

MEMORANDUM OF MEETING OF DISCUSSION GROUP

ASBESTOSIS - APRIL 21, 1977

Executive Conference Room  
12th Floor  
85 John Street  
New York, New York 10038

The meeting of the discussion group on asbestosis opened with a consideration of the question "who owes a defense?" The problem arises in asbestosis claims because of the long duration of the condition. As a result, several insurers could be on the risk and periods of non-insurance may also exist.

Consequently, the crucial question, is when did the injury occur for coverage purposes? Two views emerged, which might be characterized as the majority and minority view. The minority view was that the event which triggered coverage was the discovery or diagnosis of asbestosis. While there is no authority directly in point to sustain this view, the advocates of this position relied on U. S. F. & G. v American Insurance Company, 345 N.E. 2d 267. The minority also argued that their view should be tested through litigation and that, if successful, the result would be that asbestosis, as an industry problem, could be contained. The majority view was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, i.e. from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on Borel v Fibreboard Paper Products Corporation, 493 F. 2d 1076, U. S. Court of Appeals, Fifth Circuit (applying Texas law).

The majority was cognizant of the fact that Borel was not a coverage case. Despite this, however, the majority believed that the essential holding of Borel, i.e. that the injury was cumulative and that with each exposure the plaintiff suffered an injury, would lead to the courts holding that each carrier covered the loss and would be liable for the full defense and possibly the full loss as well. Amongst those carriers favoring the majority view, it was reported that some were working out agreements to pro-rate the loss and defense costs with one carrier acting as a lead carrier. The question was raised as to whether these agreements included insureds where periods of noncoverage existed. It was reported that the insureds were also agreeing to participate on a pro-rata basis for both the defense costs and the losses. One of the carriers advised it would supply a copy of such an agreement which could be distributed to the entire group. This has not as yet been received and therefore cannot be distributed at this time.

The next question discussed was settlement possibilities which might occur before trial. All agreed that the interest of the insured should be given priority consideration so that no possible cause of action for bad faith could arise.

The group was then asked whether they would be willing to identify their insureds so that a list could be prepared which would be distributed. It

was agreed that this was desirable. With such a list, as soon as a new suit is received, reference could be made to the list and contact between the carriers involved facilitated. To date, only one company has supplied its list of insureds and therefore distribution cannot be made with this memorandum. The possibility of reducing defense costs by the sharing of technical knowledge and possibly using single counsel for multiple defendants was next considered. It was suggested that carriers interested contact Mr. Ingegneri if they wished to use single counsel and Mr. Ingegneri would advise them of other carriers who indicated a similar interest. It was recognized that problems with insureds would have to be resolved before single representation was resorted to.

With respect to the pro-rata sharing of the loss and other costs, the majority were of the opinion that this was an equitable manner to proceed. They also expressed concern that if litigation were resorted to, the result might be conflicting decisions in the various states. The method of dividing the loss and defense expenses could be subsequently resolved by negotiations and/or arbitration. It was suggested that the arbitration procedures utilized in the cumulative injury workmen's compensation cases in California might be utilized. Attached are copies of the Workers' Compensation Inter-Insurer Arbitration Agreement, its Rules and Regulations and the Arbitration Request Notice.


One other view was expressed, i.e. that a test case be brought and attempt to have this decided directly by the United States Supreme Court. The consensus that there was little likelihood of this approach being successful. Finally, the group discussed the possible use of governmental immunity as a defense. In this connection, the case of Sanner v Ford Motor Company, 364 A. 2d 43, Superior Court of New Jersey, Law Division, was cited which held that a manufacturer of a vehicle produced in strict compliance with U. S. Army plans could not be held liable for an alleged design defect.


Attention was also called to a recent case McNeece v United States, which is pending in the United States District Court for the Eastern District of Texas. In this case, employees are seeking to recover from the United States Government alleging that under the Walsh-Healy and OSHA Acts, the United States Government has a duty to warn employees of the danger of working with asbestosis.

The meeting closed with a unanimous rejection of a suggestion that liability in asbestosis cases be admitted and the carriers agree between themselves as to their respective losses and expenses.

For the convenience of the group, attached is a separate memorandum summarizing the cases discussed.

Respectfully submitted,

  
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