



EL Trigger - Consequences for Reinsurers

Legacy Insurance, Asbestos and Latent Claims - Infoline Annual European Summit

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EL Trigger - Consequences for Reinsurers: Outline

- Coverage/Policy Construction
- PL - *Bolton* under threat ?
- Follow Settlements & Allocation
- Issues arising from Contribution between Insurers
- UNL: Aggregation and the effect of ACOD clauses
- Revisiting Historic Reinsurance of Captives - ELCIA1969 compliance

Coverage/Policy Construction

- Exposure & '*losses occurring during*' clauses: causation rules, “business as usual”
- ‘Not insignificant’ culpable exposure during period of cover, judged in comparison to overall exposure of victim (if insignificant, there may be no liability on grounds of lack of foreseeability, as well as for want of causation: *Williams v University of Birmingham* [2011] EWCA Civ 1242)
- Back to back cover for reinsurance of EL, in the absence of very clear terms limiting scope or period of reinsurance
- Distinctions between mesothelioma, other cancers and asbestosis

PL - *Bolton* under threat ?

- *Bolton v MMI* [2006] EWCA Civ 50 remains good law for PL policies triggered by injury occurring during the policy period. Will market pragmatism preserve the status quo ?
- *Bolton* is open to challenge on similar basis as EL, but the contextual imperative in favour of “causation” based PL cover is less powerful.
- Check wordings – some PL wordings may be very close to EL wordings, particularly in combined policies. This could produce a “difficult” case for the courts to grapple with.

PL - *Bolton* under threat ?

- As so long as *Bolton* stands, it will give rise to some inevitable battle grounds
- Can mesothelioma “occur” in more than one policy year ? Logic of Burton J’s analysis of the evidence is that mesothelioma “occurs” at one point in time. Result: time on risk not appropriate to allocate PL liability.
- Evidential battles:
 - Medical evidence concerning the moment – or period – of “occurrence”
 - Medical evidence concerning likely date of angiogenesis etc. in individual cases. The new “5 year” rule - Burton J’s “best guess” - is just a starting point.
 - Issues may not be resolved in underlying claim if immaterial to original insured’s cover – burden of proof issue for reinsurers: will they be stuck with the 5 year rule?

Follow Settlements & Allocation

- Provided it was arguable that some culpable exposure occurred within the period of original underlying cover, up to 100% of a mesothelioma claim would be within cover for the purpose of follow settlements clause requiring payment of settlements within the terms of the underlying insurance.
- If required to prove that a settlement was within the terms of the reinsurance, the reinsured must prove on balance of probabilities that there was some culpable exposure within the period of reinsurance cover: *Municipal Mutual Insurance Ltd v CSEA Insurance Co Ltd* [1998] Lloyd's Rep IR 421 & *IRB SA v CX Reinsurance* [2010] EWHC 974 – Burton J

Follow Settlements & Allocation

- Allocation - what was the true basis of underlying settlement ?
- Implications of judgment of Cooke J in *Energy Group Limited v Zurich Insurance PLC UK* [2012] EWHC 69:
 - reinsured entitled to allocate the claim to any period of cover in which the culpable exposure took place, subject to wording
 - no apportionment for periods of uninsured cover, in the absence of an applicable exclusion
- Distinctions to be drawn between mesothelioma (Compensation Act 2006), other cancers, asbestosis etc.

Issues arising from Contribution between Insurers

- Contribution according to the period of exposure will remain the touchstone for contributions between wrongdoers (as provided by s.3(4) of the Compensation Act 2006)
- This is subject to evidence establishing that exposure was more intense during a particular period - but market pragmatists would prefer the efficiency of a simple time on risk approach
- Contribution on grounds of double insurance: *Energy Group Limited v Zurich Insurance PLC UK* [2012] EWHC 69
- Distinctions to be drawn between mesothelioma, other cancers, asbestosis etc.

Issues arising from Contribution between Insurers

- Contributions between insurers *may* not depend on time on risk or intensity of exposure
- Applicable principles of equitable contribution are not finally determined – again, will market pragmatism survive with run-off insurers & reinsurers under increased pressure ?
- Room to argue that the division should be according to the number of solvent/paying insurers liable for the claim: this argument may be tested as run-off insurers become insolvent
- Also a possible argument relying upon s.2(1) of the Civil Liability (Contribution) Act 1978
- Reinsurers' position dependent on an analysis of costs v. benefits of taking such points.

UNL: Aggregation and the effect of ACOD clauses

- Aggregation by reference to cause/original cause
- Exposure as “event” for aggregation under JELC type clauses : *IRB SA v CX Reinsurance* [2010] EWHC 974 (“*each and every loss and/or occurrence ...and/or series.....arising out of one event*): Burton J – “colour from context”
- Accident Circle Occupational Disease (ACOD) clauses: any one claim, any one employee of original insured shall be one event

Revisiting Historic Reinsurance of Captives - ELCIA1969 compliance

- If ELCIA requires causation cover from 1 January 1972, where does this leave insureds with periods of pure claims made cover, reinsured into a captive ?
- Is there a continuing offence under s.5 of the ELCIA 1969 ?
- How can compliant retrospective cover be arranged effectively ?
- Is claims-made retrospective cover fit for purpose ?
- The alternative: causation cover with premium adjustment clause & annual reinsurance to close policy years, on an ongoing basis.
- Is there a wider problem – does insurance effected with an insurer which has become insolvent comply with ELCIA 1969 ?

Further reference

Articles on EL Trigger on Richard Harrison's page on the Devereux website



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