

## E-ALERT | Insurance

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### COURT OF APPEAL CREATES UNCERTAINTY IN UK EMPLOYERS' LIABILITY TRIGGER LITIGATION

#### Introduction

On October 8, 2010, the Court of Appeal in London handed down a long awaited judgment in the Employers' Liability Policy Trigger litigation. The Court of Appeal has reversed the effect of part of the first instance High Court judgment, which had held that EL policies in effect during the period in which claimants were exposed to asbestos in the workplace must provide indemnity. A number of aspects of the decision give rise to significant uncertainty in this complex area of law and are likely to create coverage issues for policyholders.

#### Background

The original litigation arose because certain insurers declined to indemnify Employers' Liability ("EL") policyholders for claims by employees and former employees who had developed mesothelioma as a result of alleged workplace exposure to asbestos. In November 2008, Mr. Justice Burton, in the High Court in London, held that EL coverage under all the policies at issue in the proceedings was triggered by exposure to the asbestos. An EL insurer who was on risk at the time of exposure would therefore be liable for the policyholder's loss, whether the policy wording referred to injury that was "sustained", "contracted" or "caused" during the period of coverage.

According to figures referred to in the first instance judgment, approximately 97% of mesothelioma claims notified to the UK government in 2002 to 2008 fell to be indemnified by EL policies, as opposed to about 2% of such claims being covered by public (general) liability ("PL") policies (PL policies cover product liability and other third-party claims usually brought by non-employees). Thus, the UK Employers' Liability Trigger Litigation potentially affects coverage for the vast majority of UK mesothelioma-related coverage claims,

#### Court of Appeal Ruling

The decision of the Court of Appeal was not straightforward, with the three Judges taking quite different views of major issues in the case.

The key principle to emerge was that the triggering of the relevant EL policies varies, depending upon the particular wording used in individual policies. The decision of the Court of Appeal therefore overturns part of Mr Justice Burton's ruling. The following three main categories of wording were considered:

- *Sustained* - A majority of the judges held that EL policies containing the "sustained" wording are not triggered by exposure to asbestos, but rather by the occurrence of injury in fact. The judges did not cast doubt on the rule of thumb laid down by Mr Justice Burton after hearing extensive medical evidence that injury in a mesothelioma claim occurs five years prior to the date of diagnosability of the disease, unless particular facts dictate that injury occurred before or after this date. This date of occurrence of injury represents the usual time, possibly

decades following asbestos exposure, at which the tumour is sufficiently large as no longer to be at risk of being defeated by the body's defences, and is likely to have an independent blood supply that will enable its growth to accelerate.

- *Contracted* - By contrast, the majority ruled that policies containing the "contracted" wording are triggered by exposure, because the word "contracted" is deemed synonymous with the word "caused". It was expressly accepted, with some hesitation, by one of the judges that this wording permits the triggering of multiple policies, and this appears to be implicit in the approach of the other judges.
- *Caused* - There was no controversy between the judges that policies covering injury "caused" during the policy year (the so-called "Tariff Wording") are triggered by exposure.

The majority of the judges considered themselves bound by the earlier case of *Bolton Metropolitan Borough Council v. Municipal Mutual Insurance Limited and Commercial Union Assurance Company Limited* [2006] EWCA Civ 50, which found that injury is "sustained" at the time injury in fact occurs, in the form of the development of a tumour, thus significantly limiting coverage available to policyholders for mesothelioma claims by third parties. Mr. Justice Burton had distinguished this case on the basis that it only applied to Public Liability ("PL") policies, as did one of the Court of Appeal judges. A second Court of Appeal judge, who considered himself bound by the *Bolton* decision, nonetheless expressed disagreement with that decision, and referred favourably to decisions of the US and Australian courts that recognised exposure as a trigger.

There was a lack of consensus between the judges as to the effect of the Employers' Liability (Compulsory Insurance) Act 1969. One judge held that policies issued after the Act came into force on 1 January 1972 provide protection for individual claimants in any event, by virtue of the provisions of that Act, but that policyholders are required to repay to insurers any sums that insurers have paid claimants, if the policy has not been triggered in accordance with the principles set forth above. Another judge was in favour of a more limited effect for the Act, and the third agreed with the effect that the judge at first instance gave to the Act.

There was disagreement between the judges as to whether a former employee would have an indemnity under particular policy wordings. Again, the outcome depended on the policy wording. However, at least one judge raised the possibility that a former employee would be unable to claim in respect of injury sustained or contracted after he/she was employed.

Leave to appeal the decision to the Supreme Court has been granted, and the appeal is likely to be expedited. The Court of Appeal decision is a precedent that is binding on first instance judges but, until the Supreme Court has handed down a ruling, this area of law, and in particular its application by insurers, will remain uncertain. Nevertheless, some current implications for EL and PL policyholders are briefly considered below.

### **Implications for EL Policyholders**

Pending a definitive ruling by the Supreme Court, the decision throws up a number of issues for EL policyholders, for example:

- Policyholders will need to identify and study closely the particular wordings of their current and historical EL policies in order to determine what coverage they have for mesothelioma claims. The lack of consensus between the judges means however that, even after studying the wording, uncertainty may remain as regards coverage in respect of some claims.
- Policyholders may face potential gaps in their insurance coverage, where different insurers who have used different policy wordings over time seek to minimize their coverage obligations.

- Policyholders with “sustained” policy wordings may have to produce costly expert evidence from medical professionals in order to prove that injury occurred during the period covered by any relevant policy, in cases where it is argued that the 5 year rule of thumb should not apply.
- Policyholders who made recoveries from insurers on the basis of the first instance judgment may face claims from insurers for recoupment of payments previously made.
- Prospective purchasers of UK companies, who may acquire the target’s EL policies, are advised to carry out additional due diligence in order to verify possible liabilities for mesothelioma and other asbestos-related disease claims. This applies particularly to acquisitions of companies in industries historically associated with asbestos exposure, such as the construction and shipbuilding industries.
- The uncertainty with regard to the applicable law may spread to other occupational related diseases, as the court did not explicitly restrict its ruling to mesothelioma claims. This issue will require clarification in the Supreme Court.

### Implications for PL policyholders

As the majority of the Court of Appeal declared itself bound by the *Bolton* decision, the Supreme Court will have to review that decision, unless it chooses to distinguish it, as Mr. Justice Burton did. If the Supreme Court decides to overturn *Bolton* and alter the PL policy trigger from injury (i.e. the date when the tumour has sufficiently developed) to exposure, liability for PL claims will then shift to the PL insurers on risk at the date of exposure.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our insurance practice group:

<b>Richard Mattick</b>	+44.(0)20.7067.2023	<a href="mailto:rmattick@cov.com">rmattick@cov.com</a>
<b>Roger Enock</b>	+44.(0)20.7067.2015	<a href="mailto:renock@cov.com">renock@cov.com</a>
<b>Anne Ware</b>	+44.(0)20.7067.2124	<a href="mailto:aware@cov.com">aware@cov.com</a>

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