

ALERT

No Time Like the Present: Current Insurance Recoveries for Liabilities that Include Future Costs and Claims

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Many corporate policyholders are concerned not only about the steady flow of long-tail claims which may threaten their future, but also about the collection risk on the insurance they expect to cover those claims. Recent judicial decisions recognize a simple solution: *collect the insurance now*.

For most of the past century, the insurance industry heavily marketed liability insurance for unknown risks. Now, the unknown risks insured under older occurrence-based policies, such as asbestos and environmental claims, have emerged in force. Today's insurance market presents additional uncertainties, particularly concerning the solvency and viability of many insurance companies, including the London insurance market.

Three recent decisions illustrate the current recovery solution. Two involve asbestos bankruptcies, but asbestos is not the only liability, and bankruptcy is not the only procedure, for which this is a viable solution.

Fuller-Austin

In *Fuller-Austin v. Fireman's Fund*, a California trial court recently decided that a policyholder facing present liabilities for present and future claims could prove and recover all liabilities now. The policyholder faced numerous asbestos claims and expected additional claims for years to come. Its liability and the measure of damages for those claims were fixed through a "pre-packaged" bankruptcy. The insurance company sought to delay payment for decades, until individual claims were submitted and paid in future years. The court held for the policyholder, allowing it to prove its aggregate current liability both pending and future claims.

Though hotly disputed, *Fuller-Austin* simply applied established law that there is a right to future damages in regard to contract or tort liability. The *Fuller-Austin* policyholder offered expert witnesses using recognized methods to calculate the present liability, which the court observed was typical in contract or tort disputes. The policyholder in *Fuller-Austin* was represented at trial by Anderson Kill along with Zevnick Horton.

UNR

Similarly, the Seventh Circuit U.S. Court of Appeals held in *UNR Industries, Inc. v. Continental Casualty Co.*, that an insurance company owed the policyholders' present liability for the full value of pending and future asbestos claims, based on present liability established in a bankruptcy proceeding. The

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Seventh Circuit rejected the insurance companies' argument for delay because the policyholder was not paying all claims immediately, and remanded for proof of the number of claims that would fall within the insurance companies' policy periods.

Insurance companies cannot limit this solution to asbestos bankruptcies. Although these two cases involve asbestos claims and *Fuller-Austin* involved a section of the Bankruptcy Code dealing with asbestos, *UNR* was decided prior to the enactment of that section, on general principles applicable to any type of long-tail liability.

Kayser-Roth

Outside the asbestos bankruptcy context, a current recovery recently was upheld by the Rhode Island Supreme Court in *INA v. Kayser-Roth Corporation*. *Kayser-Roth* involved a typical scenario: a corporation with "Superfund" liability was ordered by EPA to undertake a cleanup expected to take more than thirty years. The *Kayser-Roth* court affirmed a judgment against the insurance company for EPA oversight costs of \$5.4 million, despite the insurance company's arguments that it was premature and speculative, where the policyholder offered a damages expert and payment was required under an administrative order.

Conclusion

This is not a novel approach. Courts regularly award future costs — for example, tort awards based on future medical costs and lost earnings, and "front pay" in employment cases. Insurance companies regularly defend and indemnify in these cases. In commercial cases, lost profits and cash flow regularly factor into damages.

Applying these concepts in the insurance context should not be controversial. Insurance actuaries consider "Incurred But Not Reported" claims every day for accounting, reserves, regulatory reports, and reinsurance claims.

Thus, where liability is reasonably fixed, and there is a reliable basis for projecting future claims or costs, policyholders should consider seeking a present-dollar judgment from their liability insurance company. Typically, insurance companies benefit from the time value of money, but the tables may now be turned. ■

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