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Asbestos Liability Coverage

For nearly three decades, Zelle lawyers have been at the forefront of insurance coverage counseling and litigation involving asbestos liability claims. Through all of the various iterations of asbestos litigation, the firm has dealt with the vast spectrum of coverage issues implicated by asbestos-related bodily injury claims, including the most novel issues imagined over the years by the more creative attorneys in the policyholder bar. Zelle has litigated asbestos coverage claims in state and federal courts (including bankruptcy courts) across the country and has also arbitrated numerous asbestos coverage claims under both the Wellington Agreement and non-Wellington arbitration agreements. The firm has counseled clients in a variety of circumstances involving anywhere from 1,000 to 70,000 separate asbestos-related bodily injury claims spanning many decades of coverage. Zelle lawyers have negotiated complex settlements, coverage-in-place agreements, and policy buybacks and resolved some of the most troublesome, bet-the-company claims ever confronted by the insurance industry.

INDUSTRY EXPERIENCE

Throughout the years, Zelle has developed a wealth of knowledge concerning a variety of industries confronting asbestos-related claims. Some of those industries include:

- heavy construction equipment manufacturers;
- friction product manufacturers;
- chemical and adhesive manufacturers;
- insulation distributers and installers;
- industrial equipment manufacturers;
- plumbing equipment and supplies manufacturers;
- energy/oil companies; and
- pharmaceutical companies.

Our extensive experience with these industries has helped us to better counsel and represent our clients in ongoing asbestos matters as well as a variety of

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other types of litigation, including first-party property coverage, environmental coverage, subrogation, and industrial losses and disputes.

MAIN ISSUES

Drawing upon our vast experience, Zelle lawyers can efficiently and cost effectively provide perspective and creative approaches to address the unique fact patterns, unresolved questions of law, and new, complex coverage issues that need to be resolved in each asbestos coverage claim. Some of the issues we've confronted over the years include:

- trigger of coverage (including recent medical developments for identifying when asbestos-related injuries occurs);
- scope of coverage;
- allocation of coverage;
- number and applicability of deductibles and self-insured retentions;
- appropriate exhaustion of policy limits;
- "other insurance" issues;
- specific product exclusions;
- expected or intended;
- number of occurrences;
- pre-packaged bankruptcy of insureds;
- premises liability;
- non-products/operations claims;
- other insurance provisions;
- arbitration;
- abstention;
- waiver/estoppel;
- Wellington ADR;
- coverage-in-place agreements;

- pro-rata sharing;
- defense obligations; and,
- laches.

EXAMPLE OF THE EVOLUTION OF ASBESTOS COVERAGE CLAIMS

One of Zelle's most recent asbestos cases highlights just how far asbestos-coverage litigation has evolved over the years. This case involves the latest trend in policyholder efforts to obtain coverage for asbestos-related liabilities far beyond that contemplated and provided for in the insurance policies at issue.

The insured, Robert A. Keasbey Company, was an asbestos installer facing tens of thousands of asbestos claims. In the early to mid-1990s, Keasbey collected over one hundred million dollars of primary and excess coverage on the basis that its asbestos liabilities arose from products liability claims and were, therefore, subject to aggregate limits of liability. In 2001, in an about-face, attorneys for 20,000 claimants asserted that the asbestos claims were "non-products" claims resulting from Keasbey's installation activities and, as the argument went, were not subject to any aggregate limits of liability. In other words, according to the position of claimants' counsel, the liability policies issued to Keasbey offered unlimited coverage for asbestos-related bodily injury claims arising from Keasbey's asbestos installation activities.

Keasbey's management team disappeared, the company was dissolved and, ultimately, Keasbey defaulted in the coverage litigation initiated by one of its insurers. Litigation continued between Keasbey's insurers and a class of asbestos claimants. Keasbey's insurers sought to apply the equitable doctrine of laches to preclude Keasbey (and the asbestos claimants) from contending that these were "non-products" claims because, as a result of the delay in asserting this novel theory, witnesses had died, key documents had been lost or destroyed, and excess policy limits were spent. The insurers also argued that there was no bodily injury during the policy period as required by the policy language. In support of this argument, the insurers presented medical evidence, based on many scientific advances over the last thirty years, that better identifies when asbestos injuries occur. According to this medical

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evidence, bodily injury does not occur upon mere exposure to asbestos fibers, as many courts have concluded (or assumed) in the past.

The trial court rejected the insurers' arguments and ruled that under New York law, insurance coverage is triggered by mere exposure to asbestos and that injury is assumed to have occurred during the installation of asbestos insulation. The trial court also rejected the insurers' laches argument based on the conclusion that, although Keasbey committed laches, Keasbey's conduct could not be used against the asbestos claimants to support a finding of laches.

On appeal, the Appellate Division of the New York Supreme Court held that the equitable doctrine of laches applied to the claims raised by the asbestos claimants. The Appellate Division also affirmed the ruling that insurers were prejudiced by Keasbey's failure to notify them of its position regarding non-products claims until after material witnesses died, documentary evidence was destroyed, and excess coverage was exhausted. Most importantly, the Appellate Division clarified that the so-called trigger of coverage in New York is the injury-in-fact trigger. A policyholder bears the burden of proving that injury-in-fact occurred during the policy period before coverage can be found. In the context of claims involving asbestos installations, a non-products claim requires a showing that the human body's defense mechanisms to asbestos must have been overwhelmed at a time such that actual injury occurred prior to the completion of the installation operation. The appellate court determined that this type of proof was a factual impossibility based on the uncontroverted medical evidence presented at trial.

This case is just an example of how we have dealt with the many challenges inherent in asbestos liability claims. Each client and each claim are unique. Talk to us about your challenges. We would be pleased to help you.