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Commentary

Asbestos: Insurance Coverage Issues On A Changing Landscape

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The asbestos landscape is changing dramatically. The conventional wisdom is that as more and more asbestos defendants fall victim to bankruptcy, the asbestos plaintiffs bar is having to cast a wider net in its search for replacement defendants. The result — many companies are finding themselves as asbestos defendants for the first time, even if their links to the mineral and the alleged injury are dubious at best. But the changing asbestos landscape is a lot more complicated than just the addition of some new players on the field. Thankfully, however, like so many of the world's complexities, asbestos provides a simple roadmap to its understanding — follow the money.

The New York Times recently reported that American companies and insurers have spent over $30 billion to defend and settle asbestos lawsuits. While that certainly seems like a lot of money, it's nothing when you consider that *the Times* article cited industry analyst predictions that the total bill for asbestos could exceed $250 billion.[1] In other words, if asbestos were a marathon, the runners have only just passed the three-mile marker.

According to actuarial firm Tillinghast-Towers Perrin, U.S. insurers have paid $22 billion in asbestos claims through December 31, 2000 and will eventually pay $60 billion. Additionally, Tillinghast projects that when all is said and done, the total asbestos bill will be $200 billion. What's remarkable about the Tillinghast projections is not that the total asbestos bill will be $200 billion, but that only $122 billion of it will flow into the worldwide insurance industry. Tillinghast projects that the asbestos pie will ultimately have the following three slices: U.S. insurers and reinsurers — $60 billion; overseas insurers and reinsurers — $62 billion; and asbestos defendants themselves — $78 billion.[2]

Projecting the final asbestos tally is an extremely ambitious undertaking and Tillinghast may or may not be on the mark. However, the real story in Tillinghast's numbers is that there is a large piece of the asbestos pie — and maybe even the largest — for which no insurance dollars are thought to attach.[3] With that in mind, consider that there are a couple of things that the plaintiffs bar is loathe to do. First, it has shown no willingness to reduce its expectation of the settlement value of its cases, notwithstanding the elimination of some of the major players in the settlement pool. Second, the plaintiffs bar is typically unmotivated to pursue litigation against uninsured defendants, where the collectabilty of any judgment or settlement is far more time-consuming, legally challenging and, most of all, uncertain.[4]

As a result of the combination of these factors, the real change that is taking place on the asbestos landscape is an all-out effort by plaintiffs and policyholders to find ways to increase the insurance industry's share of the total asbestos bill. More than any time before in the history of asbestos litigation, the insurance industry's capital is coming under assault. The addition of some new defendants to the world of asbestos litigation is simply a means — *and only one at that* — to such ends.

While some of those involved in spending the first $30 billion on asbestos defense and indemnity may scratch their heads at projections that exceed a quarter of a trillion dollars, this much seems certain — considering the amount of coverage litigation that the first $30 billion generated, it would be naïve to think that the road to $200 billion (or whatever the eventual total is) will not be littered with coverage disputes. And the stakes could not be higher for both sides.[5]

Whether the policyholder is a large public company, which can have billions of dollars instantly shaved off its market cap by a merciless stock market that so much as hears a whisper of the word *asbestos*, or a more modest sized company, which has quietly gone about its business in relative obscurity for several generations, the consequences are the same. For both companies, their ability to successfully secure insurance proceeds, or more insurance proceeds, may determine their very survival. For U.S. insurers, the prospect of paying out an additional $40 billion on account of asbestos, with pressure on them to pay a lot more than that, is unlikely to be sitting well, even if it does not pose a threat to their survival. And such a prospect is certainly not sitting well with rating agencies or Wall Street,[6] especially these days.

The property/casualty industry saw its 2001 combined ratio — which measures losses and underwriting expenses per dollar of premium — rise to 116%. And U.S. reinsurers had it much worse last year — a combined ratio of a staggering 140%. What's more, the insurance industry is presently facing uncertainty concerning the amount of its eventual September 11th exposure and its role in potential future terrorism losses, exposure for the litigation fall-out that it sure to come from the current crisis in corporate confidence and a depressed investment climate in which to operate.

There are several scenarios that will likely cause increased pressure on the extent of insurers' liability for the total asbestos bill. In no particular order, some of these are likely to be as follows:

- Policyholders that have spent the past two decades unscathed by asbestos litigation are now at risk for seeing complaints filed against them, based on various theories that they have some connection to it. And if such companies were "installers" that used asbestos in their work, arguments will likely be made that their claims involve "operations", and not "products." Translation — their policies may not contain aggregate limits for such claims.

- Policyholders that have seen some random cases filed against them in the past, but with no real effort mounted against them by the plaintiffs — because the plaintiffs have been using their resources frying bigger fish — may now see their profile raised. In other words, companies that have spent many years calling themselves "peripheral defendants" may no longer be able to stake a claim to that label. And when a peripheral defendant begins to pay more to settle cases, there will be an incentive to keep the heat on it and include it in more cases in the future.

- Policyholders that have been "products" defendants in the past may now see cases filed against them for "premises" liability. Here, the allegation will not be that the plaintiff was exposed to the policyholder's asbestos containing *product*, but that exposure took place while the plaintiff was present on the policyholder's property, such as while working for a contractor in the policyholder's factory. Insureds are expected to argue that even if their "products" coverage has been exhausted, insurers face additional exposure for these "premises" cases on the basis that they constitute a different "occurrence", and one that is not subject to the "products" aggregate.

- Policyholders that have exhausted their asbestos "products" coverage or are close to doing so may now say *wait a minute* and attempt to re-classify their claims as "operations" instead of "products." The argument will be made that if they are successful in doing so, then their policies, which were previously thought to be exhausted, are not.

- The bankruptcy of policyholders on account of asbestos liabilities is a burgeoning issue that has enormous potential impact on insurers' exposure. The primary issue here for insurers is that their policy limits may now be due and owing much sooner than originally believed. For an industry that relies so heavily on the timing its payments, herein lies a huge potential worry.

Each of these scenarios raises coverage issues, some of which have elements that have been seen in the past and others that are entirely unique. What follows is an examination of where some of the battlegrounds may lie between insurers and their policyholders on this changing asbestos landscape. "Trigger" was the first big asbestos coverage issue, keeping courts occupied for the past fifteen years, with the vast majority of them reaching decisions that implicate more, rather than less, policies. That horse has now left the barn. What's left are disputes over the amount of insurance dollars for which the triggered policies are obligated. While insurers can expect to feel increased pressure on their share of the funding for asbestos litigation, they are not without some means for stemming the tide.

The First Time Asbestos Defendant And Uninsured Periods

The most often-cited description of the changing asbestos landscape is the addition of new defendants — companies that have gone two decades without ever seeing their name on an asbestos complaint, until now. A recent Reuters report stated that while there are about 2,000 U.S. companies presently involved in asbestos related litigation, that number, according to analysts, could triple as new companies that either handled or installed the material come under scrutiny.[7] Unless the suit involves premises liability, discussed in greater detail below, it is likely that any company that is only now being sued for the first time for asbestos is a smaller company — the proverbial "mom and pop."[8]

While there is a lot for the first time asbestos defendant to learn about its new predicament, it probably won't take long before someone advises it to put all of its potentially implicated liability insurers on notice. This will likely involve each insurer on the risk from the date of first exposure to asbestos alleged in the complaint to the date of incorporation of the asbestos exclusion in its liability policies. This could be a period that spans 30 to 40 years, or even more. However, many companies in 2002 may not be able to locate a single liability insurance policy from, say, 1950 to 1990. Not only that, they will likely react in disbelief when asked to produce such ancient documents. And even for those companies that can locate policies during this period, it is very unlikely that they will be able to locate each and every one — primary and excess.[9]

For insureds whose policies are governed by a state that has adopted an allocation scheme based on pro-rata time on the risk, or a form thereof, their first introduction to asbestos coverage will likely be an argument from their insurers that the policyholder is responsible for the share of defense and/or indemnity that is allocated to these periods of "no insurance." The policyholder is likely to strenuously reject this, arguing that they did in fact purchase liability insurance during these so-called periods of "no insurance," but that they can not locate the policies. The insureds will likely argue that it is unfair to penalize them for their inability to locate insurance policies that expired decades ago. Their argument will likely be that they do not belong in the same category as a company that voluntarily chose to "go bare" and pocket the insurance premiums.[10] Insurers, on the other hand, will likely maintain that any court that has ruled that their responsibility for asbestos injuries is limited solely to that which takes place "during the policy period" (i.e., pro-rata time on the risk) has put this issue to rest, making it irrelevant what the insured's coverage picture looks like outside their own policy period(s). Moreover, insurers on the receiving end of a charge that they issued long-expired policies will likely maintain that courts typically place the burden on the insured to prove the issuance and terms and conditions of such alleged policies.

For many companies, and especially new asbestos defendants, which are likely to be on the smaller scale, a finding that they are obligated to share in their asbestos defense and/or indemnity, even if for only a small percentage, may be a death sentence. Indeed, for many smaller companies, just having their insurers take this position could mean the end, if they can not afford to pursue coverage litigation to challenge it. For insurers, while this issue is not likely to be a matter of life and death, at stake will be a means to decrease their share of many policyholders' asbestos liabilities. If the recent Reuters report is correct, or even only partially correct, that there are 4,000 new asbestos defendants out there, this is a dispute that is sure to make its way into courtrooms.[11]

The Debutante Ball: The Peripheral Asbestos Defendant Becomes A Target

Closely related to new asbestos defendants are defendants that have been previously named in a few asbestos actions, or even a lot of actions for that matter, but that have never been the target of a plaintiff's attorney. Such companies have probably employed the "low profile defense," labeled themselves "peripheral defendants" and been successful in securing dismissals from cases voluntarily, on summary judgment for lack of product identification or, as an absolute last resort, following the payment of a very minimal sum. Indeed, it is not unheard of for companies to have been named as asbestos defendants in hundreds of cases over the years, and have never paid a dime in indemnity, limiting their exposure to defense costs only.

Some of these companies may very well have had strong cases in support of their "no pay" positions. For others, however, their success to date in asbestos litigation may have more to do with a lack of effort on the plaintiffs' part to make a case against them than the actual strength of their defense. As a result, some companies and insurers may have been lulled into a false sense of security by their previous success in asbestos litigation. But as the former "target" defendants bid adieu to the litigation, they will take with them the hiding spot that the low profile — peripheral — defendants have long enjoyed and exploited.

As the search for more insurance dollars takes center stage, the plaintiffs will likely have no choice but to take a closer look at these so called "peripheral" defendants. Such defendants may now see an increase in discovery being directed towards them, such as a greater interest by the plaintiffs in their production of documents and witnesses for depositions. While the peripheral defendant may have already produced many boxes of documents in discovery, the time may have come when the plaintiffs actually scrutinize what is inside.

From a coverage perspective, the likely difference between the new defendant and the former peripheral defendant is that the peripheral defendant has likely already faced cost sharing issues with its primary insurers, having done so at the time that the first asbestos cases were filed against it.[12] And now, with the extent of its potential asbestos liability quickly on the rise, the former peripheral defendant is likely to face a host of new coverage issues, ones that go toward determining the extent to which its policies are obligated. On such issue is the number of occurrence limits available in a multiple-year policy.[13]

Many insureds either don't believe it or don't want to believe it, but, unless there is express language to the contrary, a three-year liability policy provides a single occurrence limit, even if its aggregate limit is expressly stated to be subject to annualization. For example, consider an asbestos defendant with a three-year policy that contains a $1,000,000 occurrence limit and a

$1,000,000 aggregate limit. Unless the policy says otherwise, it provides, *for the duration of the policy*, a maximum of $1,000,000 for asbestos claims and $3,000,000 for "products — completed operations" claims. This means that after the policy has paid $1,000,000 for the asbestos occurrence, such policy has no further obligation for asbestos claims, notwithstanding that the policy is still obligated to pay $2,000,000 for *other products claims* (i.e., products other than those containing asbestos), subject to the policy's $1,000,000 per occurrence limit.

This is an issue with Herculean consequences for both insurers and policyholders. Simply put, for a policyholder with many three-year policies in its liability insurance program, resolution of this issue in the insurers' favor may result in it having one-third as much coverage available for the payment of asbestos claims as it thought it did. Given the enormity of this issue, it is surprising that it has not been the subject of more litigation. The majority of courts examining this issue have concluded that multiple-year policies are subject to a single "occurrence" limit.[14]

Take one example. In *Outboard Marine Corporation v. Liberty Mutual Insurance Company, et al.*,[15] the court addressed coverage in the context of environmental property damage (a sibling to asbestos in many ways for coverage purposes). At issue, among other things, was the extent to which a three-year policy with a $1,000,000 occurrence limit was obligated to respond. The relevant policy language was as follows:

> [I]n no event shall the company be liable for an amount in excess of that set forth in the Declarations as applicable to 'each occurrence.'
>
> Subject to the limit of liability with respect to 'each occurrence' the aggregate limit of liability set forth in the Declaration applies separately to claims arising under the insurance afforded for Products Liability and to those arising out of personal injury by Occupational Disease sustained by any employee of the insured. If the policy is written for a period of more than one year the limits of liability apply separately to each annual period that this policy remains in force.[16]

The *Outboard Marine* court held that the policy language was unambiguous and that the "annual period" language relied on by the insured only modifies the sentence before it, which begins by expressly reiterating that it is "subject to the limit of liability with respect to 'each occurrence.'"[17] Thus, the court held that the maximum liability under the three-year policy was $1,000,000, and not $3,000,000, as the trial court had found.[18]

As the pressure mounts on insurers to make more dollars available for the payment of asbestos claims, insurers would be well-served to press this issue with vigor. Given that so many insureds are likely laboring under the mistaken belief that their three-year policies provide three separate per occurrence limits of liability, this issue has more to do with insurers limiting their exposure for asbestos claims than it does with policyholders finding a way to make more funds available to pay such claims.

While policy language and a majority of decisions are unquestionably on the insurers' side when it comes to this issue, insurers must nonetheless be prepared for the tsunami-like force that will meet them when making this argument. One insured confronting this issue recently called it "reverse-alchemy," noting that it would devastate its insurance program by reducing its available limits for asbestos claims by hundreds of millions of dollars.[19] This is an issue that will have an enormous difference in the amount of money that is available for the payment of asbestos claims from insurers, versus uninsured defendants. And given the difficulties that may exist in securing payment from uninsured parties, this issue may be the difference between plaintiffs being compensated by certain defendants, or not.

The Operations Buzz

If industry hubbub has any prophetic capability, then the most important battleground in the assault on the insurance industry's capital for the payment of asbestos claims will be the "operations" portion of liability policies. Recognizing that each policyholder's situation is unique and that the nature of liability policies have evolved over time, it is fair to say that, in general, many of the liability policies that will be triggered for asbestos claims provide coverage for the insured's "products and completed operations" as well as its "operations." And, again, with the usual caveats, while liability policies likely have an "occurrence" limit for both types of coverages, many of these policies also likely have an "aggregate" limit that is applicable only to certain types of claims, such as "products liability" and "completed operations," leaving "operations" claims to be limited solely by the "occurrence" limit. This explanation, albeit generalized, is the backbone for the rumor that asbestos and "operations" coverage are planning to tie the knot, and the insurance industry will be leaving a blank check on the gift table.[20] Hold-on. Not so fast.

The "operations" issue reveals itself in various forms. One such form is when the plaintiff alleges that his or her asbestos bodily injury was caused not by exposure to the defendant-insured's asbestos containing product, but to its work that included the installation of asbestos. In an August 1, 2001 report by Standard & Poor's, the rating agency had a less pessimistic outlook on asbestos than some others. However, when it came to "operations" exposure, pessimism abound. S&P had this to say about asbestos "operations" claims:

> Today, an increasing number of asbestos claims related to installation activities are being filed under the premise or operations section of the general liability policy. Unlike product policies, these policies typically have no aggregate limit and unlimited defense cost. The potential cost to the insurance industry is apparent.[21]

S&P and others are arguing that asbestos claims against installers will lead to uncapped exposure for insurers on account of the absence of an aggregate limit. As well, some are predicting that policyholders that have exhausted their asbestos "products" coverage or are on their way to doing so may now attempt to re-classify their prior claims as "operations" instead of "products," meaning that policies that were previously thought to be exhausted are not.

The flaw in these "operations" arguments is that the insurance policies held by installers and other users of asbestos very likely contain an "occurrence" limit of liability and an aggregate limit of liability for "completed operations." Both of these policy provisions are specifically designed to prevent the uncapped exposure that insurers have been predicted to face on account of lawsuits against non-manufacturers of asbestos products.

A recent federal court decision from Maryland illustrates this point. In *In re: The Wallace & Gale Company,*[22] the United States District Court for the Southern District of Maryland addressed several asbestos coverage issues effecting the bankruptcy of Wallace & Gale, Inc., a company that probably resembles just the kind of "installer" defendant that S&P likely had in mind when it spoke of "an increasing number of asbestos claims related to installation activities." From approximately 1930 to the early 1970s, Wallace & Gale supplied and installed asbestos containing insulation materials at various industrial and commercial buildings throughout Maryland. In the course of its work, Wallace & Gale personnel regularly cut asbestos materials, generating asbestos dust and other debris, some of which was inhaled by individuals on-site, several of which filed claims against Wallace & Gale for alleged asbestos-related diseases.[23]

In addition to several other coverage issues common to asbestos, the *Wallace & Gale* court addressed the extent to which Wallace & Gale's operations fell within the "completed operations hazard," thereby subjecting such claims to aggregate limits in certain policies. The specific coverage issue before the court arose on account of the fact that while claimants were exposed to asbestos during the time of Wallace & Gale's installation work, their injuries also continued to occur even after Wallace & Gale's operations were completed. The claimants argued that if their initial exposure to asbestos occurred during the time of Wallace & Gale's operations, then no portion of their claim can come within the "completed operations hazard," and be subject to an aggregate limit. The court sided with the insurers, holding as follows:

> It remains true that asbestos-related injury can occur at any time from exposure onward and that it cannot be said with certainty when or to what extent it actually occurs. But whatever injury — theoretical or real — is assumed to have occurred after Wallace and Gale's operations were completed will always — by definition — be covered by the completed operations clause. The injury occurs after operations were completed. Nor does it matter whether an injury is viewed as occurring both upon initial exposure before operations are completed as well as thereafter. The portion of the injury extending upon completion would still, by definition, occur post-operations and thus remain subject to the completed operations hazard aggregate limit.[24]

While asbestos claims against installers may not be subject to an aggregate cap for "products liability," *Wallace & Gale* makes clear that such claims will not lead to uncapped exposure since there is more than one type of aggregate limit.

Wallace & Gale deals with claims brought by "in-house" employees against an outside contractor who came to the employees' facility to perform work. "Operations" claims can also arise when the situation is reversed. For example, an "operations" claim can arise when an outside contractor's employees bring claims against the company where they performed their work. Here, the contractor's employees will allege that they were exposed to asbestos while working in the company's facility. This situation is potentially more problematic for the defendant-company's insurers on account of the fact that such claims may not be subject to a products, completed operations or other aggregate limit. However, even if such claims are not subject to an aggregate limit, they will likely still be subject to an "occurrence" limit. Thus, as premises liability grows in popularity, and subjects insurers to potentially large unaggregated exposure, the question of *what is the occurrence* for purposes of premises claims is likely to become the subject of litigation with potentially huge stakes.[25]

Asbestos And Bankruptcy

It would be well beyond the scope of this article to properly address the myriad of issues concerning what may happen to the insurance policies of an asbestos defendant when it files for bankruptcy.[26] While this is not a new issue, its profile was recently raised dramatically on account of a California trial court decision and a subsequent article in *The Wall Street Journal*.

In *Fuller-Austin Insulation Company v. Fireman's Fund Insurance Company, et al.,*[27] the Superior Court of California was required to address the impact of Fuller-Austin's bankruptcy filing on its already-in-progress insurance coverage action. In 1994, Fuller-Austin filed a coverage action against its liability insurers to establish their obligations for claims brought against Fuller-Austin arising out of exposure to asbestos containing products installed or removed by Fuller-Austin. In 1998, while the coverage litigation was in progress, Fuller-Austin filed for Chapter 11 bankruptcy protection.

While the court issued a 37 page decision, we need only follow the money to find the few lines of the opinion that are garnering all the attention. The court held that Fuller-Austin's confirmed bankruptcy plan "served to establish [its] liability for asbestos-related injuries, the quantum of damages to which each asbestos victim is legally entitled, and the procedure for satisfying the liability."[28] The court further held:

> Consequently, now that Fuller-Austin's liability has been established, Joint Defendants policies are implicated and they are required to pay 'all sums' for each allowed claim — the allowed liquidated value or some higher value established through arbitration or trial, subject to the terms of the policies. Additionally, Joint Defendants are required to pay the aggregate value of Fuller-Austin's asbestos liability to the extent that these damages can be ascertained. Whether the amount of these pending and future claims can be calculated with reasonable certainty is an issue for the jury in the next trial phase.[29]

What does all this mean? In a nutshell, the bankruptcy judgment has established Fuller-Austin's present liability to pending and future asbestos claimants. This amount will be determined in the next phase of the trial, using expert testimony based on statistical projections of asbestos claims that are anticipated to be brought against Fuller-Austin's bankruptcy trust over the next 40 years.[30]

Why so much fuss about *Fuller-Austin*? For that, turn to *The Wall Street Journal*, which recently chronicled the *Fuller-Austin* decision in its influential Heard on the Street column.[31] *The Journal* reported that, according to Fuller-Austin's attorneys, the company has in excess of $1 billion in asbestos liabilities. Thus, if the decision is upheld, Fuller-Austin's insurers may have to pay the remaining $400 million in policy limits significantly sooner than they would otherwise, if the claims were being handled outside bankruptcy. In other words, even if the remaining $400 million of Fuller-Austin's insurance limits would ultimately be paid anyway, such payments would have likely been made in a drip and drab manner over the course of many years, enabling the insurers to earn money on their money in the meantime. As one A.M. Best analyst put it in *the Journal*, "It will mean a whole lot less time value of money on their [claims] reserves." Another analyst noted that if the case becomes influential, an insurer with significant asbestos exposure might have to incur a large one-time boost in its claims reserve, cutting its earnings.

Conclusion

It would be wise to have a little skepticism over the prediction that total asbestos exposure will reach $200 billion and beyond. After all, Y2K was overblown, projections that the insurance industry's exposure for September 11th would be $70 billion are proving to be well off the mark and the economy did not implode on January 1, 2002, despite the fact that Congress did not enact a backstop to replace reinsurance for terrorism, much of which was thought to be lost on that day. However, while the total asbestos bill may be hard to predict, it is a safe bet that the asbestos landscape is changing in an effort to have insurers pay a larger share of it. While insurers can not do anything to keep themselves out of the crosshairs, they are certainly in a position to defend the all-out assault on their capital. Granted, in some instances, invoking such defenses will likely land them in coverage litigation. However, compared to what may be at stake, a declaratory judgment action may be a relatively minor price to pay.

Absent a Congressional solution to the entire asbestos mess, the litigation is here for a very long time. Having spent in excess of two decades fine-tuning a litigation model that turns defendants' insurance policies into annuities, why would the asbestos plaintiffs' bar stop now? And as long as asbestos litigation is here, insurers will always be the plaintiffs' preferred choice as the source of funds for judgments and settlements. Why? Because they have it.

ENDNOTES

1.) Alex Berenson, "A Surge in Asbestos Suits, Many by Healthy Plaintiffs," *The New York Times*, April 10, 2002, at A1.

2.) Michael E. Angelina and Jennifer L. Biggs, "Sizing Up Asbestos Exposure," *Emphasis* 2001/3, a publication of Tillinghast-Towers Perrin, reprinted in *Mealey's Litigation Report: Insurance*, Vol. 6, No. 4, November 27, 2001.

3.) For another example, Credit Suisse First Boston projects that asbestos claims in the U.K. will be approximately GBP 3.5 billion over the next 40 years, but that only about one-third of such total will be payable by insurers. Catherine Taylor, "Asbestos to Cost UK Employers, Insurers GBP3.5B–CSFB," Dow Jones Newswires, June 19, 2002.

4.) Even if asbestos litigation, especially against a large defendant, is an exception to this rule, it is safe to assume that when it comes to collecting a judgment, a plaintiff would still rather be dealing with a defendant's insurer than the defendant itself. When attempting to collect a judgment from an uninsured defendant, the plaintiff is in competition with such defendant's numerous other financial obligations.

5.) There are several other ways in which the asbestos landscape is changing, such as (i) an increase in the number of cases being filed by unimpaired plaintiffs (See note 1 and also Susan Warren, "As Asbestos Mess Spreads, Sickest See Payouts Shrink," *Wall St. J.*, April 25, 2002, at A1); (ii) a rift that has formed within the asbestos plintiffs bar concerning accusations that dollars needed for serious injury cases are being squandered on unimpaired cases (Warren, *Id.*); (iii) a drum beat for a Congressional solution to the problem that keeps getting louder (See Review & Outlook, "Bush and Asbestos," *Wall St. J.*, February 11, 2002, at A22; Review & Outlook, "The Job-Eating Asbestos Blob," *Wall St. J.*, January 23, 2002, at A22); (iv) an overall increase in the media's attention to the asbestos issue and the effect that it could have on the economy; (v) questions being asked whether insurers are adequately reserved for their true potential asbestos exposure (See Joanne Wojcik, "Asbestos Funding Uncertain," *Business Insurance*, June 10, 2002, at 1); (vi) attempts being made by companies to spin-off their asbestos-tainted subsidiaries (See Robin Sidel and Susan Warren, "Liabilities May Trail Asbestos Spinoffs, *Wall St. J.*, May 29, 2002, at C1); and (vii) the "Enron factor" — will companies and insurers come under more pressure to make disclosures about the extent of their potential asbestos liabilities? It would be beyond the scope of this article to address each of these issues. However, each is part of the multi-faceted dynamic of asbestos litigation that gives rise to the coverage issues that are addressed herein.

6.) For example, it did not take long after St. Paul's announcement in early June 2002 of its near billion dollar settlement with Western Asbestos Company for A.M. Best to downgrade the insurer's strength rating from A+ to A. Moody's, S&P and Fitch all announced that they were reviewing the situation. St. Paul's stock also dropped about 4% on the announcement of the Western Asbestos settlement, likewise for the shares of several other major insurers. Amy Braunschweiger, "Insurance Cos Dw on Asbestos Exposure Fears," Dow Jones Newswires, June 4, 2002.

7.) Bill Rigby, "Insurers Riding a New Wave of Asbestos Claims," Reuters, June 10, 2002.

8.) An article in this month's issue of *Best's Review* concerning this situation is aptly-titled "Taking Aim at Smaller Prey."

9.) A lot has been written about how companies can attempt to locate old insurance policies or prove their existence through secondary sources. As well, many courts have addressed legal issues in this area, the most typical one being whether the burden to prove the issuance and terms and conditions of an insurance policy through secondary evidence is by a "preponderance" of the evidence or "clear and convincing" evidence. For the nuts and bolts of attempting to prove alleged insurance policies through secondary sources, see Matthew J. Schlesinger, "Asbestos Claims: Do you know where your old insurance policies are?," *InsuranceAdvisor*, Published by McKenna Long & Aldridge, available at *http://www.mckennacuneo.com/practice/Insurance/McKennaINS0602.pdf*. For a discussion of some of the case law in this area, see Michael S. Jones, "Insurance Law Annual: No Policy, No Problem? How Insureds Are Finding Coverage Even Though They Can't Find Their Policies," 50 *Drake L. Rev.* 611 (2002).

10.) For a more detailed analysis of this issue, and related others, written from policyholder counsels' perspective, see Robert D. Chesler and Lisa M. Campisi, "Return of the Asbestos Insurance Wars," *Mealey's Litigation Report: Insurance*, Vol. 16, No. 13, February 5, 2002.

11.) It is likely that this question has sat idle until now, on account of the fact that larger defendants have had the resources to prove their older policies and/or been in a position to pay some or all of the amount allocated to any period of "no insurance."

12.) At the time that it was entered into, the cost sharing agreement for a peripheral defendant may not have been a worrisome matter for the participating insurers, inasmuch as the insured was just that — peripheral. As such, the carriers may have reached a cost sharing agreement without pursuing the insured's potential participation for uninsured periods. As the insured's profile now increases, carriers may seek to re-negotiate such agreements in an effort to secure the insured's participation. While cost sharing agreements can typically be terminated, insureds will likely raise estoppel as a defense to any such attempt by its insurers.

13.) Other issues that are likely to arise as the spotlight begins to shine brighter on peripheral defendants are the transitioning of claims payment responsibility from the insured's primary to excess insurers, as well as "non-cumulation" clauses. For the excess insurer, which likely provided substantially larger limits than the primary insurer, in exchange for far less premium, its invitation to the dance is even more costly. While there is nothing new about coverage litigation that addresses "drop down", what is likely new on the changing asbestos landscape is the frequency with which such litigation will likely arise. As for "non-cumulation" clauses, it should be noted that in *Spaulding Composites Company, Inc. v. Liberty Mutual Insurance Company, et al.*, 787 A. 2d 238 (N.J. Super. App. Div. 2002), a New Jersey appellate court recently upheld such a clause in the context of a claim for environmental property damage (which, from a coverage perspective, is very similar to asbestos) to limit Liberty Mutual's total obligation under nine consecutive triggered primary policies to $1,000,000, despite the fact that such policies had cumulative total limits of liability of $8,500,000. *Spaulding Composites* is now before the New Jersey Supreme Court. 794 A. 2d 178 (N.J. 2002).

14.) See Jeannine W. Chanes, "Once Is Never Enough: Annualization Of Per Occurrence Limits In Three Year Policies," *Mealey's Litigation Report: Insurance*, Vol. 14, No. 27, May 16, 2000. This article, written by policyholder counsel, provides a comprehensive survey of the case law on this issue. Notwithstanding the conclusions of a majority of courts, a New Jersey appellate court recently ruled the other way. In *United States Mineral Products Company v. American Insurance Company, et al.*, 709 A. 2d 500 (N.J. Super. App. Div. 2002) the court examined the amount of coverage available for U.S. Mineral, which had been named as a defendant in more than 15,000 asbestos "products" cases. The court, using New Jersey's trigger and allocation law as a backdrop, concluded that the insured's policies provided a separate per occurrence limit for each aggregate period.

15.) 670 N.E. 2d 740 (Ill. App. 1996).

16.) *Id*. at 753.

17.) Other common policy language on this point provides as follows:

> The limit of liability stated in . . . the Declarations as applicable to 'each occurrence' is the total limit of the company's liability under this policy for ultimate net loss as a result of any one occurrence.
>
> Subject to the limit of liability set forth in . . . the Declarations with respect to 'each occurrence,' the limit of liability so set forth as 'aggregate' shall be the total limit of the company's liability under this policy for ultimate net loss:
>
> (i) because of all personal injury and property damage during each consecutive twelve months of the policy period, arising out of the Products-Completed Operations Hazards, . . .

18.) For an example of a court, in the asbestos arena, concluding that a three year policy is subject to only a single "occurrence" limit, see *General Refractories Company v. Allstate Insurance Co.*, 1994 U.S.

Dist. LEXIS 7563 ("[T]he plain and unambiguous language . . . establishes that only one per occurrence limit is available for any single occurrence during the policy period.").

19.) See *Uniroyal, Inc. v. American Re-Insurance Co., et al.*, Superior Court of New Jersey, Law Division, Middlesex County, No. L-8172-94, Brief of Uniroyal, Inc. in Support of its Motion for Partial Summary Judgment on the Issue of Annual Policy Limits, April 9, 2001, at 2.

20.) As one well-known policyholder counsel put it, "I believe the potential exposure to the insurance industry for these new defendants on the non-products (claims) is very substantial and could rival the product liability cost (over a period of years)." Counsel also stated that, "The insurance industry ought to be getting a wake-up call about now." Douglas McLeod, "Asbestos Continues to Bite Industry," *Business Insurance*, January 8, 2001, at 1.

21.) Matthew T. Coyle, "Asbestos Claims Pose Significant But Not Catastrophic Threat to U.S. Insurers," Standard & Poor's Insurance Commentary, August 1, 2001.

22.) 275 B.R. 223 (S.D. Md. 2002).

23.) *Id.* at 228.

24.) *Id.* at 238. In simple terms, the *Wallace & Gale* court stated, "[C]ontrary to the argument of the Intervenors — once an operations claim, not always an operations claim." *Id.* at 240.

25.) In the asbestos "products" arena, "number of occurrences" litigation has traditionally been extremely fact-sensitive and difficult to predict, with the existence or non-existence of self-insured retentions in the policyholder's liability insurance program often times being an important factor in the case. Litigation over "number of occurrences" in the asbestos premises context is likely to have the same characteristics.

26.) For an article that is solely devoted to these issues, see Mark D. Plevin, "Current Insurance Issues in Major Asbestos Bankruptcies," *Mealey's Litigation Report: Asbestos*, Vol. 16, No. 21, December 7, 2001. However, even this eleven page single-spaced article begins with a cautionary note that space does not permit a comprehensive review of all of the issues in the to-be-described asbestos bankruptcy cases that touch upon insurers or insurance.

27.) Superior Court of California, County of Los Angeles, Case No. BC 116835, Statement of Decision as to Phase 1B, Issues 2-7 and 9, February 26, 2002.

28.) *Id*. at 6.

29.) *Id*. at 7-8.

30.) For an inside look at *Fuller-Austin*, from the perspective of its co-counsel in the case, see Jason B. Komorsky and Michel Y. Horton, "*Fuller-Austin v. Fireman's Fund, et al.*: What Happens When You Cross Asbestos with Excess Policies and Bankruptcy Law," *Coverage*, May/June 2002, at 1.

31.) Christopher Oster, "Insurers Could See Payout Timeline For Asbestos-Related Claims Shrink," *Wall. St. J.*, April 23, 2002, at C3. ■