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Article abstract

L'amiantose, comme certaines maladies causées par certains remèdes nouveaux, a créé des problèmes d'interprétation de l'assurance de responsabilité civile. Lloyd's London n'a pas été lent à réagir. Il a mis la question à l'étude pour savoir comment il fallait appliquer les clauses de l'assurance-produits dans des cas où le tort ne se produit pas au même moment ou lorsqu'il se répartit sur une période d'années. C'est un résumé des notes publiées à cet effet par le Comité de Lloyd's chargé d'étudier la question que nous présente notre collaborateur. Nous l'en remercions, car il y a là des problèmes d'interprétation exigeant des précisions utiles non seulement pour les assureurs, mais pour les courtiers et pour les tribunaux.

Loss occurrence within casualty excess of loss reinsurance, particularly as it applies to products liability

by

ERIC A. PEARCE F.C.I.I.

L'amiantose, comme certaines maladies causées par certains remèdes nouveaux, a créé des problèmes d'interprétation de l'assurance de responsabilité civile. Lloyd's London n'a pas été lent à réagir. Il a mis la question à l'étude pour savoir comment il fallait appliquer les clauses de l'assurance-produits dans des cas où le tort ne se produit pas au même moment ou lorsqu'il se répartit sur une période d'années. C'est un résumé des notes publiées à cet effet par le Comité de Lloyd's chargé d'étudier la question que nous présente notre collaborateur. Nous l'en remercions, car il y a là des problèmes d'interprétation exigeant des précisions utiles non seulement pour les assureurs, mais pour les courtiers et pour les tribunaux.

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At present and in the recent past, a matter of grave concern for insurers in North America has been the problem of liability in respect of latent disease resulting from the use of, or contact with, certain products. That which has received most publicity is asbestosis. Every one of us even remotely conversant with the facts must feel the most profound sympathy with those who contract the disease. One of the terrible aspects is that a person may become affected but be quite unaware of the fact until years later.

One can immediately see the problem which this raises for an insurer in the assessment and settlement of claims for compensation. There may have been exposure to various different asbestos products, the exposure may have been over a long period and in a number of different places, each product may have been the subject of insurance with various different insurers.

The task of compensating the great number of sufferers has been called the multi-million dollar nightmare and to insurance

and reinsurance men generally it must seem to be an almost impossible undertaking to determine in some cases such basic facts as : when was the disease contracted, for it may develop over a long period ; which product was the cause or the main cause, for asbestos is used in many products ; which insurer or insurers can fairly be taxed with the payment of compensation, for over the years any one product may have been covered by a succession of different insurers, even uninsured at times.

A further complication is that the policy text may not in every case be clear beyond per adventure, as to exactly what the policy is intended to cover. Briefly there is the manifestation theory according to which injury is deemed to occur when asbestosis manifests itself. On the other hand, in the exposure theory the underlying belief is that the time of manifestation has little to do with when the bodily injury occurred, because inhalation of fibres causes damage which worsens progressively as the injured person breaths in more fibres. It seems that there is no unanimity of opinion on this vitally important point, and that apparently some courts found in favour of one theory and other courts have favoured the other.

The above will be well known and in much greater detail to many readers, and the purpose of this brief introduction is merely to explain to other readers who may be less closely involved, the background to my main observations which deal with the reinsurance aspect.

As insurers proceed with the settlement of claims made against them, obviously they will be considering their possible claims against their reinsurers. There is, unfortunately, the possibility of misunderstanding and disagreement regarding the correct application of excess of loss reinsurance covering Casualty business, when products liability claims are formulated against reinsurers. It was therefore decided by an important organisation, which consists of those who act both as insurers and reinsurers, to produce and circularise a memorandum intended to encourage dialogue that would lead to a clear understanding of the common intent of the parties as to the degree to which such reinsurance should be expected to respond to products liability type losses on an occurrence basis rather than responding only under the Aggregate Extension Clause (see below).

Although the developments regarding asbestosis may have persuaded reinsurers to take this quite unusual step, I believe that

reinsurers have been preoccupied for some years with these problems in general, not only in the narrower context of latent disease. This subject is of considerable importance and my endeavour in this present paper is to provide a précis of the first memorandum and the subsequently issued explanatory text.

The memorandum refers to the concept in definitions of loss occurrence of "causative agency", "common origin" or "common cause" and expresses the view that such terms relate to the earliest event, error, act or omission, which is directly connected with a loss. The intention is therefore, to bring together within one loss
 occurrence only such claims as are linked to the same event, same error, same act or same omission, limited in time and place.

1. This then clarifies the position when losses arise from one batch of a product which has been accidentally contaminated. After distribution this might result in claims being prosecuted successfully against the manufacturer and several distributors. Such losses can be traced back to a mistake clearly limited in time and place. As such, this then can be considered as one loss occurrence. There is also the example of error in the manufacturing process itself, the results of which might be extended over long periods and wide areas, but nevertheless having a common origin and as such likely to be within the contract definition of loss occurrence.

2. A distinction is drawn between the above and losses related to several manufacturing plants involving different manufacturers. In such a case the common origin of the losses might be the original conception of the manufacturing process, which would be far wider than the scope of normal reinsurance definitions.

3. There are losses which may be related or of a like kind, but which cannot reasonably be grouped together as a single loss occurrence. Examples are : all food poisoning ; all fatigue of metal ; all failure of rubber tyres, brakes, steering etc ; all misuse of specific acids or caustic substances and all chemicals or compounds.

The endeavour here is to draw attention to the fact that the resultant claims are related only because they are of a like kind, but not of any definable common origin or common cause. If there is a common cause such as an accident or error, the position is as set out in 1. abo.

4. A further category of losses not considered as coming within the normal definition of loss occurrence are those which are linked

only by a specific element, compound or mixture in which case any relationship of time or place is lost and beyond the intention of current reinsurance contracts. This refers, inter alia, to claims involving asbestos. Here again the endeavour is to emphasise that various claims cannot be included in one loss occurrence merely because each claim results from the use or application of the same element, same compound or same mixture, any more than all claims arising from fire or water are necessarily within the definition of one loss occurrence. There must be a common origin and in the context of asbestosis, it is suggested that an acceptable common origin could conceivably be the absence of safety procedures governing exposure to dust at a particular worksite.

As mentioned above, the intention of the memorandum was to encourage dialogue and in this respect at least, the memorandum was evidently very successful. After some months a second and even more voluminous explanatory memorandum was issued. Much of it refers in detail to losses involving asbestos, but merely elaborates the principles outlined above, without any new developments. In other respects regarding excess of loss reinsurance, it provides little that has not already been considered. Nevertheless, some aspects of the discussion have been widened, and I give below some details which I believe will be of interest to readers.

A. It is again emphasised that, as we have seen, under excess of loss reinsurance, if claims are to be brought together into one loss occurrence they must be linked to the same event, same error, same act or same occurrence, limited in time and place. This is discussed further to explain that it does not mean all claims making up the totality of the loss occurrence must be limited in time and place. Such claims might happen over a considerable period and a wide area, but provided that the event linking the claims was itself limited in time and place, they would be within one loss occurrence, as explained in 1. above. (There is also the Aggregate Extension Clause to be considered. See below).

B. Even when an entire Fire and Casualty portfolio is included in one single excess of loss reinsurance, this does not protect "all business" against "all losses". Although any claim for which the cedent is liable may be within the scope of the reinsurance, the manner and extent to which more than one claim can be added together is defined in the contract and such claims must be linked, as seen above.

C. A very interesting and indeed vital distinction is drawn between the nouns "catastrophe" and "disaster" used in reinsurance as technical terms and the adjectives "catastrophic" and "disastrous" as used in general conversation. The distinction is explained by reminding the reader that unprofitable trading in insurance may cause individuals to refer to such conditions as being disastrous. Nevertheless, the fact that the loss ratio is heavier than anticipated does not mean that the losses can be added together to formulate a claim against excess of loss reinsurers.

280 D. The concept that the reinsurer should follow the fortunes of the cedent is explored and it is explained that although the reinsurer would certainly expect to follow the fortunes so far as the settlements of original claims are concerned, nevertheless when formulating a claim under an excess of loss contract the definitions of what constitutes a loss occurrence must be respected.

I have made reference to the Aggregate Extension Clause. This is a recurrent theme throughout the two memorandums and is of considerable importance to all those interested in products liability insurance and reinsurance. It is explained that the difficulties which have been encountered in the past in defining the occurrence in some cases, led the insurers to issue their policies on an Annual Aggregate basis. In support of this solution to the problem, reinsurers introduced the Aggregate Extension Clause into excess of loss contracts where appropriate.

It is perhaps a pity that the memorandums do not set out a standard Aggregate Extension Clause, for it seems that there are differing texts. However, in general the reinsurance is likely to be subject to the following conditions :

> When the policy is on an annual aggregate basis, for such original policy, for each original year of insurance, the reinsurance shall protect the cedent excess of a stated sum in the aggregate, up to a stated sum in the aggregate, in respect of such aggregate loss.

From the foregoing it is seen that for this special category of insurances, the reinsurance is not "an occurrence" excess of loss but becomes a stop loss or aggregate excess of loss. This may be an advantage to the cedent in some circumstances as it may favour the reinsurer in others, but at least both parties know from the outset, exactly where they stand and how claims will be dealt with when they arise.