

## Untapped Insurance Coverage For Asbestos Liabilities



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Companies facing increasing asbestos claims may believe they have exhausted or settled all their insurance coverage. They may believe they have to face the newly rising number of claims without insurance. Those companies may be wrong.

Several forms of insurance purchased long ago still may be available to provide defense and indemnity protection even after supposed exhaustion and even after settlement. This article addresses two forms of insurance coverage that frequently still are untapped: "premises-operations" coverage and "other people's insurance" or OPI.

### "Premises-Operation" Coverage

While insurance companies have portrayed the scope of insurance coverage for asbestos-related liabilities as limited to "products-liability" or "products-hazard" coverage, "premises-operation" coverage also provides protection from asbestos-related liabilities.

Historically, insurance companies sold premises-operations coverage, in addition to "products" liability coverage, to insure against liabilities arising out of ownership, occupancy, or use of property prior to the completion of business operations. Your company probably has some form of premises-operation coverage available to protect it from asbestos-related injuries to third parties on the business premises, or from injuries that occur during operations away from your normal business premises while the your company retains control of a job site. "Premises" coverage frequently has limits separate from "products"

coverage. The insurance company may not have paid out separate limits for "premises" coverage when exhausting its "products" limits. Even settlement agreements with insurance companies may not have released this separate "premises" coverage.

In what circumstances might this separate "premises" coverage apply? One example is where an employee of a sub-contractor who worked on your premises may seek to hold you liable for, among other things, asbestos-related injuries during the course of working on property under your control. As long as the possibility exists that the asbestos-related claims arose in the context provided for by premises-operation coverage, insurance companies should not deny coverage without understanding the nature of the underlying asbestos claims. *See Commercial Union Ins. Co. v. Porter Hayden Co.*, (Md. Ct. Spec. App. 1997).

In *Porter Hayden*, a Maryland appeals court explicitly acknowledged premises-operations coverage for asbestos-related liabilities. In that case, an insurance company denied coverage for its policyholder's asbestos-related liabilities on the basis that the policyholder lacked "products hazard" coverage. In rejecting the insurance company's narrow classification of asbestos-related claims, the court held that the asbestos liabilities potentially were insured under the "premises operation" coverage purchased by the policyholder.

"Premises" coverage also may provide insurance when the policies contain a "products-hazard" exclusions. *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, (N.Y. 1997). In *Frontier*, New York's highest court held that lawsuits alleging asbestos exposure at various locations did not fall entirely within the

products-hazard exclusion in general liability policies. The court held that products-hazard exclusions only pertain to liabilities arising from the defective nature of a completed product that has been placed in the stream of commerce. Asbestos liabilities arising while work is in progress, in contrast, are protected by “premises-operations” coverage.

Companies should be aware that one potentially overlooked source of protection from asbestos-related liabilities is the “premises-operation” coverage in general liability policies purchased by or for the policyholder. Corporate counsel and risk managers should examine their policies to see if separate “premises” coverage limits may be available and should examine their settlements to see if it was not released.

### *Other People’s Insurance*

Other people’s insurance (“OPI”) is another underutilized source of coverage for asbestos liabilities. If a contractor is sued by an employee of a subcontractor, there may be five different potentially applicable policies: liability policies of the contractor and subcontractor, policies purchased by the property owner, and general liability and errors and omissions liability policies of a design professional. Similarly, liabilities from the installation or removal of asbestos containing products frequently will implicate several insurance policies held by several different parties. There is no reason why a party should not pursue the additional insurance available from other sources.

The benefits of pursuing OPI are numerous. OPI may afford a legal defense against a lawsuit. This is important since legal costs can mount quickly. Moreover, OPI actually may pay for any liability or loss suffered. In addition, under OPI, you can be provided coverage without having to pay coinsurance obligations, deductibles, or self-insured retentions because of an adverse claims history. By successfully pursuing OPI, parties avoid driving up their own future premiums. Finally, by looking to OPI, parties might even be able to avoid the adverse impact of aggregate limits, exclusions, and other coverage-limiting characteristics of their own policies.

The most common avenue to OPI is the inclusion of a party as an additional insured or

additional/named insured. Often a named insured will pay extra to purchase this additional/named insured coverage. In the asbestos context, a company that uses asbestos-containing products on its premises may contract out for the installation, distribution, or removal of these products. For this work, the premises owner may name the contractor as an additional insured under its comprehensive general liability insurance. Thus, if employees of the contractor are exposed to asbestos, the contractor may seek compensation from the insurance company of the premises owner as an insured.

A second way to obtain the benefits of OPI is through a direct action. In a direct action, an aggrieved party directly sues the insurance company of another party. Direct actions are available only where provided for by contract or statute. However, in “direct action” states, this is a highly effective means of obtaining insurance coverage. Under Minnesota’s direct action statute, a group of claimants obtained a judgment directly against Great American Insurance Company (“Great American”) to compensate them for injuries caused by exposure to asbestos-containing materials supplied by Spraycraft, Great American’s policyholder. *Great American Insurance Co. v. Spraycraft, Inc.*, (S.D. Ohio 1994).

Too many businesses fail to look to all the benefits available under their own insurance (i.e. “premises” coverage) or OPI when calamity strikes. Companies that want to stay out of bankruptcy when faced with mounting asbestos liabilities immediately should look at “premises” coverage, OPI, and any other source of recovery now instead of when it is too late. ■

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