

Adviser

Employers' Liability Trigger Litigation



A recent High Court judgment has reaffirmed that employers' liability (EL) mesothelioma claims are triggered by the cause of the claim – i.e. when exposed to asbestos.

This decision provides employers and the victims of asbestos poisoning with some clarity over who pays for asbestos-related claims.

Municipal Mutual Insurance Limited (MMI) was one of the insurers who lost this case. Its latest report and accounts indicate that they had fully reserved for all such known and anticipated claims. But if MMI had won the case their liabilities would have reduced considerably and with it the risk of insolvency.

Marsh recommends that all public sector organisations review whether or not they have exposure to asbestos related claims and if so check what resources are in place to meet them.

Members of MMI's Scheme of Arrangement should quantify their potential exposure to clawback in the event that MMI does become insolvent.

Introduction

On 21 November 2008 the High Court found against those insurers who had refused indemnity in respect of employers' liability (EL) mesothelioma claims. The High Court confirmed that employers' policies in force at the time of a claimant's exposure to asbestos should apply. This means that employees who were exposed to asbestos some years ago and subsequently contracted mesothelioma can continue to claim against their employer and if necessary their employer's historical insurers.

Background

This is not the first time asbestos related cases have reached the High Court. The 2006 Bolton case concerned a public liability (PL) case and determined that a mesothelioma victim suffered an injury for the first time when the tumour started to develop, rather than when exposed to the asbestos which caused it. The Bolton judgement was positive news for Municipal Mutual Insurance Limited (MMI) as it reduced some of their liabilities relating to PL claims. Overall, this case created a grey area that prompted some insurers, including MMI, to refuse to pay out on many EL asbestos related cases.

MMI and three other insurers applied the Bolton case precedent to their historical EL policies and declined cover. They argued that insurance policies in force when the tumour started to develop, years after exposure, should instead pay out. This prompted the latest High Court case when the victims and their employers teamed up against the insurers over exactly what triggers a compensation claim.

The judgement

The judge in this case stated that the EL wordings were unclear and open to interpretation. However, in the past the insurance market has always assumed EL policies are triggered by the original cause of the injury or disease – in this case when exposed to asbestos. The High Court judge found that EL policies should continue to respond in this way and that MMI and the other insurers should pay out on these claims.

While the judgement is good news for insured public sector organisations it is bad news for self-insured organisations or those who do not have access or information on the insurance purchased.

For these organisations, in the absence of evidence of policy cover, the confirmation of the causal trigger for liability means that they will need to meet the cost of these claims from their own finances.

As more recent insurance policies will have asbestos exclusions, had the High Court found for the insurers, public sector organisations would have had to meet potentially sizeable asbestos claims themselves. Nor would current insurers have any liability to meet legacy claims of this nature as policies are not retro-active in respect of periods of insurance prior to the original inception of cover.

What does this mean for you?

This judgement does not end confusion around asbestos liabilities especially as MMI and the other insurers are planning to appeal. The final resolution will determine when the claims attach and whether or not it is the organisation or a solvent insurer that pays. Until then, the additional media attention on the latest court case will undoubtedly refocus minds on asbestos as a source of potential liability. This may increase claims activity overall and further increase the size of the asbestos issue generally.

A key issue for any individual organisation is to ensure that its insurance history is known and therefore the impact of any change in legislation is understood. Most public sector bodies will invariably have exposure to asbestos related claims and ought to have sufficient funding in place to meet them. Subject to appeal, organisations are covered by the insurances in place at the time their employees were exposed to asbestos. If the insurers are known and still in business at the time the claim is settled then there should be few issues. If the insurer is unknown then a potential source of capital to pay the claims will be untapped.

A number of insurance companies have failed, partly as a result of asbestos related claims. If the insurers are insolvent, or in run-off, claims may revert back to the organisation which the employee worked for at the time of exposure to asbestos.

Public Sector organisations face a further risk from this judgement. Most are Scheme Creditors of MMI, a public sector insurer in run-off since 1992, one of the insurers in this case and currently with greater liabilities than assets. Under the terms of MMI's Scheme of Arrangement if MMI cannot complete a solvent run-off Scheme Creditors may have to pay back part of all claims for which they have received settlements since 1992. Had the judgement gone in MMI's favour, their liabilities and the risk of insolvency would have been reduced considerably. MMI's directors are still predicting a solvent run-off but this judgement does not reduce the risk of insolvency.

How Marsh can help

Marsh has a broad portfolio of relevant solutions that help clients to assess the potential liability and manage legacy claims. These include:

- insurance archaeology services to determine whether or not the current public sector organisation is the correct successor to historical liabilities – an important issue, given a number of structural re-organisations over the last 35 years and consequent difficulties in accessing predecessor authorities' policy documentation,
- risk modelling to project future diseases manifestations and claims notifications – another important issue, given the preponderance for late reported claims emanating from the public sector,
- modelling to assess potential future financial loss and risk financing.

As an extension of our Self-Insured Fund Review, Marsh can also advise on the potential levy which could be triggered if MMI becomes insolvent and therefore how much public sector clients should consider as funding in this event. Our analysis will ensure authorities are fully informed about the issues arising from their past involvement with MMI and allow them to make suitable provision in case MMI does become insolvent.

For more information and assistance, please contact your usual Marsh Public Sector Practice representative.