

# Insurance coverage for asbestos liabilities: a review for UK policyholders

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Asbestos claims and liabilities in the United Kingdom continue to mount. According to the Health & Safety Executive (HSE), at least 3500 people die each year from mesothelioma and asbestos-related lung cancer as a result of earlier exposure to asbestos.<sup>1</sup> Given that asbestos was used extensively in construction throughout the United Kingdom from the 1950s to the mid-1980s, annual numbers of asbestos-related deaths are predicted to continue to rise in the foreseeable future, with the number peaking during the period 2011–2015.<sup>2</sup> In addition to the increase in asbestos-related deaths, the diagnosis of asbestos-related diseases, such as asbestosis and pleural thickening, is also on the increase.<sup>3</sup> In all, it is expected that the number of asbestos claims filed in the United Kingdom will total between 80,000 and 200,000 over the next three decades.<sup>4</sup>

The rise in the number of asbestos claims being asserted against UK corporations in recent years has been accompanied by a flurry of activity in the English courts regarding the standards for imposing legal liabilities on employers and other potentially responsible parties for asbestos-related injuries and claims. For example, the House of Lords in *Fairchild v Glenhaven Funeral Service*,<sup>5</sup> held that, where a mesothelioma claimant was exposed to asbestos while working for multiple employers, any one employer may be held liable for the claim, even if the claimant could not prove that the employer's tortious conduct actually caused illness, so long as it could be

shown that the employer's conduct materially increased the risk of the claimant's illness.<sup>6</sup>

With the dramatic increase in the number of asbestos claims and the expansion of legal avenues for asbestos claimants to be compensated, the projected future cost of asbestos liabilities to be borne by UK corporations and their insurers is substantial. It is estimated that the total cost of asbestos claims within the United Kingdom could amount to more than \$10 billion over the next 30 years.<sup>7</sup> Indeed, as stated by Julian Lowe, chair of the working group that authored the report: 'Asbestos is certainly not yesterday's problem – its effects will continue to affect insurance companies and healthcare providers in the West for decades to come.'<sup>8</sup>

This article examines various issues regarding insurance coverage for the rising tide of asbestos claims in the United Kingdom. Specifically, will UK corporations be able to rely on historical insurance coverages – including both employers' liability (EL) and public liability (PL) policies purchased in previous decades during which the bulk of claimants' exposure took place – to respond to these claims? This article begins by discussing certain aspects of the imposition of legal liability upon employers and other parties for a claimant's asbestos-related disease or death. It then explores issues relating to insurance coverage for such liabilities – first by discussing certain basic principles of insurance law and practice, and then by examining relevant common law and insurance market practices that have developed in the United Kingdom in connection with asbestos claims. The article goes on to review basic insurance coverage law in the United States so as to provide a comparative guide showing how US courts have addressed and resolved certain difficult coverage issues. Finally, it gives some recommendations for corporate policyholders confronted by the challenges of asbestos liabilities to interpose historical insurance coverages to help meet those challenges.

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1 Health & Safety Executive Website: [www.hse.gov.uk/asbestos](http://www.hse.gov.uk/asbestos) (15 June 2006).

2 J T Hodgson et al 'The Expected Burden of Mesothelioma Mortality in Great Britain from 2002–2050' (2005) 92 *British Journal of Cancer* 587–93.

3 Health & Safety Executive Website (n 1) (30 May 2006).

4 See Asbestos Working Party, Actuarial Profession 'UK Asbestos – The Definitive Guide' (2004) §7.6. This article can be viewed online at: <http://www.actuaries.org.uk>.

5 *Fairchild v Glenhaven Funeral Service* [2002] UKHL 22 (HL).

6 *ibid* ¶134. The House of Lords subsequently held in *Barker v Corus* [2006] UKHL 20, that an employer held liable to a claimant for asbestos-related disease under the *Fairchild* rule shall be responsible for an allocated share of the claimant's damages, rather than the entire amount of those damages. See n 15 and accompanying text.

7 Asbestos Working Party (n 4).

8 *The Independent* 2 November 2004 <http://news.independent.co.uk/business/news/article18313.ece>.

## Asbestos coverage law in the United Kingdom

### UK legal principles relevant to asbestos liabilities

It has been recognised for well over half a century that a person exposed to asbestos dust may at a later date contract one or more medical conditions as a result (or partly as a result) of this exposure. Victims of these various conditions may sue those responsible for their exposure to asbestos in order to obtain compensation. The most common causes of action pursued by claimants in the English courts are those for negligence at common law, or breach of statutory duty under various primary and secondary legislation. These two causes of action are often pleaded in the alternative.

Claimants may seek to recover compensation from various classes of defendants: their employer(s), the owner or occupier of the premises where they were exposed to asbestos, the employer of a family worker who worked with asbestos, asbestos manufacturers and owners of asbestos plants in the locality where the individual sufferer lived. This is not an exhaustive list. The categories of negligence are never closed, and it may be that, in the future, the courts will hold that other classes of defendants may be liable in relation to asbestos-related illnesses.

In contrast to the United States, the majority of insurance claims arising from industrial illnesses in the United Kingdom are made against EL rather than PL policies. This can largely be attributed to the fact that employers are more often sued by claimants than are third parties, and the fact that, since 1972, almost all private employers in the United Kingdom have been required to maintain EL insurance under the Employer's Liability (Compulsory Insurance) Act of 1969 (the Act).<sup>9</sup> There is no such requirement to maintain PL insurance. The Act requires the amount of EL cover that must be put in place in respect of relevant employees to be not less than £5 million in respect of a claim relating to any one or more of those employees arising out of any one occurrence and any costs and expenses incurred in relation to the claim.<sup>10</sup> According to the Association of British Insurers (ABI), most employers obtain policies to insure up to at least £10 million per occurrence.<sup>11</sup> An employee who suffers from an asbestos-related disease and sues the employers who employed her or him before 1 January 1972, and who may be uninsured, may rely on a statutory scheme to provide compensation under the Financial Services Compensation Scheme (FSCS) administered by the Financial Services Authority.

The ability of the parties to an EL insurance policy to limit the insurer's liability has been strictly curtailed by

legislation.<sup>12</sup> By way of example, the insurer cannot escape liability under the policy because the policyholder does not take reasonable care to protect employees against injury, or because the policyholder is in breach of a relevant statutory duty. In the event that there is a breach of duty by the policyholder, the insurer may be entitled to reclaim some or all of the compensation paid to an employee from the policyholder, but the obligation of the insurer to meet the amount of compensation agreed with the employee or awarded by the court is unaffected. Clearly the public policy consideration behind this legislation is to ensure that victims of industrial disease or injury are not left without adequate compensation because of circumstances falling outside the employee's relationship with the employer.

Most claims for damages for asbestos-related diseases under English law have been made against employers. The close employer/employee relationship may make it more straightforward to find a duty of care in negligence than is the case with the relationship between the employee and some other third party (such as the manufacturer of products containing asbestos), and employers' statutory duties in relation to the health of their employees are relatively stringent. In addition, there is a contractual nexus between an employee and employer which may form an additional cause of action. Also, from a purely practical point of view, identifying the claimant's former employer(s) is likely to be simpler than undertaking enquiries as to who owned a building where the employees were exposed or who manufactured the asbestos-containing product to which they were exposed (which may have been removed from the site by the time the claimant manifests an asbestos-related injury). Furthermore, the requirement that the majority of all private employers operating in the United Kingdom maintain EL insurance, and the absence of a similar requirement in relation to PL insurance, means that claimants are more likely to find a solvent party to pay compensation if they proceed against their employer.

It may be that, in the future, more claims will be made against non-employer third parties. For example, the Court of Appeal has recently been called upon to determine whether an employer who negligently exposed an employee to asbestos dust is liable to the wife of that employee who subsequently contracted mesothelioma.<sup>13</sup> By a majority of two to one, the court decided that question in the negative on the basis that, given the state of knowledge at the time when the claimant was exposed to asbestos, injury to her was not a reasonably foreseeable consequence of exposing her husband to asbestos. Permission to appeal to the House of Lords was refused but, bearing in mind the approach of the House in *Fairchild*, the reasoning behind this decision may be called into question, particularly because it was not disputed that, had the husband himself become ill, the employer would have been liable to him.

In many instances, a claimant will have been exposed to asbestos on more than one occasion, and therefore

9 Employers' Liability (Compulsory Insurance) Act of 1969, as amended.

10 Employers' Liability (Compulsory Insurance) Regulations 1998 SI 1998/2573 s 3(1).

11 <http://www.abi.org.uk/default.asp> under the page 'Business Insurance Information Zone'.

12 Employers' Liability (Compulsory Insurance) Regulations (n 10) s 2.  
13 *Maguire v Harland & Wolff plc and Another* [2005] EWCA Civ 01 (CA).

different defendants may be liable in relation to different periods of exposure. When deciding how to determine liability among defendants in such cases, the court distinguishes between diseases which can be triggered by exposure to a single asbestos fibre (so-called indivisible conditions) and those where the condition is caused by cumulative exposure to asbestos over time. The most serious of asbestos-related conditions – the almost invariably fatal cancer, mesothelioma – is an indivisible disease. In *Fairchild*, the courts considered the question of liability for mesothelioma where more than one employer had negligently exposed a claimant to asbestos and the claimant subsequently developed mesothelioma. The Court of Appeal applied the traditional ‘but for’ test of causation and held that:

1. Mesothelioma begins on a single identifiable occasion where one or more asbestos fibres are inhaled by the claimant and initiate a process of genetic change in the cells of the outer lining of the lung (mesothelium) which leads, many years later, to the development of mesothelioma.
2. Where a claimant had been exposed to asbestos due to the negligence of more than one employer, he could not, as against any individual employer, discharge the burden of proof that, on the balance of probabilities, his condition was caused by exposure to asbestos during the period he was employed by that employer.
3. It would be illogical, and possibly unjust, to impose liability for the whole disease on an employer which had employed the claimant for a short time.

The claimant appealed the Court of Appeal’s judgment to the House of Lords on the question of whether, in the circumstances, a modified approach to the traditional rules of causation was required by principle, authority or policy. The House of Lords agreed with the appellant and held that a modified approach was justified. It is instructive to look at the rationale of the House of Lords’ judgment in *Fairchild*. The House of Lords held that:

1. The overall objective of the law of tort was to define cases in which the law could justly require one party to compensate another.
2. In special circumstances, where the interests of justice demanded it, the court could depart from the ‘but for’ test and impose a lesser threshold of causation.
3. In the case of mesothelioma, where there is exposure to asbestos during employment with more than one employer, there is no way of identifying, on a balance of probabilities, which particular incidence of exposure initiated the genetic process which culminated in the disease.
4. Had there been only one tortfeasor, the claimant would have been entitled to recover but, on the Court of Appeal’s ruling, because the duty owed to him was broken by two tortfeasors and not only one, he is held to be entitled to recover against neither of them because he is unable to prove scientifically, on the balance of probabilities, which tortfeasor caused his disease.

5. It was accepted that, to alter the burden of proof from the traditional ‘balance of probabilities’, would potentially cause injustice to the employers and their insurers. However, this policy consideration was heavily outweighed by the potential injustice caused to the claimant if he was unable to recover against any of his employers.
6. Therefore, in the context of mesothelioma claims against successive employers, it was sufficient for the claimant to prove that his exposure during his employment with each individual employer had materially increased his risk of developing mesothelioma.
7. Therefore, a mesothelioma claimant can claim compensation from any former employer, without having to prove which particular one caused the disease.<sup>14</sup>

The House of Lords, in the recent judgment of *Barker v Corus*, clarified and expanded upon its ruling in *Fairchild* by addressing, inter alia, the question of the extent of the liability of an employer for a claimant’s mesothelioma based on the *Fairchild* theory of liability. In addressing this question, the House of Lords held that an employer-defendant would not be held jointly and severally liable for the claimant’s illness; rather, the employer-defendant is liable for its aliquot contribution to the total risk of the claimant contracting the illness.<sup>15</sup>

The House of Lords (per Lord Scott) explained its judgment in *Barker* by observing that joint and several liability of tortfeasors is based on a finding that the breach of duty of each defendant has been a cause of the indivisible damage for which redress is sought, but that finding is not existent in a *Fairchild* type of case. Thus, because a defendant in a *Fairchild* type case has not been shown to have definitively caused the claimant’s injury, but rather has exposed the claimant to a significant risk of eventual damage, the defendant’s liability should be commensurate with the degree of risk for which that defendant is responsible.<sup>16</sup>

The House of Lords’ decision in *Barker* has stirred vigorous opposition among groups representing workers suffering from asbestos-related illnesses. As a result, as of the writing of this article, the UK Government has announced that it will introduce legislation to overturn the *Barker* ruling. Specifically, the Department for Constitutional Affairs stated that it would bring forward an amendment to the Compensation Bill to provide that employers held liable for a worker’s mesothelioma under the *Fairchild* analysis would be held jointly and severally liable for the entire amount of damages suffered by the worker, rather than an allocated share of liability, as held in *Barker*.<sup>17</sup> Such

<sup>14</sup> *Fairchild* (n 5) ¶¶9,13,21,33–36, 40–44,47,63,74,108,116,119, 126,143,154–55,169,171.

<sup>15</sup> *Barker v Corus*, [2006] UKHL 20 ¶2.

<sup>16</sup> *ibid* ¶61–62.

<sup>17</sup> Dept for Constitutional Affairs *Government To Act on Mesothelioma Claims* Press Release (20 June 2006) [www.gnn.gov.uk/environmental/detail.asp?Release](http://www.gnn.gov.uk/environmental/detail.asp?Release).

legislation, if enacted, would increase the financial burden on employers and their insurers with respect to mesothelioma claims.

In contrast to liability for mesothelioma claims, the liability for other asbestos-related disease is treated differently under English law. Specifically, where the claimed injury is a chronic illness brought about as a result of cumulative exposure to asbestos causing increasingly severe injury (for example with asbestosis), then UK courts use a different liability analysis. In the case of exposure to asbestos by more than one employer causing asbestosis, the Court of Appeal has held that, since the evidence showed that more than one employer had contributed to the disability suffered by the claimant, the court could reduce the liability of the defendant to take account of the contribution of others.<sup>18</sup>

Another recent English court decision addressing the issue of an employer's liability for a claimant's asbestos-related disease is *Grieves and Others v F T Everard and Sons & British Uralite plc and Others*.<sup>19</sup> In this case, Mr Justice Holland, sitting in the Manchester District Registry of the High Court, considered the question of the liability of employers who had negligently exposed employees to asbestos, where those employees later developed pleural plaques. Pleural plaques are a permanent penetration of the chest by asbestos fibres. They are a non-life threatening condition, which can be discovered only by X-ray, which may have no effect on the quality of life of the sufferer. On the question of liability, the court held that the real harm caused by a finding of pleural plaques lies in the indication that the claimant has been exposed to asbestos, which has had an effect on the lungs and which carries a risk of future symptoms — even of a terminal condition — which is the cause of continuing anxiety. The simple presence of pleural plaques did not amount to injury or damage sufficient to give a cause of action. However, once the presence of pleural plaques has been detected, the anxiety caused to the claimant is sufficient for there to be 'damage' so as to complete the cause of action. For limitation purposes, the court held that the cause of action commences from the date of a finding of pleural plaques.<sup>20</sup>

The High Court's decision in *Grieves* went to the Court of Appeal and, by a majority of two to one, the decision was overturned in the judgment captioned *Rothwell v Chemical & Insulating Co Ltd et al*.<sup>21</sup> The Court of Appeal found in *Rothwell* that there can be no compensation for asymptomatic pleural plaques which are accompanied by the risk of future asbestos-related disease and feelings of

anxiety. The Court of Appeal held that the development of pleural plaques is insufficiently significant, of itself, to constitute damage upon which a claim in negligence can be founded. The court's reasoning lay in the fact that negligence is not actionable per se: rather, claimants need to prove damage, and any damage must be more than minimal. The court found that pleural plaques do not threaten or lead to other asbestos-related conditions; they do not increase the risk of lung cancer; they are purely evidence of asbestos exposure. Although the individuals did run a risk of developing asbestos-related disease, the court said that this was not as a result of pleural plaques, but rather was a result of exposure to asbestos.<sup>22</sup> In addition, the Court of Appeal held that there can be no compensation for claimants exposed to asbestos who, in the absence of physical injury, develop a recognised psychiatric condition as a result of anxiety about the consequences for the future. Finally, the court commented that there was no duty on an employer to take reasonable care not to cause anxiety.<sup>23</sup> The Court of Appeal's decision may save companies and their insurers millions of pounds in compensation payments. However, the last word may not yet have been spoken on this issue. Indeed, the Court of Appeal has given leave to appeal to the House of Lords. A final judgment by the House of Lords may not be forthcoming until 2007.

In summary, therefore, English courts have been closely examining theories of liability relating to asbestos-related claims, and are likely to continue to do so, given the rise in the number of such claims. The British Government is also getting involved in developing law relating to liability for asbestos-related injury. At this point, it appears as if English law may be moving in the direction of expanding the theories of liability for an asbestos defendant. This movement makes examination of the insurance coverage for such liabilities all the more important.

### Basic principles of insurance law in the United Kingdom

Historical occurrence-based employers' liability or public liability insurance policies may well serve to indemnify an asbestos defendant for asbestos-related claims. Under an occurrence-based policy, the triggering of insurance coverage commences at the point at which the injury or damage occurs, and coverage typically continues as long as that injury or damage continues.

In considering the applicability of historical employers' liability and public liability policies to asbestos claims, it is important to bear in mind several basic principles of English insurance law that come into play. First is the principle of *contra proferentem*, under which any ambiguity in a clause is interpreted against the party seeking to rely on it. For example, a provision in an insurance contract that is ambiguous is construed strictly against the party that drafted the provision. A standard-form insurance policy

18 *Holtby v Brigham & Cowan (Hull) Limited* [2000] 3 All ER 421. Leave to appeal to the House of Lords was refused by the House of Lords.

19 *Grieves and Others v F T Everard and Sons & British Uralite plc and Others* [2005] EWHC 88 (QB).

20 *ibid*. On quantum, the court held that recent final awards of damages for pleural plaques, broadly in the region of £12,500, were too high. Where a provisional award is made, the court adopted a guideline of £4000. Where a final award is made, given that the risks of future serious illness are small, the court adopted a guideline bracket of £6000 to £7000.

21 *Rothwell v Chemical & Insulating Co Ltd et al* [2006] EWCA 27 (CA) ¶23, 24, 26.

22 *ibid* ¶69.

23 *ibid* ¶63.

will have been drafted by the insurer, and thus any ambiguities will be construed against the insurer and in favour of the policyholder.<sup>24</sup> In addition, the burden of proving that an express insurance contractual exclusion clause, on its true construction, applies to the particular claim in issue is on the party so asserting.<sup>25</sup>

An example of the application of the *contra proferentem* rule in relation to exclusion clauses in EL policies is seen in the case of *T&N Ltd (in administration) and Others v Royal Sun Alliance plc and Others*.<sup>26</sup> In this case, the court was asked to determine whether an EL policy that expressly excluded liability in respect of pneumoconiosis (defined in the policy as fibrosis of the lungs caused by asbestos dust) could also apply to other asbestos-related conditions. In support of their interpretation of the policy, the insurers sought to rely in part on later agreements whereby the assured agreed to bear the full cost and expense of handling and disposing of asbestos and mesothelioma claims. The court held that the exclusion in the policy applied to pneumoconiosis, which, given the definition of that term in the policy, was synonymous with asbestosis. Nonetheless, the court held that the wording of the policy did *not* apply to exclude the insurer's liability for asbestos-related diseases *other than* pneumoconiosis/asbestosis. Thus, there was no legitimate process of interpretation by which the exclusion could be extended to include liability for mesothelioma.<sup>27</sup>

The strict interpretation of the various policies under consideration in the *T&N* case should provide some comfort to corporate policyholders seeking to recover an indemnity from their insurers. The rule is that, unless the wording of any exclusion, and its application to the relevant claim situation, is clear and unambiguous, the exclusion should not bar the assured from obtaining coverage.

### UK insurance industry market practice regarding coverage for asbestos claims

In response to the *Fairchild* decision, the ABI has implemented voluntary guidelines for apportioning and

handling mesothelioma claims under EL policies (ABI guidelines).<sup>28</sup> These guidelines recognise that, where various employers have negligently exposed a claimant to asbestos and the claimant has suffered from mesothelioma as a result, each employer on the risk during that period (and therefore each of the employers' respective EL insurers) may be liable for the whole of the claim. Indeed, the High Court has recently held that a single insurer may be responsible to cover the whole amount of a mesothelioma claim, even if it was not the insurer on the risk during the entire period.<sup>29</sup> The ABI Guidelines also apply where one or more of the employers or their insurers is insolvent.

The ABI Guidelines seek to apportion liability in proportion to the periods of employment over which the claimant was exposed to asbestos, and then in proportion to the periods of insurance coverage, subject to the claim being met in full. For the purposes of these guidelines, and because of the long latency period between the onset and manifestation of the disease, any period of employment less than 10 years before the diagnosis of mesothelioma is disregarded under this apportionment scheme. Under this scheme, there is a mechanism whereby the insurance company with the longest period of exposure settles the claim with the claimant as soon as possible and then obtains contributions from other exposed insurers in proportion to their respective periods of culpable insurers. Any gaps in cover are attributed to the employer, if solvent, and if the employer is not solvent, to the employer's insurers. The FSCS may also participate in this scheme.

There is no weighting in the apportionment to reflect the dose of asbestos received during any period of employment. Moreover, there is also no weighting to reflect the type of asbestos to which the claimant was exposed during various periods of employment. This aspect of the apportionment scheme is potentially controversial because mesothelioma has been linked in particular to exposure to blue and brown asbestos (amosite and crocidolite), but medical opinion is divided on the question of whether exposure to white asbestos (chrysotile) can be linked to mesothelioma. It is alleged that white asbestos is chemically and crystallographically different from the other kinds of asbestos, and the fibres, when inhaled, are eventually removed from the body, unlike other kinds of asbestos particles. Given the ambiguous nature of the medical evidence, some countries (mainly those that produce asbestos) have kept chrysotile off the toxics list, although the European Union has introduced a ban, effective from 2005.

The approach taken by the ABI Guidelines is therefore to operate a 'continuous trigger' rule in determining which insurers are liable for mesothelioma damage. This is the

24 By way of example from a case not related to asbestos, *Houghton v Trafalgar Insurance* [1954] 1 QB 247, a five-seater car was involved in an accident while carrying six passengers. The insurers sought to rely on an exclusion clause in the policy which provided that they would not be liable for any damage caused 'whilst the car is carrying any load in excess of that for which it was constructed'. The court held that this clause did not extend to cases where the car was carrying too many passengers, and the insurers could not therefore rely on the exclusion clause. Where a clause merely seeks to limit the insurers' liability in respect of specified claims, the courts apply the *contra proferentem* rule with less vigour than in the case of clauses which purport to exclude liability altogether.

25 *Panamanian Oriental Steamship Corporation v Wright* [1971] 1 Lloyd's Rep 487 (CA).

26 *T&N Ltd (in administration) and Others v Royal Sun Alliance plc and Others* [2003] EWHC 1016 (Ch).

27 *ibid* ¶¶226. In another case, the court also held that a reference in an exclusion clause to 'pneumoconiosis' did not operate to exclude liability for all asbestos-related diseases. The term had a specific medical meaning, and should not be construed according to any wider or looser definition. *Cape plc v The Iron Trades Employers Insurance Association Limited* [1999] All ER (D) 405.

28 The guidelines apply to EL claims for mesothelioma only. Claims under other policies (for example, public liability policies) fall outside the guidelines. The guidelines apply to all EL claims not settled by 1 November 2003. The guidelines can be found at the ABI website using this link: <http://www.abi.org.uk/Newsreleases/viewNewsRelease.asp?nrld=8940>.

29 *Phillips v Syndicate 992, Gunner and Others* [2003] EWHC 1084 (QB).

trigger rule generally favoured by policyholders, because it provides the most comprehensive cover. It is also favourable to the claimant because it indicates that the claimant is more likely to be able to find one or more solvent insurers to satisfy the claim.<sup>30</sup>

Although, in the United Kingdom, EL insurers are likely to be responsible for indemnifying the bulk of asbestos claims, there will be instances in which the claimant was never an employee of the defendant and so the defendant's PL insurers will instead be asked to indemnify the defendant for such liability. For example, if there had been an appeal in the *Maguire* case (family members of asbestos workers contracting mesothelioma) and it had been successful, it would have opened up another raft of potential claims under PL policies and might compel the PL industry to take measures to agree upon a claims-handling strategy. Although the ABI has produced guidelines for the apportionment of liability among EL insurers for mesothelioma claims, there are no such formal guidelines in force applicable to PL insurers. Typical PL insurance policies, by their terms, obligate the insurer to provide coverage so long as injury took place during the policy period – rather than when the *cause* of the injury took place. Thus, in the case of a continuous and progressive injury leading to a policyholder's public liability loss, multiple, successive insurers of the policyholder may be liable to cover the same asbestos claim.

In the absence of definitive ABI Guidelines, or a court judgment indicating how liability is to be apportioned between and among successive PL insurers, certain insurers may be reluctant to agree to or comply with any 'gentleman's agreement' among insurers as to how these claims are to be met. The industry practice is not recognised as being uniform or binding, as a matter of business practice, by the courts.<sup>31</sup>

An example of disagreement within the PL insurance market as to insurers' relative responsibility for covering asbestos claims was recently highlighted in the seminal case of *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd*.<sup>32</sup> This case involved, essentially, a dispute between two PL insurers of the Bolton Metropolitan Borough Council (Bolton) over coverage responsibility for Bolton's liability for a mesothelioma claim.

The claimant in the case had been exposed to asbestos during the 1960s when he was an independent contractor

working at a site owned by Bolton. During the period of the claimant's exposure to asbestos, Bolton had maintained PL insurance with a predecessor of Commercial Union Assurance Co Ltd (CU). The expert medical evidence accepted by the court was to the effect that the claimant's exposure to asbestos did not result in the development of mesothelioma until approximately 1980 and that this mesothelioma did not manifest itself with the onset of symptoms until 1991. During this period from 1980–1991, when the claimant's mesothelioma indisputably existed, Bolton maintained PL insurance with Municipal Mutual Insurance Ltd (MMI).

The PL policies issued by both CU and MMI contained language in the basic insuring agreement that obligated the insurance company to indemnify the insured, Bolton, in respect of 'all sums' which the insured became legally obligated to pay to a third party arising out of injury taking place during the policy period.<sup>33</sup> The dispute at issue in this case centred around the legal question of when did injury take place, in the context of mesothelioma. In attempting to avoid coverage responsibility, MMI argued that injury to the claimant occurred when the claimant was exposed to asbestos at the Bolton premises – namely in the 1960s, when CU was on the risk. By contrast, both Bolton and CU argued that exposure to asbestos alone was not sufficient to trigger coverage under its policies and that the medical evidence demonstrated that the mesothelioma began to develop in the claimant's body in 1980, continuing until 1991, when it was diagnosed and, therefore, it was MMI's policies that were obligated to cover the claim.

The Court of Appeal affirmed the judgment of the High Court in favour of Bolton and CU, holding that MMI's PL policies had coverage responsibility. The Court of Appeal held that the 'injury' that triggers coverage under a typical PL policy cannot be equated with the 'insult' or causative event giving rise to the injury. Moreover, a PL policy requirement of 'accidental' injury during the policy period merely requires that the injury taking place during the policy period be caused by an accident – even if the accident pre-dates the policy period.<sup>34</sup> Accordingly, the Court of Appeal heard that, under the PL policy, MMI was obligated to indemnify Bolton in respect of the mesothelioma claim.

The *Bolton* judgment is quite significant in addressing the relative responsibility of PL insurers on the risk over a period of years during which an asbestos claimant is exposed to asbestos and then as the asbestos fibres in the claimant's body cause cellular change, ultimately leading to the development and manifestation of mesothelioma. It is important, however, to note the issues left unaddressed by this judgment, which will leave room for further argument between and among PL policyholders and their insurers over coverage responsibility for asbestos claims.

First, the Court of Appeal in *Bolton* only examined the particular disease of mesothelioma and rendered its

30 Alternative trigger rules, used in some states of the US, are as follows:

- (a) the exposure trigger – coverage is triggered only during the period that the claimant was exposed to asbestos in the workplace.
- (b) the manifestation trigger – coverage is limited to the policy in effect when the damage or injury is discovered, or manifests. Many insurers favour the manifestation rule because it generally limits coverage to a single year and to more recent policies.

31 In *Phillips v Syndicate 992* (n 29), the defendant insurers tried to rely on the industry practice that, in long-tail claims, responsibility would be shared on a time-exposed basis. The court did not agree. Mr Justice Eady stated that there was no generally recognised custom or industry practice regarding the sharing of asbestos claims. *ibid* ¶29. Moreover, in the recent judgment in *Barker* (n 15), Lord Walker observed that it should not be assumed that courts will follow the ABI Guidelines *ibid* ¶108.

32 *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Limited* [2006] EWCA Civ 50 ¶¶7–12.

33 *ibid* ¶¶4–5.

34 *ibid* ¶¶13–19.

judgment based on the medical evidence findings of the High Court Judge (which were not challenged by the parties on appeal), to the effect that mesothelioma incepted in the claimant's body only about 10 years before it was diagnosed. It is unclear how the Court of Appeal would have ruled if evidence had been presented that either mesothelioma or some other covered injury had occurred in the claimant's body at an earlier point in time that was nearer to the first date of exposure. Moreover, there are other, more common, types of asbestos-related diseases, where medical evidence may be more clear that injury to the claimant commences at or near the time of the claimant's first exposure to asbestos and continues progressively thereafter. In the face of such evidence, there would be good reason for PL policies that are triggered by injury taking place during the policy period to be triggered throughout the period of exposure, development of the asbestos-related disease and manifestation.

In this regard, the Court of Appeal did take note of the court decisions in the United States stemming from *Keene Corp. v Insurance Co. of North America*<sup>35</sup> which held that all insurance policies on the risk from the date of first exposure to the diagnosis of an asbestos-related disease are triggered for coverage to the insured. The Court of Appeal observed that it may well be appropriate to hold, in a future case, that the continuous trigger approach of *Keene* should apply to employers' liability policies. Nonetheless, the Court of Appeal attempted to distinguish the application of the *Keene* continuous trigger rule from English PL policies, based on the specific wording in the PL policies issued by CU and MMI. This distinction is not valid because the relevant language of the CU and MMI PL policies that required injury during the policy period for coverage to be triggered is essentially the same liability policy language that was considered in the *Keene* decision. Thus, the relevant language of the CU and MMI policies does not provide a valid basis for distinguishing the holding in *Keene*.

In addition, the Court of Appeal in *Bolton* suggested that in *Keene*, the court's adoption of the continuous trigger theory was based on an application of 'public policy reasons' present in the US because of its vastly greater numbers of asbestos claimants – a public policy rationale that the court did not find present in the United Kingdom. Again, however, this distinction is not valid. Indeed, the *Keene* court's adoption of the continuous trigger approach to coverage for asbestos-related disease was based primarily on application of the relevant policy language to the facts and expert opinion evidence relating to asbestos disease.<sup>36</sup> The court in *Keene* did not adopt the continuous trigger theory because of predominant public policy considerations.

It should also be noted that an important issue not fully addressed by the *Bolton* judgment is the issue of

whether latent injury triggers a PL policy even though, by definition, that latent injury has not yet manifested itself. In the *Bolton* case, the medical evidence accepted by the court was that mesothelioma injury had developed in the claimant's body at least 10 years before the claimant displayed symptoms, and 11 years before it was diagnosed. As held by the Court of Appeal, PL policies typically are triggered by injury occurring during the policy period. Significantly, there is no requirement in typical PL policies that the injury must be 'discovered' or 'discoverable' during the policy period in order to trigger coverage. Rather, such policies only require that the injury take place during the policy period. Therefore, as in the *Bolton* case, if medical evidence can demonstrate that a claimant's injury actually occurred in a period prior to its manifestation, the policy period(s) of the injury's occurrence should be triggered, as well as the period when the injury becomes manifest.

The Court of Appeal in *Bolton* did not exclude the possibility that latent injury may trigger coverage under a PL policy. Indeed, the court noted that, since the same insurer (MMI) was on the risk for the entire period between the date when the mesothelioma was understood to have developed (1980) until the date when the claimant became symptomatic (1990), the court did not need to address the specific question of whether the 1980 MMI policy or the 1990 MMI policy, or both, were triggered by this claim.<sup>37</sup> As a practical matter, it made no difference which policy was triggered. MMI would cover the claim regardless of which alternative was accepted.

Finally, it must be noted that another significant aspect of the Court of Appeal's judgment in *Bolton* was that MMI was held liable to cover the entire amount of Bolton's liability for the mesothelioma claim at issue. The MMI policy language compels this result. Indeed, in the MMI policy it was expressly agreed to indemnify Bolton 'in respect of "all sums" which the insured shall become legally liable to pay. . .'<sup>38</sup> This phrase 'all sums' means what it says – to the extent that a policy is triggered for coverage by a claim, that policy should provide coverage for the full amount of the claim (subject to policy limits) even if other policy periods are also triggered by that claim. This proper interpretation of the phrase 'all sums' was notably handed down in the *Keene* decision, and many court decisions in the US have followed *Keene*. Courts in the United Kingdom should follow the judgment and reasoning of *Keene* in this regard and hold that, if a policy is triggered by the occurrence of asbestos-related injury, the insurer should be jointly and severally liable for 'all sums' relating to that injury.

## Asbestos coverage law in the United States of America

An understanding of asbestos coverage law in the United States may provide guidance in considering similar issues under UK law. To understand how American courts have

<sup>35</sup> *Keene Corp. v Insurance Co. of North America* 667 F.2d. 1034 (D.C. Cir. 1981). The policies at issue in *Keene* required, in the language of their basic insuring agreement, that the claimant's injury take place during the policy period (1039). This language is substantially similar to that of the MMI policy at issue in *Bolton* (n 32) ¶4.

<sup>36</sup> *ibid* 1042–47.

<sup>37</sup> *Bolton* ¶12.

<sup>38</sup> *ibid* ¶4.

developed the law of insurance coverage for asbestos claims, it is important to keep in mind that American state and federal courts operate independently of one another. As a consequence, insurance coverage principles in general, and asbestos insurance coverage principles in particular, have not developed uniformly throughout the United States. Indeed, they vary from state to state, and even from one federal court to another federal court. The variations among the states and among the federal courts can mean the difference between a policyholder recovering millions of dollars in insurance coverage for asbestos claims or failing to recover anything at all.

Over the last 25 years, American courts have addressed numerous asbestos coverage issues that have not yet been addressed in depth, if at all, in the United Kingdom. The most significant of these issues are the trigger of coverage, the scope (or allocation) of coverage and the applicability of asbestos exclusions.<sup>39</sup> It is important to note that these issues have been addressed in the context of an American tort system that for decades has been relatively hostile to corporate policyholders facing asbestos claims – a system that is quite different from the UK's system of compensating asbestos claimants. While the way in which American courts have resolved these issues may not directly influence how UK courts will approach the same issues, the 'American' approach is instructive to corporate policyholders outside the United States who seek insurance coverage for asbestos claims now or in the future.

### Salient features of asbestos litigation in the United States

In contrast to the UK system in which an asbestos claimant looks initially to an employer for compensation, asbestos claimants in the USA are quite limited in the compensation they may obtain from their employers for work-related illness and injuries. Nonetheless, asbestos claimants in the United States are permitted to sue manufacturers, sellers and distributors of asbestos-containing products, as well as premises owners whose plants, shops and buildings incorporate asbestos-containing materials. It is not unusual for a single asbestos complaint to name as defendants as many as 100 manufacturers and premises owners. As a result, asbestos litigation has been the longest-running mass tort litigation in the United States.<sup>40</sup> At least 73 US companies have been driven into bankruptcy because of ever-increasing asbestos liabilities.<sup>41</sup> Plaintiffs' lawyers have responded to the growing number of bankruptcies by focusing on companies with no direct links to the manufacture, sale or distribution of asbestos-containing products, such as plumbing and electrical companies and engineering and contracting firms. Indeed, by 2002, at

least 8400 different companies had been the subject of asbestos claims.<sup>42</sup> RAND estimates that, as of 2002, total spending on asbestos claims by US companies and their insurers was \$70 billion.<sup>43</sup>

US jurisprudence holds that tort claimants with valid injuries must be appropriately compensated by the tortfeasor, and tort liability in most states is joint-and-several, meaning that, where multiple tortfeasors are found liable to a tort claimant but not every tortfeasor is able to pay, the financially viable tortfeasor(s) must pay the entire judgment.<sup>44</sup> With so many asbestos bankruptcies having occurred already, the joint-and-several liability principle has led to an ever-increasing number of asbestos claimants turning toward fewer and fewer solvent defendants. Moreover, the effect of the joint-and-several principle has been exacerbated by evidentiary rules adopted in some courts. For example, in Illinois State Court, an asbestos defendant may not put in evidence of an asbestos claimant's exposure to another company's asbestos-containing product, so long as the claimant has demonstrated exposure to that defendant's asbestos-containing product.<sup>45</sup> As a result, American companies that have been subjected to asbestos claims and have found themselves in serious legal and financial jeopardy have pursued insurance coverage to provide needed relief. As a result, US courts have frequently been called upon to decide how insurance policies should respond to asbestos liabilities.

### Basic insurance principles applicable in the United States

Insurance policies are specialised contracts with unique common law rules that have been developed by US courts over time. US common law has been developed with an eye on protecting the policyholder. Because insurance policies are less arms' length than standard contractual agreements, and because insurers often hold greater bargaining power relative to the potential insured, much judge-made law has focused on the protection of the policyholder against potential insurer abuses.

One of the most widely accepted insurance principles is *contra proferentem*, meaning 'against the drafter'.<sup>46</sup> When an insurance provision is held to be ambiguous, a court may invoke the *contra proferentem* principle and construe the ambiguous provision against the drafter – typically, the insurer – and in favour of coverage. Some courts invoke the *contra proferentem* principle whenever the policy supports a pro-coverage interpretation,<sup>47</sup> while other

39 The scope of this article does not permit discussion of other key issues addressed by American courts, such as number of occurrences, timeliness of notice to insurers, duties of cooperation, and a policyholder's knowledge of asbestos hazards.

40 S J Carroll, D Hensler and others *Asbestos Litigation* (RAND 2005) (2005 RAND Report) xvii.

41 *ibid* xxvii.

42 *ibid* xxv.

43 *ibid* xxv–xxvi.

44 Liability for asbestos defendants is joint and several in all but 14 states. See A Malani and C Mullin *Assessing the Merits of Reallocation Under Joint and Several Liability, With an Application to Asbestos Litigation* (University of Virginia John M Olin Program in Law and Economics Working Paper Series: Working Paper 18) (January 2005).

45 *Lipke v Celotex Corp. et al.* 503 N.E. 2d 1213 (Ill. App. Ct. 1987).

46 *Eg Am. Home Products Corp. v Liberty Mu. Ins. Co.* 565 F.Supp. 1485 (S.D.N.Y. 1983).

47 *Rusthoven v Comm Standard Ins. Co.* 387 N.W. 2d 642 (Minn. 1986).

courts invoke the principle only when the policy language reasonably could be construed to support a pro-coverage interpretation.<sup>48</sup> The *contra proferentem* principle protects policyholders while honouring the actual language of the policy.

A small but growing number of courts have interpreted insurance policies in accordance with the reasonable expectations of the insured.<sup>49</sup> Courts sometimes justify this approach by pointing to the insurer's affirmative representations about the policy at the time of sale or the insurer's failure to correct its insured's misunderstanding of the coverage. Other courts invoke the reasonable expectations principle, even where a policyholder's expectations contradict otherwise unambiguous policy language,<sup>50</sup> or where the policyholder is a large corporation with institutional knowledge.<sup>51</sup>

Other well-established principles of American insurance law include the principle that an affirmative grant of coverage is to be construed broadly while exclusions are to be construed narrowly,<sup>52</sup> that the policy should be read as a whole, interpreting the same language in the same way throughout,<sup>53</sup> and that policy provisions ordinarily are to be construed as a layman would understand them and not as 'legalese'.<sup>54</sup> Each of these principles provides a tool for courts to engage in flexible policy interpretation where justice and practicality requires.

### Trigger of coverage for asbestos claims

Because asbestos-related injuries may not manifest for decades after a claimant's first exposure to asbestos-containing materials, US courts have had to answer the question of which insurance policies are triggered by an asbestos claim. In the United States, the insurance policies most typically implicated by asbestos claims are comprehensive general liability (CGL) policies – akin to public liability policies – which, by their terms, are triggered by an 'occurrence'. The term 'occurrence' is typically defined as an accident, including continuous and repeated exposure to conditions, which results, during the policy period, in bodily injury neither expected nor intended by the insured. All loss arising out of continuous or repeated exposure to substantially the same conditions shall be considered as arising out of one occurrence.

In applying the foregoing language to asbestos claims, American courts have considered a number of different trigger theories. The most common of these theories are

the exposure theory, in which the only policy(ies) triggered are those in place during the claimant's external exposure to asbestos in the workplace;<sup>55</sup> the manifestation theory, in which only the policy in place at the time of the claimant's manifestation of an asbestos-related injury is triggered;<sup>56</sup> and the continuous-injury trigger, in which every policy in place from the date of a claimant's first exposure to asbestos until the manifestation of an asbestos-related disease is triggered.<sup>57</sup>

The continuous-injury trigger theory was first announced by the United States Court of Appeals for the District of Columbia Circuit in *Keene* in 1982. The factual and legal justification for the continuous trigger is found in the etiology of asbestos-related injuries, which have been shown to continue progressively and indivisibly beginning with the inhalation of asbestos fibres, as well as in the 'occurrence' language in CGL policies, which requires that bodily injury take place during the policy period.<sup>58</sup>

### Allocation of coverage for asbestos claims

Even if a court applies the continuous-injury trigger to an asbestos claim such that multiple policy periods are triggered, it must decide how much of the claim each triggered policy is required to pay. As they have with trigger theories, American courts have applied a number of different allocation theories to asbestos claims. Resolution of the allocation issue may be affected by the presence of 'other insurance' clauses in the policies and by the requirement in excess insurance policies that the underlying policies be exhausted as a precondition to coverage from the excess policies.<sup>59</sup>

Corporate policyholders generally favour the 'all sums' theory,<sup>60</sup> in which under a single triggered policy an insurer is obligated to pay all of an asbestos claim up to the limits of the policy. An important corollary of the 'all sums' theory is that the policyholder is entitled to choose which of the triggered policies will respond to the asbestos claim. The 'all sums' theory allows the policyholder to maximise its insurance coverage by avoiding gaps in coverage caused by

48 *Vargas v Ins. Co. of N. Am.* 651 F.2d 838 (2d Cir. 1981).

49 *MacKinnon v Truck Ins. Exch.* 73 P.3d 1205, 1214 (Cal. 2003) (holding, in pollution exclusion case, that court must 'attempt to put itself in the position of a layperson and understand how he or she might reasonably interpret the exclusionary language'); *Werner Industries, Inc. v First State Ins. Co.* 548 A.2d 188 (N.J. 1988).

50 *Eg Atwood v Hartford Accident & Indemnity Co.* 365 A.2d 744 (N.H. 1976).

51 *Keene* (n 35), cert. denied, 455 U.S. 1007 (1982).

52 *Eg Crawford v Weather Shield Mfg., Inc.* 38 Cal. Rptr. 3d 787 (Cal. Ct. App. 2006).

53 *Eg First Financial Ins. Co. v Bugg* 962 P.2d 515 (Kan. 1998).

54 *Eg Jamestown Mut. Ins. Co. v Nationwide Mut. Ins. Co.* 146 S.E.2d 410 (N.C. 1966).

55 *Eg Ins. Co. of N. Am. v Forty-Eight Insulations, Inc.* 451 F.Supp. 1230 (E.D. Mich. 1978), aff'd, 633 F.2d 1212 (6th Cir. 1980), clarified, 657 F.2d 814 (6th Cir. 1981), cert. denied, 454 U.S. 1109 (1981).

56 *Eg Eagle-Picher Indus., Inc. v Liberty Mut. Ins. Co.* 523 F.Supp. 110 (D. Mass. 1981), modified, 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028 (1983).

57 *Eg Keene* (n 35).

58 *ibid* 667 F.2d at 1040–47. Some American courts have adopted the 'injury in fact' trigger for asbestos claims, but because of the etiology of asbestos-related injuries, the 'injury in fact' trigger is essentially the equivalent of the continuous trigger. See *Stonewall Ins. Co. v Asbestos Claims Mgmt. Corp.* 73 F.3d 1178 (2d Cir. 1995), modified reh'g denied, 85 F.3d 49 (1996).

59 *Compare Carter-Wallace, Inc. v Admiral Ins. Co.* 712 A.2d 1116, 1124 (N.J. 1998) (holding that no part of insured's damages could be allotted to excess insurer because 'horizontal exhaustion' of the lower layers of coverage had not occurred), with *Koppers Co. v Aetna Cas. & Sur. Co.* 98 F.3d 1440 (3d Cir. 1996) (rejecting horizontal exhaustion, but holding that selected excess insurers had a set off to the policyholder's claim in the amount of the pro rata shares of other insurers that had settled with the policyholder).

60 The 'all sums' approach is solidly based in the policy language, which typically states that '[t]he company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay'.

insolvencies or exhaustion. Again, *Keene* was the first case to adopt the 'all sums' allocation theory,<sup>61</sup> but it also has been adopted by courts in many other states.<sup>62</sup>

Some courts have adopted, and most insurers prefer variations of, the 'pro rata' allocation theory, in which each triggered policy is required to pay only a pro rata portion of the asbestos claim.<sup>63</sup> Calculation of a particular policy's pro rata share is based on a comparison of the limits of each triggered policy,<sup>64</sup> or on the number of years that each triggered policy is on the risk.<sup>65</sup> An important variation of the pro rata theory was adopted in *Owens Illinois, Inc. v United Ins. Co.*,<sup>66</sup> in which the policyholder is responsible for paying a pro rata share for all years which the policyholder made a decision not to purchase insurance. Moreover, in *Stonewall*, the court adopted a variation of the pro rata theory that is very unfavourable to policyholders, in which the policyholder is responsible for paying all years in which it does not have coverage for any reason, including the reason that coverage in a given year was purchased but had been exhausted.<sup>67</sup>

Nonetheless, the majority of courts – and the better reasoned decisions – have adopted the *Keene* judgment that the phrase 'all sums' means what it says, and thus an insurer should be responsible to cover the full liability for claims that triggers its policy (up to the policy's limits), even if other triggered policies have a similar obligation.

### Applicability of asbestos exclusions

In response to the first wave of asbestos claims in the late 1970s, insurers began to insert different versions of asbestos exclusions in their policies. Some corporate policyholders who were directly involved in the manufacturing of asbestos-containing materials had asbestos exclusions in their policies as early as 1980, and virtually all CGL policies had asbestos exclusions by 1986.

In the early years, it was not uncommon for the exclusion to mention asbestosis specifically and no other asbestos-related injury.<sup>68</sup> By 1986, however, most insurers had introduced the so-called absolute asbestos exclusion.<sup>69</sup> Like their British counterparts, American courts construe exclusions from coverage narrowly, and they have generally refused to expand the asbestosis-only exclusion to other asbestos-related injuries such as mesothelioma and lung cancer.<sup>70</sup> But American courts have consistently applied the so-called absolute asbestos exclusion to bar coverage for any and all asbestos-related injury claims.<sup>71</sup>

In summary, American courts generally have ruled favourably for corporate policyholders in pursuing insurance coverage for asbestos liabilities. American courts have interpreted general liability policy language broadly so as to afford corporate policyholders indemnity for defence costs, settlement amounts and court judgments paid as a result of asbestos claims.

### Conclusion and recommendations

Asbestos liabilities from historical products and operations pose a serious threat to the financial well-being of many UK companies.<sup>72</sup> One of the most valuable assets that a UK company may possess to interpose between itself and the potentially ruinous effect of asbestos liabilities is its historical EL and PL coverage. Any company that is

61 *Keene* (n 35) 1047–50 (relying on the terms of the policies, the court held that once an insurer's coverage is triggered, each insurer is liable to the full extent of insured's liability up to its policy's limits).

62 *Eg J. H. France Refractories Co. v Allstate Ins. Co.* 626 A.2d 502 (Pa. 1993) (rejecting a pro rata approach as inconsistent with policy language obligating the insurers to pay 'all sums which the insured shall become legally obligated to pay', and holding each policy fully liable, subject to limits of liability, for all damages awarded to a plaintiff who suffered asbestos-related 'injury' during a policy period). See *Zurich Ins. Co. v Raymark Industries, Inc.* 514 N.E.2d 150, 165 (Ill. 1987); *Allstate Ins. Co. v Dana Corp.* 759 N.E.2d 1049, 1057–58 (Ind. 2001); *Hercules, Inc. v AIU Ins. Co.* 784 A.2d 481, 491 (Del. 2001); *Goodyear Tire & Rubber Co. v Aetna Cas. & Sur. Co.* 769 N.E.2d 835, 840–41 (Ohio 2002).

63 *Eg Insurance Co. of N. Am. v Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *clarified* 657 F.2d 814 (6th Cir. 1981), *cert. denied* 454 U.S. 1109 (1981); *Commercial Union Ins. Co. v Sepco Corp.* 765 F.2d 1543 (11th Cir. 1985); *Owens-Illinois, Inc. v United Ins. Co.* 650 A.2d 974 (N.J. 1994).

64 *Eg Spaulding Composites Co., Inc. v Caldwell Trucking PRP Group* 819 A.2d 410 (N.J. 2003).

65 *Eg Sybron Transition Corp. v Security Ins. of Hartford* 258 F.3d 595 (7th Cir. 2001).

66 *Eg Owens-Illinois, Inc. v United Ins. Co.* 650 A.2d 974 (N.J. 1994) (allocating the losses among the carriers on the basis of the extent of the risk assumed, ie proration on the basis of policy limits, multiplied by years of coverage).

67 *Stonewall* (n 58).

68 A typical asbestosis exclusion provides that the policy 'does not apply to any claim alleging exposure to or the contracting of asbestosis ...'.

69 A typical 'absolute' asbestos exclusion provides that the policy 'excludes any direct or indirect loss arising out of asbestos or any products containing asbestos sold, manufactured or distributed by the Insured or on behalf of the Insured'.

70 *Eg Utter v Asten-Hill Manufacturing Co.* 309 A.3d 583, 584 (Pa. 1973) (holding that asbestosis refers to the singular, specific disease by that name and not all diseases alleged to be caused by exposure to asbestos fibres). Interestingly, the asbestosis exclusion continues to be the subject of litigation, with the insurers arguing that the term 'asbestos' was intended to refer to all asbestos-related injuries. *Asten-Johnson, Inc. v Columbia Cas. Co.* No. 03-01552 (E.D. Pa. 2005), reported in 19 Mealey's Litigation Rept: Insurance 11, 12 (18 January 2005).

71 *Eg Schneider v Continental Cas. Co.* 989 F.2d 728, 730 (4th Cir. 1993); *LaFleur v Hollier Floor Covering, Inc.* 774 So.2d 359, 360 (La. App. 2000).

72 This article deals principally with potential claims arising out of a company's historical asbestos-containing facilities and operations. In the United Kingdom, an increasing number of contracts are being created wherein private sector companies are required to take over the operation and management of existing facilities and infrastructure (eg PPP projects where an incoming private sector consortium takes over the management of existing buildings which form part of a school, hospital or defence establishment), or contracts where employees transfer across to a new employer under the TUPE legislation. Both types of contract present potential difficulties for the company assuming responsibility: for example there may be asbestos present in the buildings which the project company is taking responsibility for, or the employees who are transferring across under TUPE may in the past have been exposed to asbestos. It is important to consider whether such asbestos-related risks are transferring to the new contractor or are being retained by the public sector authority (in the case of a new PPP contract) or the original employer (in the case of a TUPE transfer). Companies that are bidding for such contracts should seek legal advice to analyse these issues.

threatened by asbestos liabilities would be well advised to take steps to maximise the value of that insurance coverage.

As a first step, companies should collect, maintain and preserve historical EL and PL policies for as long a period of time as possible. Asbestos claims that are being asserted today may well involve exposure to asbestos and resulting injury that took place decades ago. EL and PL policies that have been on the risk during all those years may be obligated to respond to such claims. Companies threatened by asbestos claims or other long-term liabilities should not wait to compile their historical insurance policies. With the passage of time, more of such policies are lost or destroyed by brokers and insurers. For those companies that do not know how to compile their historical insurance programmes, there are professional insurance archaeologists in the United Kingdom who specialise in this task. Thus, help is available in this regard.

Another important task for companies facing asbestos liabilities is to obtain and maintain key data regarding the asbestos claims that they are defending and settling. Insurers may demand information such as the medical records of the claimant and detailed data regarding the claimant's work history as a prerequisite to paying a claim. Such data assist in determining how the liabilities for a particular claim may trigger multiple policy years.

It is also critical for corporate policyholders to provide early notice to all potential insurers of any potential asbestos claims or liability. EL and PL policies typically contain notice provisions requiring that notice be given

to the insurer at a very early stage, and some insurers contend that failure to comply strictly with such notice provisions divests the policyholder of coverage, even if the insurer has not been prejudiced by untimely notice. Although this position by an insurer may be unreasonable, it is preferable for a policyholder to avoid this type of dispute with its insurer by exercising great prudence in giving early notice of claims to any potentially responsible insurers.

Finally, and significantly, a corporate policyholder should not automatically accept the decision of its insurer in denying or limiting coverage for a claim. Insurers sometimes reject coverage of a claim based on 'market agreements' or other typical insurance industry understandings or practices that are at odds with the actual contract language of the insurance policies they have issued. A policyholder is not necessarily bound by any such market agreements or insurance industry practices. Rather, a corporate policyholder's coverage rights are determined by the language of its insurance policies and the law which has developed over the years in interpreting and applying that language. Accordingly, in the case of an asbestos claim – or for that matter any other type of complex and costly claim – a policyholder confronted with a denial of coverage by an insurer should seek professional advice as to whether such denial is reasonable and appropriate. Lawyers who are trained in the law of insurance can greatly assist a policyholder in maximising the value of its historical insurance assets.