

Enforce

The Insurance Policy Enforcement Journal

Long-Tail Claims and Insurance Archeology: *Why You Need Historic Insurance and How to Reconstruct It*

By Robert M. Horkovich and Diana Shafter Gliedman

Old insurance policies that cover long-tail claims such as asbestos, environmental or latent defect claims are worth more than their weight in gold. However, many businesses follow strict document destruction policies to clear the clutter from company file rooms. While no sane businessperson knowingly would throw away a shoebox full of hundred dollar bills to make room for next year's performance reviews, many companies made the mistake of throwing away an asset worth millions, or even hundreds of millions of dollars: their old insurance policies.

Historic Insurance: Why Those Old Policies Are Worth Their Weight in Gold

Upon being named in a lawsuit, many policyholders immediately notify their current insurance companies. That would seem to make sense — if you're sued in 2014, wouldn't your 2014 insurance policy apply? Well, perhaps — but only if your 2014 policy is a

“claims made” policy, which provides coverage for claims or lawsuits that are brought within the policy period, regardless of when the alleged injury occurred.

Most general liability insurance policies, however, are not claims made — rather, they are written on an “occurrence” or “accident” basis. The policies cover events that happen during their policy period *even if claims against your company are not filed until years, or decades, later*. In other words, it doesn't matter when the lawsuit is filed; it matters when the event that gave rise to coverage allegedly took place. So, a lawsuit filed in 2014, alleging that someone was injured in 1964, probably would be covered by the company's 1964 commercial general liability policy, or CGL.

A CGL policy typically requires the insurance company to pay for “all sums” that the policyholder is legally liable to pay as damages arising

Robert M. Horkovich is a shareholder in Anderson Kill's New York office, and chair of the firm's insurance recovery group. He is a trial lawyer with substantial experience in trying complex insurance coverage actions on behalf of corporate policyholders and has obtained over \$5 billion in settlements and judgments from insurance companies for his clients over the past decade. 212-278-1322 | rhorkovich@andersonkill.com

Diana Shafter Gliedman is a shareholder in Anderson Kill's New York office. Ms. Gliedman represents policyholders in actions ranging from small insurance coverage disputes to multi-party, multi-issue insurance coverage litigations. 212-278-1036 | dgliedman@andersonkill.com

from an occurrence that resulted in “property damage” or “bodily injury” during the policy period, up to the limits of the policy. Moreover, primary first-dollar CGL policies generally cover the costs of a legal defense, and often those costs are outside the limits of the policy, i.e., unlimited. Courts have interpreted these policies broadly and have found coverage for all kinds of liabilities, asbestos, environmental, latent defects, etc.

Old Injuries, New Claims

But how likely is it that your company will be sued for an injury that allegedly took place before the bicentennial? More likely than you’d think. Claims of illness from exposure to asbestos are an example of the type of bodily injury covered by historic CGL policies. Asbestos routinely was used in all types of construction, insulation of homes, and in a wide variety of consumer products (such as hairdryers and cosmetic products) up until the 1970s. Asbestos-related diseases may not exhibit symptoms for decades after exposure, and have resulted in billions of dollars of claims, with many billions more expected through 2040. Every year, companies are blindsided by lawsuits alleging that claimants were injured by asbestos that the defendant manufactured, installed, removed, used or even carried — decades after the products were removed from the shelves.

Similarly, environmental cleanup is a costly undertaking often necessitated today by pollution that “occurred” before the creation of the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, in 1980. Discharge or water disposal practices in the 1950s, 1960s, 1970s and 1980s resulted in contamination without the policyholder intending it or expecting it. Pollution can be the result of operations that continue over the course of decades, and can remain in and spread through soil and groundwater in and around a site without discovery for years before removed or treated.

Products claims are another big-ticket item that can have a long tail. Despite a company’s best intentions, a number of helpful products have produced (or are alleged to have produced) lasting, unintended harmful effects.

Putting Your Policies Back Together

So what happens if you hit the storage facility in search of your historic insurance coverage, only to find a drawer filled with dust bunnies and old take-out menus? Are you out of luck?

Not necessarily. Obviously, the first goal is to find copies of the actual insurance policies. If a sweep of the likely storage areas is unsuccessful, you may need to get more creative in your search. Employees who placed historic coverage may remember where the policies are, or the identity of historic insurance providers. Policy information may also be found in documents such as certificates of insurance, insurance ledgers, annual reports, canceled premium checks and year-end financial summaries. Finding one policy may lead to others, because a policy schedule often lists prior insurance or insurance in layers above or below the policy.

Also, there are a lot of places to find clues about a policyholder’s historic insurance program outside of the company:

- **Insurance Companies:** Upon request, some will at least make a nominal attempt to search their files. If pressed, they may look at their databases.
- **Insurance Brokers:** A great resource for documents as well as personal knowledge of insurance placed.
- **Outside Underlying Defense Counsel:** They may have files with evidence of policy information, often in relation to old third-party lawsuits or claims they defended (maybe at the cost of the insurance company). Outside legal counsel also may be able to advise you regard-

ing what secondary evidence constitutes the “best” evidence of a policy’s existence.

- **The Government:** If you sold products to, or did work for, a local, state or federal entity, chances are you had to provide evidence of insurance. The document probably still is kept in a box (indexed) at a warehouse in Bethesda, Maryland, monitored by the U.S. Navy.

Even if your search fails to find the policies themselves, “secondary evidence” may suffice to prove their existence and terms. The starting point is a policy number, because from that number a skilled insurance archeologist can ascertain the type of coverage (i.e., workers’ compensation vs. CGL vs. first-party property, etc.), the issuing insurance company, and possibly the standard insurance form that was used. An insurance archaeologist or expert then can reconstruct the policy from a library of policy forms historically used by many insurance companies. In addition, it is important to find evidence of the policy period and the limits of liability for the policy. With this basic information and proof of a diligent search, many courts will find that a policyholder has sustained its burden of proving the existence and terms of coverage.

Other People’s Insurance

Policies sold to your company may not be your only source of coverage. Many companies have themselves designated as “additional insureds” on other company’s policies. These policies may provide millions of dollars in additional coverage. Review old contracts and agreements with contractors, subcontractors, franchisees, and other business partners to see whether they agreed to purchase insurance that will cover your company. If the answer is yes, contact them at once and ask for policies, certificates and any other evidence of potential coverage.

Conclusion

Old insurance policies may provide coverage for current claims. Companies potentially exposed to long-tail claims should ensure that their old insurance policies have been archived properly. If there are gaps, start looking for policies or evidence of policies now, so that you will be prepared in the case of a lawsuit alleging an old injury. And going forward, if you have to make room, make sure you don’t toss your insurance. You wouldn’t throw away gold, would you? ▲

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estate, Trusts and Tax Services, Corporate and Securities, Antitrust, Bankruptcy, Real Estate and Construction, Public Law, Government Affairs, Anti-Counterfeiting, Employment and Labor Law, Captives, Intellectual Property, Corporate Tax and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small- and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Dallas, TX, Stamford, CT, Washington, DC, Newark, NJ, and Philadelphia, PA.

The information appearing in this article does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.

©2014 Anderson Kill P.C.

New York, NY • Ventura, CA • Dallas, TX • Stamford, CT • Washington, DC • Newark, NJ • Philadelphia, PA