



**CHICAGOLAND
RISK FORUM**
CHICAGO & MID-ILLINOIS RIMS CHAPTERS



THE FUTURE OF MASS-TORT LONG-TAIL LITIGATION

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THE FUTURE OF MASS-TORT LONG-TAIL LITIGATION

- I. Asbestos, Talc, Pollution, Sex Abuse, Pre-conception Torts
- II. Restatement of the Law on Liability Insurance
- III. Dealing with Difficult Insurers/ Claims Handlers
- IV. Alternative Risk Transfer Opportunities
- V. Jury Composition

ASBESTOS LITIGATION

- Longest-running mass tort in U.S. history
- Jurisdictions
 - IL (Madison and Cook County) most active
 - LA, Oakland, NY, NJ,
- Total incurred defense and indemnity
 - constant if not slightly rising
 - Meso claims value accounts for the rise

FUTURE OF ASBESTOS LITIGATION

- Out of market place since 1985/1986 - potential claimants age out
- Actuarial predictions
 - future decline
 - but, increase in women and non-occupational meso claims
- Idiopathic?
- Genomics - “Eggshell Plaintiff”
 - impacts proximate cause / sword vs. shield

.... TALC

WHAT IS TALC?

Non-Cosmetic Talc:

industrial grade

Plastics
Paints / Coatings
Rubber
Paper

Cosmetic Talc:

high quality / grade

Cosmetics
Pharmaceuticals
Food

TALC LITIGATION

1. **“Industrial Talc”** contaminated with asbestos
 - causing asbestos-related disease
2. **Cosmetic Talc** not contaminated with asbestos
 - causing non-asbestos related disease
 - ovarian cancer
3. **Cosmetic Talc** contaminated with asbestos
 - causing asbestos-related disease
 - causing ovarian cancer

TALC LITIGATION HISTORY

Cosmetic Talc

- J&J defending 4,800 claims nationwide (baby powder)
- Recent J&J verdicts
 - July 2018 - \$4.69B verdict against J&J
 - 22 plaintiffs / \$550M compensatory / \$4.14M punitives
 - April 2018 - \$117M against J&J
 - August 2017 LA largest individual verdict to date - \$417M
 - overturned due to insufficient evidence
- Colgate – several verdicts and settlements (baby powder, etc.)
- Four other J&J St. Louis individual verdicts alleging talc caused ovarian cancer
 - \$55M - \$110.4M (damages and punitives)
 - appeals pending
 - one case reversed – *Bristol-Myers* jurisdictional

WHAT DO YOU NEED TO KNOW ABOUT TALC LITIGATION?

Plaintiff Pool (Ovarian Cancer)

- NIH estimates 22,240 new U.S. cases in 2018
- 14,070 women likely die of ovarian cancer in U.S. in 2018
- only 3,000 annual mesothelioma diagnoses
- 700% more plaintiffs

Future Defendants

- personal care products
 - then, home products, then food manufacturers

Takeaway: Demographics indicate much at stake

- plaintiffs' firms are "all in"
- many same plaintiffs' firms and jurisdictions as traditional asbestos

POLLUTION LITIGATION

- Class actions continue apace
- CERCLA: Comprehensive Environmental Response, Compensation, and Liability Act of 1980
 - as of October 1, 2018, 1338 Superfund sites on the NPL
 - 53 additional sites (4 Illinois) proposed for entry on the NPL
 - 412 sites cleaned up and removed from the NPL
- Future – unclear
- PRP / joint & several rules still in place

SEXUAL ABUSE / MOLESTATION LITIGATION

- Frequently involve multiple acts of abuse spanning several years
- Awareness of misconduct is on the rise / #MeToo
- Allegations:
 - Negligent Supervision
 - Negligent Hiring/Retention
 - Vicarious Liability
 - Failure to Warn/Report Misconduct
- Defendants include:
 - religious institutions
 - daycare providers
 - schools
 - camps
 - scouting organizations
 - athletic organizations
 - hospitals
 - social service providers
- Defenses

PRECONCEPTION TORT LITIGATION

Involves alleged tortious conduct occurring prior to plaintiff's conception and resulting to injuries to plaintiff

- Recent examples of preconception litigation:
 - DES litigation – alleged injuries to third generation plaintiffs
 - claims arising out of assisted reproduction
 - work place exposure to parents and often exposure to plaintiffs' fathers
- Recent Cook County (IL) Preconception Tort Litigation
 - Motorola Lawsuits – eight lawsuits filed by former employees and children
 - allege birth defects linked to fathers' exposure at semiconductor facilities
 - dismissed but reinstated by Illinois Appellate Court (Feb '18)
 - Boeing Lawsuits – four lawsuits filed by children of former employees
 - Same plaintiffs' firm

OPIOID LITIGATION

- Long-Tail
- CDC says 115 Americans die daily from opioid overdose
- Estimates total "economic burden" of opioid misuse \$78.5 billion yearly
- Hundreds of lawsuits filed by states, counties and cities alleging lies about the dangers of opioids and flooding of communities with prescription pills
 - against manufacturers and distributors
 - allegations include fraud, negligence, unjust enrichment, false advertising and deceptive marketing
- Health Care Industry, Prince heirs sued Walgreens and an Illinois hospital alleging failure to provide reasonable care and contribution to his death



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MASS-TORT LONG-TAIL COVERAGE LITIGATION

Past, Present, Future

TRIGGER OF COVERAGE

- Which policies are implicated by an “occurrence” or claim
- Various theories
 - Continuous Trigger most popular
 - asbestos and pollution
 - IL “Triple Trigger” (asbestos)
 - translates to exposure-only for asbestos
 - Sex abuse – shorter tail
 - Pre-conception torts – date of loss
- Trigger different than allocation

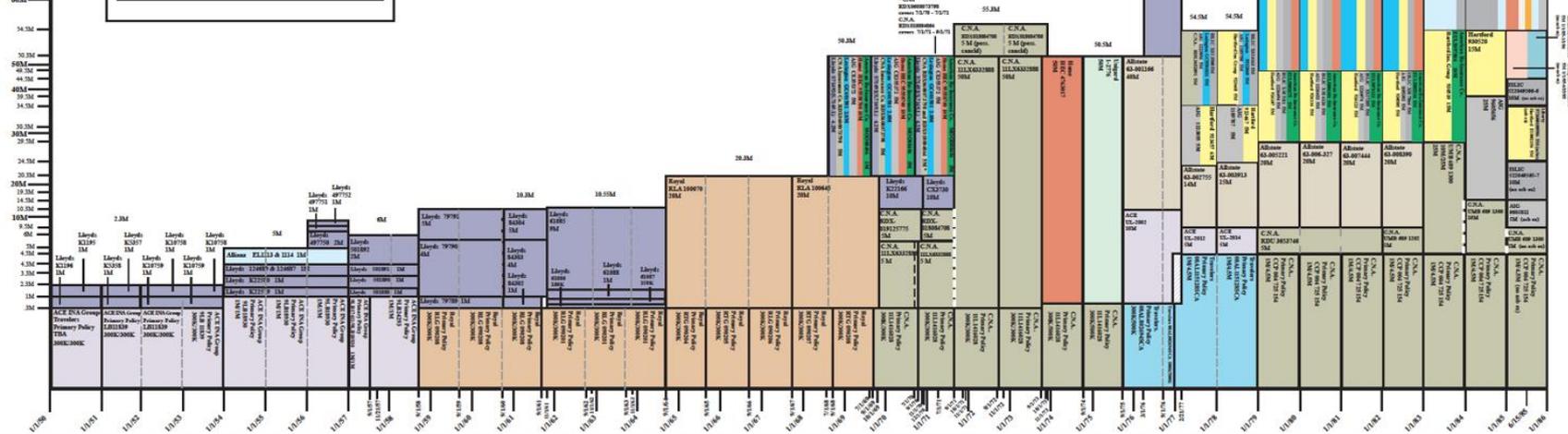
Policy Chart Research as of 1/19/2007
 Prepared by Legacy Risk Consulting
 (Beginning Date: 1/1/50)

130M
124.5M
119M
113.5M
108M
102.5M
97M
91.5M
86M
80.5M
75M
69.5M
64M
58.5M
53M
47.5M
42M
36.5M
31M
25.5M
20M
14.5M
9M
3.5M
0M

Legend	
Overlapping Policies	Insultment
Lloyds	
Alliant - Intertec Fire & Casualty, Alliant Uhd. Inc., Foreman's Fund Group	
Home - Home Ins. Co.	
Royal - Royal & Sun Alliance USA, Royal Indemnity Co.	
Unigrip - Randall America, Unigrip Ins. Co., Sennen Ins. Co.	
USLC - Investment Group, International Surplus Line Ins. Co.	
Hartford - Hartford Ins. Group - Nating Ins., Twin City Fire Ins., Hartford, First State	
C.N.A. - Columbia Casualty, Continental Casualty, Continental Ins. Co.	
Allstate - Northbrook Ins. Co., Northbrook E. & S.L. Ins. Co.	
Travelers - Aetna Casualty and Surety, Travelers Ins. Co.	
ACE - Integral Casualty & Indemnity, A.C.E. Ins. Co., CIGNA/Indemnity Ins., Indemnity Ins. Co. of N.A. -<9/13/A	
AIG - Illinois National, A.I.U. Granite State Ins. Co., American Home, National Union Fire	

Thomson - Thomson Co. Co. (Growth)	
Mutual American Risk Partners (MARP) - American Excess Ins. Co., American Re-Insurance	
Safety Group - Safety Mutual Ins. Co.	
Harber - Harber Ins. Co. (Growth)	
Midland - Simmons Ins. Group (Growth)	
Highlands - Highlands Ins. Co.	
Zurich - Zurich International	
Republic - Republic Insurance Company	
Industrial - Industrial Indemnity	
Liberty - Employer Ins. of Wausau	
American Re-Insurance Co.	
Transport - Transport Indemnity	
Louisiana - Louisiana Ins. Co.	

Note: Excess layer per occurrence and aggregate amounts are the same.



ALLOCATION

Different than Trigger: what happens when claim triggers multiple policies?

- Heavily litigated over the past 40 years
 - asbestos
 - environmental
 - other toxic torts and pharmaceutical
- States may apply different allocation theories to defense / indemnity
- States may apply different allocation theories to different long-tail claim types (IL pollution vs. asbestos)

APPROACHES TO ALLOCATION

“ALL SUMS”

- Promise to pay “all sums”
- Policyholder can pick any triggered policy and force insurer to pay entire claim, subject to limits
- Avoids policyholder responsibility for uninsured, insolvent or underinsured periods

PRO RATA

- Frequently focuses on “during the policy period” language
 - “Bodily Injury or Property Damage that takes place during the policy period”
- Each insurer only liable for share based on time on the risk
- May result in policyholder liability for pro rata share:
 - lost policy periods
 - insolvencies
 - periods when insurance unavailable

ALLOCATION

“All Sums”: IL (asbestos-only), CA, DE, DC, IN, MO, NY (*Viking Pump*), OH, PA, TX, WA, WV, WI, OR

Pro-rata: IL (asbestos PD and pollution only), CO, CT, IA, KS, KY, LA, MD, MS, MI, MN, NE, NH, NJ, NY, NC, SC, UT and VT

Duty to Defend:

“All Sums” applied to defense expenses
CT pro-rates the duty to defend

AVAILABILITY RULE

- “Hottest” issue currently
 - no allocation to policyholder for years when coverage not available (asbestos and pollution)
 - Pollution and Asbestos Exclusion widespread in 1986
- Pro-rata states only
- Consequences severe
 - 15/15 recovery (1971-86) Vs. 15/45 recovery (1971-2016)
 - NY, MA, SC recently have ditched “Availability Rule”

ISSUES IMPACTING ALLOCATION

- “Occurrence”
 - “p/o” deductible or SIR vs. aggregate
 - most states each claims is a separate occurrence
 - IL: “the decisions to use asbestos” is the occurrence (*Gypsum*)
 - denies policyholder benefit of aggregate limits
- Non-cumulation clause and multi-year policies
 - insurers aggressively asserting (NY)

EXHAUSTION

- Three-way dispute when primary policies exhaust
 - primary insurer has burden vis a vis policyholder
 - policyholder has burden vis a vis excess
- Excess becoming aggressive
- Difficult process managing transition between layers

ACCESSING EXCESS POLICIES “QUALCOMM ISSUE”

BEWARE : The “Qualcomm” Dilemma

- If you settle with insurer for less than full limits,
- Or, if underlying insurance insolvent and can never be “exhausted”
 - Will you ever be able to reach the excess above?

No: limits can never be exhausted and policyholder not allowed to fill
(Qualcomm & Comerica)

Yes: policyholder may pay the difference between settlement and full
limits

- Outcome frequently turns on policy wording

ASSIGNMENT

- Mergers, asset sales
 - historical policies required insurers' consent to assign
 - consent rarely acquired
- Insurers deny coverage
 - complicated post-transaction disputes
- Some courts side with insurers (CA, *Henkel*)
 - California S.C. overturned – *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175 (2015)
 - trend is now policyholder friendly
- Majority: no assignment necessary if insurance in place at time of loss

OTHER SIGNIFICANT LONG-TAIL ISSUES

- Duty to defend
 - Insurers increasingly difficult in mass-tort claims
- Pollution exclusions
 - IL does not strictly enforce “sudden and accidental”
- Late notice
- *Bristol-Meyers* (jurisdiction)
 - defendant must have a local connection



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RESTATEMENT OF THE LAW, LIABILITY INSURANCE

RESTATEMENT OF THE LAW ON LIABILITY INSURANCE (2018)

- What is a Restatement?
 - kind of a “Best Practices” for resolving legal questions
 - advice to courts
 - not binding on courts – does not create law
 - But, frequently influential
- *Restatement of the Law on Liability Insurance*
 - “first-ever” for liability insurance
 - approved by American Law Institute
 - who is the ALI?

RESTATEMENT OF THE LAW ON LIABILITY INSURANCE

- Heavily criticized by both insurers and policyholders
- “Horse-trading” of issues vs. “best practices”
- Ohio legislation:
 - “American Law Institute’s approved Restatement of the Law, Liability Insurance does not constitute the public policy of Ohio.”

TRIGGER AND ALLOCATION

Sections 33, 41

- Continuous Trigger
- Pro-rata should be the law
 - Pro-rata by years is “the most consistent, simplest and fairest solution to this problem.”
 - no mention of contract law or ambiguity
 - “fair to who?”
 - promotes more litigation up-ending 40 years of litigation
- According to the Restatement, contract terms can opt out of the default rule.
 - e.g., if the policy does not include the “during the policy period” limitation

ALLOCATION CONT.

No Availability Rule

- Policyholders to be allocated years in which no insurance available
- “Fair because all triggered years, include the years in which the insured did not purchase insurance, share equally in the indivisible losses.”
 - Again, “fair” to who? Contract law?
- 40 years of court decisions poorly decided
 - All but 3 states got it wrong?
 - “All Sums” plus Pro-rata + Availability Rule = 40 states (all wrong)
- Consequences
 - promotes insurer “do-overs” through-out U.S.
 - devastating consequences to policyholders

BAD FAITH

Sections 49 & 50

- Bad faith if insurer acts:
 - (a) without a “reasonable basis” for its conduct;
 - **and** (b) with knowledge of its obligation to perform or in “recklessly”
- Requires **both** an **objective** and a **subjective** element
- Insurer liable only when its actions evidence a conscious or reckless disregard of a policyholder’s rights and a deliberate choice to promote the insurance company’s interests at the policyholder’s expense.

MATERIAL MISREPRESENTATION / POLICY RESCISSION

Sections 7 – 9

- “Material misrepresentation” and “reasonable reliance” by insurer in deciding to issue the policy
- Misrepresentation is material if it “so significantly understates” the risk presented by the policyholder’s application that an insurer would have not issued the policy or issued it under substantially different terms.
- To meet the reliance requirement the insurer must show that the misrepresentation caused it “significant harm.”

CONSEQUENCES OF INSURER'S BREACH

Section 48

Damages available to policyholder:

- Reasonable defense costs or settlement costs
 - View from “perspective of an insured forced to defend a liability action without the timely assistance of its insurer.”
 - insurer negotiated rates paid to regular defense counsel unlikely to provide a useful guide to what is reasonable
- Adverse judgment against the policyholder – after insurer failure to settle
 - unreasonable refusal to settle – insurer pays full judgment even if excess of limits
- Any other loss, including incidental or consequential, caused by the breach if foreseeable
 - not subject to policy limit

OTHER SECTIONS OF THE RESTATEMENT CREATING DEBATE

- Insurer Recoupment of Defense Costs (§21)
 - insurer may recoup defense costs if later determined claim not covered
 - not the law in IL and many other states
- *Qualcomm* (§ 39) – no loss of coverage unless policy language clear
- Known Claims (§46)
 - attempts to clarify “known loss,” fortuity and “expected and intended”
 - exists if policy policyholder “substantially certain” claim impacting insurance likely
- Policy Interpretation – “plain meaning” (§§3 & 4)
 - more weight to custom, practice, and usage (discourages extrinsic evidence?)
 - “plain meaning”: dictionaries, court decisions, statutes and regs, and secondary legal authority



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DEALING WITH DIFFICULT INSURERS OR CLAIMS HANDLERS

COMMON CAUSES OF CONFLICTS BETWEEN POLICYHOLDER AND INSURER

- LIMITS AND EXCLUSIONS: conflicting interpretations of contract wording
- LOSS ASSESSMENTS: differing valuations for projected or incurred losses
- DUTY TO DEFEND: increasingly causing serious disputes in long-tail cases.
 - claim has covered and noncovered aspects
- COMMUNICATION DEFICIENCIES: poor or infrequent communication
- UNREASONABLE EXPECTATIONS: preconceived, hardline positions
 - causes delay and harm business relationships

ADDRESSING A RESERVATION OF RIGHTS

- Don't assume insurer's position consistent with applicable law
- Does reservation of rights entitle policyholder to independent counsel?
- Must policyholder respond or risk waiving rights
- Impact on privilege?
 - insurer not entitled to privileged claims information after denial
Federated Mut. v. Grapevine Excavation, 241 F.3d 396 (5th Cir. 2001)
 - *Illinois*: insurer has broad rights to privileged information
Waste Mgmt. v. Int'l Surplus Lines Ins. Co., 579 N.E.2d 322 (Ill. 1991)
 - *Insurer entitled to privileged claims information even after denial*

RESPONDING TO A DENIAL OF COVERAGE

General Rule - insurer must conduct reasonable investigation before a denial

- Only exception is for indisputable facts such as policy cancellation

Post-Denial

- Well-stated comprehensive response often successful in reversing denial
- Declaratory judgments and a “rush to the courthouse”
 - trend of filing DJ suit first, denying coverage later
 - IL estoppel rule promoting litigation by insurers
 - jurisdiction is everything – especially in long-tail cases
 - historical policies rarely include choice of law clauses
 - often can be case dispositive because choice of law or venue may affect outcome

LONG-TAIL CLAIMS CLAIMS-HANDLING ENVIRONMENT

- Continued consolidation of claims-handling
 - London, ACE, CNA, Liberty Mutual, AIG, ACE (again), Hartford
- NICO/Berkshire
- TPA's
 - Resolute, Riverstone, Brandywine
 - responsible for 90% typical long-tail coverage chart
 - one sneeze and you can lose $\frac{1}{2}$ your coverage

COMMON LONG-TAIL CLAIMS-HANDLING PROBLEMS

Insurer too aggressive

- Equitas / Resolute controversies
- Demands to commute, refusal to fund settlements
- Slow pay
- “Covered claims” – only pay defense on claims that incur an indemnity
- Filing Bad Faith DJ's
 - porcupine bad faith defendant”
 - appears to be a strategic business decision
 - notable policyholder victories, but outweighed by losses
 - incredibly difficult and expensive

Insurer not aggressive enough

- Long-tail policyholders - only way to reduce exposure is to try cases
- Many insurers resist
- Who has the defense duty?
- What if it is shared in pro rata state?
- Who gets to make decision?
- What if you can't decide how to resolve?

BAD FAITH

- Bad Faith standards vary widely by state
- Conduct required
 - e.g., specific intent vs. “reasonable woman”
 - gross negligence / recklessness vs. something less
- Damages
 - Statutory: IL limits to \$60k and attorney fees
 - Tort remedy for failure to settle within limits
 - consequential damages
 - consult coverage lawyer regarding demand within limits
 - Understand applicable law before considering options
 - What is applicable law?
- Long-Tail
 - pattern of improper claims-handling
 - practice Tip: Each claim is a separate potential violation

TAKEAWAYS

1. Carefully review ROR and denial letters even in mass tort situations
2. Ensure that you respond to reasonable insurer requests for information
3. Don't allow insurer to "generally" reserve rights for months and years
4. Carefully consider the need to file coverage action quickly
 - especially in long-tail situation
 - consult coverage counsel if necessary – insurers have lawyers on speed-dial
5. IL law: may require insurer to file a DJ or risk estoppel
 - poorly considered response may prompt insurer to file DJ

INSURER INSOLVENCIES

- “Schemes of Arrangement” and Domestic Insurer Insolvencies
- “Free Money”? . . . Maybe
- Frequently pro-Insurer, especially in U.K.
 - pro rata only in U.K. and Home
 - adjudication and mediation
 - complex rules - cheaper and better to out-source recovery
 - can monetize immediately
 - shop around
- Don't ignore notices
 - someone always eager to underwrite



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Alternative Risk Transfer Opportunities

LONG-TERM SOLUTIONS TO LONG-TAIL CLAIMS

Options either expensive or aggressive

- Generally only for serious claims
 - no end in sight
 - need to “stem the bleeding”
 - reduce the corporate distraction
- Two approaches
 - isolate and confine the problem
 - purchase insurance

LONG-TERM SOLUTIONS TO LONG-TAIL CLAIMS: INSURANCE OR SOMETHING MORE?

- Purchase insurance
 - limited market / very expensive
 - sticker shock – typically only large cos. can afford
 - often considered in relation to transactions
 - no finality
- Corporate reorganization
 - isolate the liability, typically in a subsidiary
 - “litigation shell”
 - maintain access to historical insurance
 - take care to maintain separate corporate identity
 - avoid piercing of the corporate veil and “alter ego”
 - possibly sell “litigation shell” to third-party
 - typically requires seller to provide capital to buyer

ALTERNATIVE RISK TRANSFER OPPORTUNITIES

RECENT DEVELOPMENTS

Currently Available Alternatives

- Global Risk Capital
- Randall & Quilter
- PWC Investors
- Berkshire Hathaway

Recent Transactions

- Public Data Limited
- Deals accelerating
 - Better data = better pricing



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JURY COMPOSITION

Jury Composition

Emerging Risk



NOTABLE CHANGES IN JURY COMPOSITION

IMPACT ON MASS-TORT LIABILITIES

Millennials are 1/3 of jury pool

Educated

May be “status inconsistent”

Quiet in *voir dire* – active on-line

Homogeneity is a problem – convergence

Commerce & conscience

Higher standard (perfect)

Social justice crusaders

Sympathy driven, want to show compassion

“Can’t let the company off the hook”

“Not going to give a lot . . . maybe \$5M”

Smart plaintiff counsel

Get rid of “low damages” jurors

“How many of you think the judicial system is broken?”

Those that remain less willing to take a stand

Run MIT algorithm to skew towards emotional/moral decision making



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APPENDIX

CTE LITIGATION

- Long-Tail
- CTE: Chronic Traumatic Encephalopathy
 - a degenerative brain disease brought on by continual head trauma
- Litigation largely confined to the deep-pockets
 - NCAA, NFL, NFL
 - some suits against individual institutions, associations and conferences
 - helmet makers

CHOICE OF LAW

- Place of contracting vs. “site of insured risk”
- IL unusually clear
 - corporate headquarters typically
- Other states less clear
- “First-filing” advantage
 - unusually strong in coverage actions
 - cases often won or lost before filing

DUTY TO DEFEND

- “Any” possibility of coverage
- Most lenient standard in law
- Failure to defend
 - IL: wrongful – insurer estopped if doesn’t file coverage action
 - estoppel – applies to exclusions, conditions
- Long-tail cases
 - insurers increasingly deny on corporate successor issues
 - RM should play active role in transactions to preserve insurance

TRIGGER OF COVERAGE

What is Trigger of Coverage?

Trigger Theories

- **Exposure theory:** a policy is triggered when the first exposure to injury-causing conditions occurs (“DOFE”)
- **Injury-in-fact theory:** triggered when injury occurs
- **Continuous or multiple trigger theory:** exposure to manifestation

TRIGGER OF COVERAGE IN ILLINOIS

- Asbestos: Triple Trigger / *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23 (1987)
 - exposure, manifestation and diagnosis - “triple trigger”
 - most jurisdictions apply continuous trigger
 - insurers advocating more aggressive positions
- Talc: Likely same as asbestos
 - one insurance case to date: *R. T. Vanderbilt*, 171 Conn. App. 61 (2017)
 - ovarian cancer claims may present change
- Pollution: no clear trigger for pollution claims adopted in Illinois
- Future
 - but, the future battles over Allocation

NON-CUMULATION / DEEMER CLAUSE

Non-Cumulation

- E.g., insured pays max per occurrence limit of liability, regardless of the number of policies it issued that are triggered by the occurrence
- Multiple variations

Deemer Clauses – deems a particular date in the progression of injury or damages the relevant triggering date

NON-CUMULATION CLAUSES / ANTI-STACKING PROVISIONS

- Can seriously impact available coverage
- Insurers increasingly asserting
- Enforcement may be impacted by whether the court follows “all sums” or “pro rata” approach to allocation
 - *In re Viking Pump, Inc.*, 52 N.E.3d 1144 (N.Y. 2016) – asbestos case
 - “All sums” only if you have a non-cumulation clause
 - if no, pro rata
 - other courts have found void or unenforceable
 - IL App. CT. in *Outboard Marine* found non-cumulation clause unenforceable for public policy reasons
 - gives the insurers a double credit would deprive the insured of the full value of its premium
 - inequitable: no excess insurer is concurrently liable with any other
 - makes insurers liable for damages occurring outside their policy periods
 - other courts find non-cumulation clause ambiguous

MULTI-YEAR POLICIES

Often, unclear if the limits are annualized

Do not assume limits annualized

- Policy language
- Declarations
- Premium calculation

LATE NOTICE

- Insurers becoming more aggressive
 - IL cts. increasingly finding late notice
- Dominate legal issue
 - prejudice vs. non-prejudice
 - most states require prejudice
 - IL prejudice not required
 - if notice late and policyholder delay not reasonable – no coverage delay, insurance
 - prejudice a factor whether notice reasonably delayed
- “Notice of circumstances”

“OCCURRENCE”

Occurrence vs. Trigger vs. Allocation

- Frequently litigated in two ways:
 - single occurrence limit vs. aggregate
 - “per occurrence” deductible or SIR
- Most states each claim is a separate occurrence
- IL: “The decision to use asbestos” is the occurrence (*Gypsum*)
 - *Gypsum* had p/o deductibles so pro-policyholder
 - *Nicor* (IL Sup. Ct.) adopts *Gypsum* - only one occurrence limit available
 - policyholder not able to access higher aggregate limits

POLLUTION EXCLUSIONS

- Superfund and landfills frequently gradual pollution
- “Sudden and Accidental” PE (pre-86)
 - some courts found “sudden” as ambiguous – including Illinois
 - most states require some showing of “sudden” release
 - scavenger hunt for spills
- “Absolute PE” (post-86)
 - eliminates coverage for “sudden”
 - typically enforced
 - Illinois limited to traditional environmental contamination
 - litigation ongoing over asbestos, carbon monoxide, noxious smells

ASBESTOS EXCLUSIONS

- Prevalent since 1986
- Typically enforced
- Occasionally not included by accident or circumstance
- Scrutinize policy language closely – it may define disease narrowly
- Impact
 - “Availability Rule”

GENERAL LONG-TAIL COVERAGE LITIGATION ISSUES

- Bristol-Myers jurisdiction issues:
 - U.S. Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017)
 - non-resident plaintiffs cannot join their claims with those of resident plaintiffs — no matter how similar their claims may be — in states with no connection with claim
- Occurrence vs. claims-made
- Retrospective premium endorsement impact

PRECONCEPTION TORT LITIGATION

- Preconception litigation may create unique coverage issues
- Trigger of coverage
- Number of occurrences
- Pollution exclusion
- Applicability of employer liability/general liability coverage
- Other issues

Motorola Coverage Litigation

SEXUAL ABUSE / MOLESTATION LITIGATION – EMERGING COVERAGE ISSUES

- Trigger:
 - first encounter rule
 - exposure rule
- Number of occurrences
- Occurrence definition
- Allocation
- Intentional conduct /
expected or intended injury /
inferred intent rule
- Negligent supervision/
negligent hiring
- Failure to warn/vicarious liability
- Specific exclusions
- Statute of limitations
- Charitable/sovereign immunity
- Respondent superior liability

SECTIONS RELEVANT TO ALL RISK MANAGER PROFESSIONALS

- Trigger of Coverage for Long-Tail Claims §33
- Allocation of Long-Tail Claims §41
- Bad Faith §§49 & 50
- Material Misrepresentation / Policy Rescission §§7-9
- Consequences of Insurer Breach §48
- Excess Drop-Down §39

EXCESS COVERAGE DROP-DOWN

Section 39

Recommends no “Qualcomm drop-down” rule

- Policyholder may fill-in unpaid limits due to settlement or insolvency
- But ...
 - except when policy language provides otherwise
 - thus, not really much of a change to status quo

CONFLICTS BETWEEN POLICYHOLDER AND INSURER – POLICYHOLDER DUTIES

- “While the insured is always supposed to read the policy, only a very hardy soul would have plowed through all of the fine print and separate sections in an effort to understand the many terms and conditions listed in the main policy and the convoluted additions thereto.” *Nat. Mut. Ins. Co. v. Curtis*, 867 N.E.2d 631, 636 (Ind. Ct. App. 2007)
- Establish claims management procedures
 - who reports claims
 - timely notice
 - respond to document and information requests
 - keep insurer(s) informed: defense bills; significant litigation developments; periodic status reports; details of settlement negotiations