

Two forms of commercial general liability ("CGL") policies may provide coverage for asbestos claims: (1) CGL policies issued to your company as the named insured and (2) CGL policies issued to other companies in which your company is listed as an "additional insured."

Many companies know to look to their CGL coverage but fail to determine whether coverage may also exist in situations in which they are listed as an "additional insured" under the policies of another company.[9] For example, if a general contractor is sued by an employee of a subcontractor who alleges an asbestos bodily injury claim, there may be several potentially applicable policies to tap into: the liability policies of the general contractor and the subcontractor, the policies purchased by the property owner, and the general liability and errors and omissions liability policies of the architect. By tapping into the insurance policies of other companies, your company may find that those policies have an obligation to provide a legal defense against a lawsuit when your policies do not. In addition, by pursuing the insurance policies of other companies, you avoid driving up premiums under your company's policies.

CGL insurance applicable to asbestos claims is typically written on an occurrence basis.[10] As a general matter, occurrence-based policies are triggered upon the existence of bodily injury or property damage during the policy period, regardless of when the claim is ultimately brought by the underlying plaintiff.[11] As discussed later in the article, sometimes determining when such injury or damage has occurred is half the battle.

PREMISES COVERAGE APPLIES WHEN AN EMPLOYEE OF AN INDEPENDENT CONTRACTOR OR SUBCONTRACTOR SUES YOUR COMPANY FOR ASBESTOS-RELATED INJURIES ALLEGEDLY RECEIVED DURING THE COURSE OF WORKING ON PROPERTY UNDER YOUR COMPANY'S CONTROL.

One of the significant aspects of CGL policies lies in the fact that there are separate coverages for bodily injury claims arising from the sale of asbestos-containing products and bodily injury claims arising from exposure to asbestos on the defendant's premises. For many years, most property and casualty insurance companies wrote CGL policies with at least two limits of liability: one set of limits for products and completed operations and another set of limits for premises liability and other operations.

Products coverage insures against liabilities arising from the use of a company's products. Typically, the products and completed operations had an aggregate limit in the policies. That is, the insurance company had to pay only a certain amount of money in settlements, called the aggregate limit, and once that money was paid, the product coverage was exhausted.

Premises operations coverage insures against liabilities arising out of the ownership, occupancy, or use of property before the completion of business operations. Premises coverage applies when an employee of an independent contractor or subcontractor sues your company for asbestos-related injuries allegedly received during the course of working on property under your company's control. As long as the possibility exists that the asbestos-related claims arose in the context provided for by premises-operation coverage, there is coverage.[12] Unlike products coverage, most CGL policies do not contain aggregate limits for premises operations. As a result, a company facing asbestos premises claims usually has an unlimited amount of insurance coverage available.

Because of the unlimited amount of coverage available for asbestos premises claims, classification of the insurance claim at the outset is important, particularly when large employers, such as oil, chemical, and steel companies, utilities, railroads, and even hospitals and universities, are being hit with increasing numbers of asbestos-premises claims.[13] In fact, many companies that have previously exhausted their products coverage are now engaged in the task of reviewing thousands of claims that might be subject to coverage under premises and operations portions of their general liability policies instead of the product liability portion of the policies. Successful reclassification of claims filed against an insured not only frees up previously exhausted insurance coverage, but also affords the insured an opportunity to file future

THE ACTUAL POLICY, A PARTIAL POLICY, OR SECONDARY EVIDENCE OF A POLICY MAY BE ENOUGH TO SATISFY THE POLICYHOLDER'S BURDEN OF PROVING THE EXISTENCE AND TERMS OF THE POLICY BY A PREPONDERANCE OF THE EVIDENCE.

claims under a virtually limitless policy. Accordingly, prior settlement agreements should be reviewed to determine whether the claims were classified as either products or premises claims and whether the premises coverage was released in the settlement agreement.

Finding Pre-1986 Insurance Coverage

Sometimes, the difficulty is not in understanding what coverage might apply to asbestos claims but in finding the actual policies. This difficulty arises because the applicable CGL policies tend to be those written before the insurance industry began imposing blanket asbestos exclusions in the mid-1980s.

In-house counsel should look for CGL policies from 1940 to the 1980s to provide coverage for asbestos liabilities. The actual policy, a partial policy, or secondary evidence of a policy may be enough to satisfy the policyholder's burden of proving the existence and terms of the policy by a preponderance of the evidence.[14] The policy evidence must establish four basic elements: (1) parties, (2) policy period, (3) type of insurance coverage, and (4) limits of liability.[15] An insurance carrier attempting to deny coverage on the basis of an asbestos exclusion or any other type of an exclusion allegedly within the missing policy bears the burden of proof as to the existence of the exclusion.[16]

You can establish the existence and terms of insurance coverage through documents and testimony. You can use several types of documents to establish the four basic elements discussed above, including the following:

- Partial policies, declaration pages, or other records showing policy numbers and dates of coverage.[17]
- Unexecuted policy forms accompanied by a declarations page.[18]
- Certificates of insurance.[19]
- Subsequent policies suggesting that prior coverage was similar.[20]
- Records produced by insurance brokers.[21]
- Interoffice memoranda and correspondence proving that the insurer believed that a policy existed.[22]
- Premium invoices.[23]
- Canceled checks.[24]
- Board of directors meeting minutes and other corporate records.[25]
- Excess policies referencing primary policies.[26]

You can also use testimony from company employees, brokers, consultants, outside counsel, and company auditors to establish coverage.[27]

Once you have established the existence and terms of the insurance coverage, the next step is to determine how the insurance will apply to the asbestos claims.

Practical Aspects of Getting Coverage

Suppose that you have found the policies and given notice to the insurance company, only to receive back a lengthy reservation of rights, which makes it unclear whether the insurance company will pay more than a fraction of defense costs or any settlements. At this point, you need to determine the amount of coverage available to you and how best to negotiate a long-term agreement with the insurer, particularly if your coverage was placed with several different insurers, all of whom owe a defense and indemnity obligation. This process requires accomplishing three tasks: (1) understanding which policies should pay (called "trigger of coverage"), (2) finding out how much an insurer should pay if there is more than one insurer or there are periods for which insurance is missing or exhausted, and (3) getting a signed written agreement so that your company has a regular process to follow and some form of protection that it can show to satisfy concerns of shareholders, lenders, and creditors.

Trigger of Coverage

CGL policies require that some bodily injury or property damage alleged in the underlying claim occur during the policy period to trigger coverage under the policy. This issue can be complicated to resolve in the case of asbestos-related diseases, which entail decades-long periods between initial exposure to asbestos and ultimate manifestation of an asbestos-related disease.

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- Scott DeVries, Tad Pethybridge, and José N. Uranga, "Insurance Coverage for Environmental Investigation Expense," *ACCA Docket* 16, no. 2 (1998): 52–64, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/ma98/insurance.html.
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- Mark R. Siwik, Lori L. Siwik, and Robert C. Mitchell, "Environmental and Toxic Tort Claims: Are You Covered?" *ACCA Docket* 18, no. 6 (2000): 26–41, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/jj00/toxictort.html.
- TORT & INSURANCE LAW JOURNAL, published by the ABA's Tort and Insurance Practice Section, available at www.abanet.org/abapubs/periodicals/home.html.

ON PAPER:

- EUGENE R. ANDERSON, JORDAN S. STANZLER, LORELIE S. MASTERS, AND GIOVANNI RODRIGUEZ, EDS., INSURANCE COVERAGE LITIGATION (John Wiley & Sons 2001).
- PETER J. KALIS, THOMAS M. REITER, AND JAMES R. SERGERDAHL, POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE (Aspen Law & Business 2001).

Courts have developed four different theories for triggering policy coverage:

- **Exposure.** Triggers coverage in effect during the period of exposure to asbestos, beginning from a claimant's first exposure to a harmful substance.[28]
- **Injury-in-fact.** Triggers coverage during the period that injury or damage actually occurs, regardless of when exposure or manifestation occurs.[29]
- **Manifestation.** Triggers coverage when the claimant's asbestos-related disease is reasonably capable of medical diagnosis.[30]
- **Continuous or triple trigger.** Triggers coverage under all policies in effect when claimant (1) was either exposed to asbestos products, (2) suffered exposure-in-residence, or (3) manifested an asbestos-related disease during the policy period.[31]

The trigger of coverage theory for asbestos cases varies from state to state and from case to case. Several courts have concluded that the trigger that applies to each case depends on the terms of the insurance policy and the nature of the injury.[32] Review applicable policy language, the facts of the asbestos claims, and state law to determine which trigger of coverage theory applies. Once you have determined the trigger of coverage, you will know which policies of insurance to turn to for funding.

Allocation of Coverage

With the exception of the manifestation theory, which limits coverage to a single year, the remaining theories usually trigger multiple policy periods. When more than one policy period is triggered, the coverage issue known as "allocation" arises. Allocation refers to the process of determining how much one insurer should pay in comparison to other insurers whose policies are also triggered. Allocation

becomes a contentious issue when part of the triggered period includes periods of high deductibles, insolvent coverage, or self-insured retentions. Learning the basics of allocation law, however, can help you reduce the degree of contention.

Most CGL policies provide coverage for "all sums [that] the insured shall become legally obligated to pay because of bodily injury or property damage to which the insurance applies." Many courts have interpreted this language to mean that a policyholder is entitled to the full extent of coverage provided by a policy that was in effect during any time throughout the continuum from exposure to asbestos to the manifestation of injury or damages.[33] Under this approach, commonly referred to as the "joint and several" or "all sums" approach, a policyholder may pick any policy in effect during this time period against which to assert the full extent of an insured loss, regardless of the amount of damage occurring during other policy periods. After the policyholder decides which policies should respond to the asbestos claim, the insurers, in turn, have the ability to seek contribution from the other triggered policies not selected by the policyholder.[34]

A second allocation approach spreads damages across some or all policy periods in effect throughout the continuum of exposure to manifestation.[35] The allocation approaches used by these courts are varied. Some approaches allocate losses according to the relative "time on the risk" of each carrier.[36] Other approaches prorate the loss based on the maximum coverage limits of each policy.[37]

A third allocation approach blends the two preceding approaches, by multiplying the "time on the risk" by policy limits for each carrier and then calculating each carrier's proportion of the insured loss.[38]

A fourth approach calculates the relative amount of loss or injury that occurred in each policy year by reference to some case-specific yardstick, such as the amount of an alleged defective product sold by an insured in each year.[39]

These attempts by courts to allocate insured asbestos losses among triggered policies can result in complex formulations for determining the ultimate sums payable by each insurance carrier and, in some cases, by the policyholder itself for a particular loss or series of losses. Choice of law determinations can result in different allocation formulas being applied to a single insurance carrier's obligation.

To determine how much an insurer should pay for asbestos claims, review applicable policies and develop calculations using the different allocation methodologies discussed above. The results of the calculations will vary depending upon the allocation methodology that you use. You can then use the most favorable methodology supported by law to maximize insurance coverage when negotiating an agreement with the insurer.

Negotiating a Defense Agreement with Insurance Carriers

A written agreement between the policyholder and the insurance carrier regarding procedures for the administration, defense, and disposition of the asbestos case can lessen suspicion about whether the insurance carrier is truly interested in defending the policyholder or is simply acting to protect its economic interest. For example, the parties can design procedures that allow for joint input and control over selection of defense counsel, strategy, and settlement.

Defense agreements are essential for asbestos claims, situations involving repetitive claims or multiple carriers. With asbestos claims, several carriers will have a duty to defend the policyholder. To avoid conflict over how much each carrier should contribute to the defense and to facilitate prompt reimbursement of defense costs, a written agreement that appoints a lead carrier to act on behalf of the other insurance carriers will minimize confusion and frustration. A lead carrier representative can work with the policyholder on behalf of the carrier group to select counsel, review fee bills and expenses for payment, make decisions regarding settlement, and collect monies owed by other insurance carriers who are obligated to provide a defense. The agreement can also reallocate responsibility in the event that one of the carriers participating in the defense becomes insolvent or exhausts its policy limits.

Negotiating Indemnity Agreements with Insurance Carriers

Often insurance carriers want to resolve both the defense and indemnity obligation in the same settlement agreement. If an insurance carrier proposes this option, you must evaluate several coverage issues before responding to the proposal.

First, determine whether the defense costs in the insurance policy exceed the limits of liability. In many CGL primary policies, defense costs do not count against the policy limits.[40] If defense costs are not counted against the limits, it will be important to structure the terms of any settlement agreement to ensure that the duty to defend is not cut off until indemnity limits are exhausted.

Second, the preferred option is to draft the settlement agreement so that the insurance carrier pays settlements and judgments on an ongoing basis, much like the defense arrangement described above. If, however, the parties prefer that the insurance carrier make a lump sum payment for all past, pending, and future asbestos claims, you must give extra care to the scope of release and settlement terms. Types of lump sum settlements include the following:

- **Partial release.** Either release of asbestos property damage or release of bodily injury claims only.
- **Full release.** Both release of asbestos property damage and release of bodily injury claims.
- **Policy buy back.** Release of all types of claims.

Under a partial release and a full release, the settlement can be limited to known claims or known policies. Most carriers want to include unknown claims and unknown policies into the settlement agreements and buy back all insurance policies issued to the insured. When a policy buyback is not an option, many insurance carriers do not want to resolve only asbestos liabilities and may suggest a settlement that involves all claims that affect the coverage, such as environmental claims, toxic tort claims, advertising claims, and so forth. Depending upon your company's goals, those of you facing asbestos liabilities will need to carefully evaluate the effect of any settlement agreement that resolves claims other than known asbestos liabilities. In addition, as discussed above, if a policy contains aggregate limits, those aggregate limits may not apply to asbestos premises claims. Therefore, make sure that any settlement agreement takes the value of unlimited coverage for asbestos premises claims into account. The key point is understanding and appreciating that the broader the type of settlement, the larger the settlement value.

Ultimately, the settlement terms will depend on the needs and creativity of the parties.

CONCLUSION

The surge in asbestos claims has resulted in companies facing significant increases in both the number of claims filed and their average payment per claim, increases far beyond those projected a few years ago. In addition, the defendant pool has increased, increasing the potential insurance limits available for asbestos losses. Many believe that these increases are a result of an acceleration of claim filings due to the recent bankruptcies and an attempt by plaintiff attorneys to file claims before Congress enacts any reform legislation.

Those of you who are in-house counsel for those companies engulfed in increasing asbestos liability claims and for those that are just breaking the surf can avoid the rip tides by evaluating their insurance options. You can help protect your legal department budget if you can tap your company's insurance policies to help pay for asbestos claim liabilities. Look for CGL policies issued to your company, as well as CGL policies issued to other companies in which your company may be listed as an additional insured.

Once you have found the insurance policies or evidence of insurance coverage, you should determine the amount of coverage available and how best to negotiate a long-term agreement with your insurers. Keep in mind that premises operations coverage generally does not have aggregate limits. Thus, significant coverage may be available to companies with premises-related asbestos claims. Once you have in place a settlement agreement for asbestos claims with the insurance carrier(s), your company will have some form of protection to show to shareholders, lenders, and creditors to satisfy concerns about the profitability of the company.

NOTES

1. Paul Brodeur, *Annals of Law, The Asbestos Industry on Trial, A Failure to Warn,* THE NEW YORKER, June 10, 1985, at 49.
2. Mike Angelina, "The 'Energizer Bunny' of Toxic Torts" (July 2001), at www.towers.com/towers/publications/emphasis/emp2001-1/energizer.htm.
3. *Id.*
4. *Id.*
5. Raji Bahgavatula, Rebecca Moody, and Jason Russ, *Asbestos: A Moving Target,* BEST'S REVIEW, Sept. 2001, at 85, 88.

6. In summer 2001, the Manville Trust cut the pro-rata amount it pays on all approved claims to 5 percent from 10 percent because of the significant increase in asbestos claims. At the end of December 2001, the Trust asked a federal court to order changes in its claims handling procedures to cut the amounts payable to less seriously injured claimants and to bar claims by anyone not exposed in an "industrial" setting. Trusts formed by other bankrupt asbestos defendants have cut the amounts they pay to claimants because of the significant increase in claim filings.
7. DEBORAH HENSLER, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE, 10–11 (Rand 2001). See also Mark A. Wisniewski, Exposure in Hospitals: Is It the Fourth Wave of Asbestos Litigation? PRONATIONAL INSURANCE COMPANY HEALTH SYSTEMS RISK REV. (2001), at www.picm.com/news/hsriskrv/AsbestoLitigation3Q1999.htm (hospitals and universities are new asbestos targets).
8. Bahgavatula, Moody, and Russ, *supra* note 5, at 85, 90.
9. Another way to tap into the insurance coverage of other companies is to bring a direct action—that is, directly sue the insurance carrier of the other company. Direct actions are available only where allowed by contract or statute. Certain states permit direct actions, including Louisiana and Minnesota.
10. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 771 (1993).
11. Before 1986, virtually all general liability insurance policies were written on an occurrence basis; since 1986, some general liability policies have been written on a claims-made basis. *Id.* at 773–74.
12. *See* Commercial Union Ins. Co. v. Porter Hayden Co., 116 Md. App. 605, 698 A.2d 1167 (Md. Ct. Spec. App. 1997); Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co., 660 N.Y.S.2d 768, *modified,* 667 N.Y.S.2d 982, 690 N.E.2d 866 (1997).
13. *See* Wisniewski, *supra* note 7.
14. *See* Turner v. Ewing, 255 La. 659, 232 So.2d 468 (1970).
15. *See* Gulf Gate Management Corp. v. St. Paul Surplus Lines Ins. Co., 646 So.2d 654 (Ala. 1994).
16. *See* Emons Industries, Inc. v. Liberty Mut. Fire Ins. Co., 545 F. Supp. 185 (S.D.N.Y. 1982).
17. *See* Abex Corp. v. Maryland Cas.Co., 790 F.2d 119 (D.C. Cir. 1986).
18. *See* UNR Industries, Inc. v. Continental Ins. Co., 682 F. Supp. 1434 (N.D. Ill. 1988).
19. *See* Mapco Alaska Petroleum, Inc. v. Central Nat. Ins. Co., 795 F. Supp. 941 (D. Alaska 1991).
20. *See* Emons Industries, Inc. v. Liberty Mut. Fire Ins. Co., 545 F. Supp. 185.
21. *See* Abex Corp. v. Maryland Cas.Co., 790 F.2d 119.
22. See Bourne v. Seal, 53 Ill. App. 2d 155, 203 N.E.2d 12 (Ill. App. Ct. 1st Dist. 1964).
23. *See* Mapco Alaska Petroleum, Inc. v. Central Nat. Ins. Co., 795 F. Supp. 941.
24. *See* UNR Industries, Inc. v. Continental Ins. Co., 682 F. Supp. 1434.
25. *See* Burroughs Wellcome Co. v. Commercial Union Ins. Co., 632 F. Supp. 1213, *modified,* 642 F. Supp. 1020 (S.D.N.Y. 1986).
26. *Id.*
27. *See* Emons Industries, Inc. v. Liberty Mut. Fire Ins. Co., 545 F. Supp. 185; Clendenin v. Benson, 117 Cal. App. 674, 4 P.2d 616 (Cal. App. 1931); 6 MEALEY'S LIT. REPORTS INS. 1, p. 13 (Nov. 1, 1991).
28. *See* Insurance Co. of North America v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir., 1980), *clarified and aff'd on rehearing,* 657 F.2d 814 (6th Cir.), *cert. denied,* 454 U.S. 1109 (1981), *reh'g denied,* 455 U.S. 1009 (1982).
29. *See* Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178 (2d Cir. 1995); American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983), *modified and aff'd,* 748 F.2d 760 (2d Cir. 1984).
30. *See* Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982), *cert. denied,* 460 U.S. 1028 (1983); Zurich Ins. Co. v. Raymark Indus. Inc., 118 Ill. 2d 23, 514 N.E.2d 150 (1987); Transamerica Ins. Co. v. Safeco Ins. Co., 189 Mich. App. 55, 472 N.W.2d 5 (1991).
31. *See* Keene Corp. v. Ins. Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied* 455 U.S. 1007, *reh'g denied* 456 U.S. 951 (1982).
32. *See* Sentinel Ins. Co., Ltd. v. First Ins. Co., 875 P.2d 894, 915 (Haw. 1994).
33. *See* AcandS, Inc. v. Aetna Ca, & Sur. Co., 764 F.2d 968 (3d Cir. 1985); Keene Corp. v. Ins. Co. of North America, 875 P.2d 894; Aerojet-General Corp. v. Transport Indem. Co., 17 Cal. 4th 38, 948 P.2d 909 (1997); Zurich Ins. Co., 514 N.E.2d 150; Owens-Corning Fiberglas Corp. v. Centennial Ins. Co., 74 Ohio Misc. 2d 183 (Lucas Co. 1995); J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 626 A.2d 502 (Pa. 1993); CNA Lloyds of Texas v. St. Paul Ins. Co., 902 S.W.2d 657 (Tex. Ct. App. 1995).
34. *See* Keene Corp. v. Ins. Co. of North America, 875 P.2d 894.
35. Note that courts that have applied the "all sums" approach have generally refused to allocate any portion of a loss to a policyholder for periods during which it did not have insurance in place. *See* AcandS, Inc. v. Aetna Ca, & Sur. Co., 764 F.2d 968; Armstrong World Industries Inc. v. Aetna Ca. & Sur. Co., 45 Cal. App. 4th 1 (1st Dist. 1996); Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974 (1994).
36. *See* Insurance Co. of North America v. Forty-Eight Insulations, 633 F.2d 1212.
37. *See* Buckeye Union Ins. Co. v. State Auto. Mut. Ins. Co., 49 Ohio St. 2d 213, 361 N.E.2d 1052 (1977).
38. *See* Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974.
39. *See* Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368 (E.D.N.Y 1988).
40. DONALD S. MALECKI AND ARTHUR L. FLITNER, COMMERCIAL GENERAL LIABILITY INSURANCE 14 (1997).