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2012 BRINGS UK POLICYHOLDERS TWO IMPORTANT MESOTHELIOMA INSURANCE COVERAGE DECISIONS

The UK Courts have recently handed down two decisions of importance for corporate policyholders in relation to insurance coverage for mesothelioma claims: a much-heralded decision of the Supreme Court in the Employers' Liability Policy Trigger Litigation, and a less-publicised, first-instance decision adopting the "All Sums" principle, which should help policyholders plug gaps in their coverage. The combined effect of these two decisions is to bolster significantly the position of corporate policyholders seeking coverage for asbestos liabilities.

1. UK SUPREME COURT RULING SUPPORTS AVAILABILITY OF EMPLOYERS' LIABILITY INSURANCE COVERAGE FOR MESOTHELIOMA CLAIMS

Introduction

On 28 March 2012 the UK Supreme Court handed down its judgment in the Employers' Liability Policy Trigger Litigation. Corporate policyholders facing mesothelioma claims by present or former employees should no longer face uncertainty about recovery from their Employers' Liability insurers.

Background

Employers' Liability ("EL") policies, which cover claims by employees and former employees against their employers, provide the vast majority of potential coverage for mesothelioma claims in the UK — a reported 97% of the mesothelioma claims notified to the UK government from 2002 to 2008. Only about 2% of such claims are reported as being covered by public (general) liability ("PL") policies (the dominant type of policy for product liability and other tort claims not arising from an employment relationship). Thus, the Employers' Liability Policy Trigger Litigation is central to UK coverage law for mesothelioma claims.

The coverage litigation arose when certain insurers declined to indemnify 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 the EL policies at issue in the proceedings were triggered by exposure to asbestos during the policy period. An EL insurer that 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.

However, in October 2010, on appeal from the first instance ruling, the Court of Appeal created significant uncertainty by holding that EL policies with "sustained" wordings were not triggered until the date — usually long after exposure — when the mesothelioma tumour started to develop, which could result in lack of indemnification for a policyholder that no longer had responsive policies by that time. This judgment also raised other coverage questions that potentially jeopardized EL policyholders' ability to recover in full from their insurers.

The Supreme Court Ruling

The Supreme Court reversed the Court of Appeal's modification of the High Court holding and decided that the EL policies under consideration all responded to employees' mesothelioma claims on an exposure basis, whether the policy trigger wording included the words "*sustained*", "*contracted*" or "*caused*". Specifically, the Court held that exposure, coupled with the causal link to the injury that is recognised by English law, is sufficient to trigger the insurance policy. This holding resolved in policyholders' favour the other potentially prejudicial issues raised by the Court of Appeal.

In reaching its decision, the Supreme Court adopted a less literal approach to interpreting insurance policies than has hitherto been the practice, and instructed judges in lower courts to avoid focusing on the meaning of single words or phrases used in isolation, but rather to look at insurance contracts more broadly.

The Supreme Court's judgment does not provide explicit assistance to policyholders faced with mesothelioma claims by non-employees, who are currently being denied coverage by public liability insurers as a result of the case of *Bolton v Municipal Mutual.* It could, however, provide a basis for the *Bolton* case to be re-visited by the English courts. The Supreme Court chose to distinguish the *Bolton* case on the grounds that it concerned PL policies, which the Court believed to have different characteristics from EL policies, and that no evidence concerning PL policies had been presented to the Court.

The Supreme Court did not take issue with the view expressed by Mr. Justice Burton at first instance on the basis of the expert evidence before him, albeit *obiter,* that a mesothelioma injury is deemed to occur about five years before it is diagnosed (as opposed to the finding of ten years prior to diagnosis made by the judge at first instance in the *Bolton* case).

Implications for EL Policyholders Defending Claims by Employees

- EL insurers that have provided coverage on the basis of the common wordings that were considered by the Supreme Court will no longer be able to refuse to indemnify corporate policyholders in relation to mesothelioma claims by former or current employees on the basis that the policies are only triggered when a mesothelioma tumour begins to develop.
- As discussed in Part 2 below, policyholders will now be able to derive full benefit from the High Court's January 2012 decision in *International Energy Group Limited v Zurich Insurance PLC UK*, which confirms the application of the "*all sums*" principle to mesothelioma claims under EL policies and should enable policyholders to overcome gaps in coverage.

Implications for PL Policyholders Defending Claims by Non-Employees

- PL insurers will continue to refuse to indemnify policyholders on an exposure basis in respect of claims by non-employees, on the authority of the *Bolton* case.
- However, the Supreme Court's support for a less literal interpretation of commercial insurance policies and other aspects of its approach to the interpretation of the EL policies could provide a basis for re-consideration of the *Bolton* decision in a PL context in the near future.

Wider Implications

- The Supreme Court's broader approach to the interpretation of insurance policies may provide assistance to corporate policyholders in many other insurance coverage contexts.
- It remains to be seen to what extent the decision itself will assist policyholders in the context of other long term disease claims, given the unique medical nature and liability background of mesothelioma.

2. HIGH COURT CONFIRMS APPLICATION OF "ALL SUMS" PRINCIPLE TO MESOTHELIOMA CLAIMS UNDER EMPLOYERS' LIABILITY POLICIES

Introduction

On 24 January 2012, Mr. Justice Cooke in the High Court of Justice in London handed down a judgment in *International Energy Group Limited v. Zurich Insurance PLC UK* that is likely to have wide-ranging implications for the handling of mesothelioma claims under employers' liability ("EL") policies.

In his judgment, the Judge made clear that, under English law, any insurer that has covered an employer for any period during which an employee was negligently exposed to asbestos by the employer is liable to indemnify the employer under a triggered policy for the full amount of compensation payable to the employee. This is the principle referred to in the USA as "All Sums".

Background

The claimant policyholder, previously known as Guernsey Gas, settled a mesothelioma claim by a former employee whom it had employed for a period of 27 years for the sum of about £278,000. It then sought to recover the full amount of compensation from its EL insurer, Zurich, whose predecessor company had only insured Guernsey Gas for 6 out of the 27 years of employment. Zurich claimed that it was only liable for a proportion of the victim's compensation equivalent to the portion of the claimant's employment for which it had been on the risk.

The Decision

Zurich was successful in defending its coverage claim, but only because Guernsey law, which differs from English law in one crucial respect, governed the employee's claim against Guernsey Gas. However the Judge made clear that, under English law, the policyholder's claim against its insurer for the full amount of compensation would be "*unanswerable*", because the UK Compensation Act 2006 - which does not apply in Guernsey - provides that any employer found liable to an employee in relation to a mesothelioma claim is jointly and severally liable for the entire damage caused to the employee.

In reaching his decision, the Judge cited approvingly the 2003 decision in *Phillips v. Syndicate 992 Gunner*, in which an insurer had been ordered to pay full compensation to the widow of a mesothelioma victim exposed to asbestos by a dissolved employer under the Third Party (Rights against Insurers Act) 1930, even though the insurer had not provided insurance coverage for the full period of the late husband's employment with the employer. Insurers had taken the position that this decision should be confined to cases where the employer has been dissolved or is insolvent, but Mr. Justice Cooke's decision clarifies that *Phillips* cannot be so limited.

The Judge also dismissed Zurich's argument that, even if it was prima facie liable for the totality of the compensation, it nevertheless would be entitled as a matter of equity to contribution from the policyholder in respect of those periods in which the employee had been exposed to asbestos but for which the policyholder had not purchased insurance from Zurich. The Judge gave short shrift to this argument, holding that there was no room for the operation of any equitable principles that could undermine the application of ordinary insurance contract law principles. As the policyholder would be liable under UK law for the totality of an employee's damages in any policy year that was part of the employee's period of exposure to asbestos, that policyholder is entitled to recover those damages from its insurer in any such year. Thus, where a policyholder is liable for an employee's damages arising from exposure to asbestos over many years, that policyholder is entitled to a full indemnity in respect of those damages under any EL insurance policy it purchased, beginning from the date of the employee's first exposure to asbestos. The targeted insurer will have a right of contribution from the policyholders' other triggered insurers, but not from the policyholder itself.

Although, technically, the Judge's statements rank as *"obiter dicta"*, the decision confirms that the *Phillips* case should not be confined to situations where the employer is insolvent or has been dissolved. Now, two first instance High Court judges have confirmed that the so-called "All Sums" principle applies to mesothelioma claims under EL policies under English law, although the Court of Appeal is currently considering whether to give permission to appeal, and may yet rule on this issue.

The Implications for Mesothelioma Claims under EL Policies

The "All Sums" principle, as it has been applied in practice in the USA, gives policyholders significant flexibility in seeking coverage from their insurers. As a policyholder is entitled to seek full indemnity coverage from any one triggered insurer, it can choose which of the insurers that has covered it during the claimant's period of employment to pursue and, subject of course to policy limits, can avoid having to deal with insolvent or uncooperative insurers or being bound by unfavourable terms. Insurers selected by policyholders will then seek to recover contribution from other insurers on risk during the period of exposure. Policyholders are thus in a stronger position to negotiate a favourable allocation of risk between insurers as an alternative to pursuing the "all sums" route.

Now that the Supreme Court in the EL Policy Trigger Litigation has restored the full effect of the first instance decision of Mr. Justice Burton, so that all EL policies cover the policyholder on an exposure basis, the "All Sums" principle should be applicable to all EL coverage in the UK, to the significant benefit of policyholders.

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

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