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*Practice Group:**Insurance Coverage*

Coverage Options for Employee Asbestos Claims

By Paul E. Del Vecchio, John M. Hagan, and Ngofeen Mputubwele

Over the past year, courts in Illinois and Pennsylvania have dramatically altered the ability of an employee to bring claims against past and present employers for asbestos-related injuries. Traditionally, employees were limited to the workers' compensation scheme as their sole means of recovery from employers for injuries arising out of their employment, with an exclusivity bar preventing employees from seeking recovery from their employers for such injuries in court through the tort system. But now, at least with respect to asbestos-related injuries, courts in Illinois and Pennsylvania have permitted employees to pursue common law actions for damages against their employers. In addition, Montana courts have long permitted such common law claims.¹ Policyholders with operations in states that have or may give rise to Employee Asbestos Claims should evaluate the availability of insurance coverage for their potential defense and indemnity costs related to such claims.

Courts in Illinois, Pennsylvania, and Montana Have Permitted Employee Asbestos Claims

Workers' compensation schemes were designed "to provide financial protection to workers for accidental injuries arising out of and in the course of their employment."² The general approach of these state statutes is to impose liability without consideration of fault upon an employer and, in return, prohibit employees from bringing common law tort actions against their employers.³

Relevant to asbestos-related claims, workers' compensation schemes often limit the time in which an employee can bring a claim for occupational disease.⁴ Given the long latency period often associated with asbestos-related diseases, employees with alleged asbestos-related injuries could find that they are both time-barred from seeking recovery through the workers' compensation scheme and barred from proceeding against their employers in the

¹ In addition, some states may permit employees to bring occupational disease-related claims against their employers outside of the workers' compensation system if the employee can meet an intentionality standard. *See, e.g.*, LA. REV. STAT. ANN. § 23:1032(b) (2013) (workers' compensation exclusivity does not apply to liability resulting from an intentional act); OHIO REV. CODE ANN. § 2745.01(a) (2014) (workers' compensation exclusivity does not apply if employer intended to cause injury or was substantially certain that injury would occur); W. VA. CODE § 23-4-2(c) (2014) (workers' compensation exclusivity does not apply if the employer deliberately intended to cause injury or death); *see also Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 407 (Tex. 1985) (holding that workers' compensation exclusivity does not apply if employer was substantially certain that injury would result to its employee).

² *Folta v. Ferro Engineering*, 14 N.E.3d 717, 723 (Ill. App. Ct. 1st Dist. 2014), *leave to appeal granted*, No. 118070, 2014 Ill. LEXIS 1117 (Ill. Sept. 24, 2014); *see also Tooley v. AK Steel Corp.*, 81 A.3d 851, 857 (Pa. 2013); *Gidley v. W.R. Grace & Co.*, 717 P.2d 21, 22 (Mont. 1986).

³ *See Folta*, 14 N.E.3d at 723; *Tooley*, 81 A.3d at 857; *Gidley*, 717 P.2d at 22.

⁴ *See Folta*, 14 N.E.3d at 719 (discussing Illinois' 25-year statute of repose for asbestos-related injuries and 3-year statute of repose for asbestos-related diseases); *Tooley*, 81 A.3d at 855 (discussing the 300-week period set forth by Pennsylvania's Workers' Compensation Act); *Gidley*, 717 P.2d at 22 (stating that employees had three years after their last day of work to bring a claim in Montana).

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tort system by the exclusivity provision.⁵ Faced with this situation, and despite the exclusivity bar, courts in Illinois, Pennsylvania, and Montana have permitted certain employees to bring common law claims against their former employers for asbestos-related injuries when no remedy is available under the applicable workers' compensation statute.⁶ In light of these decisions, policyholders that have had employees and operations in Illinois, Pennsylvania, and Montana may find themselves facing Employee Asbestos Claims.

Potential Sources of Insurance Coverage for Employee Asbestos Claims

For most Employee Asbestos Claims, given the time period of the exposure and injury involved, policyholders will typically turn to historical policies rather than current policies. In this regard, policyholders should generally consider the potential for coverage under both (1) employers' liability policies; and (2) general liability policies, including both primary and umbrella policies.

Employers' Liability Policies

When faced with common law claims brought by employees, policyholders typically will look first to their employers' liability insurance for coverage. Such insurance, which is often provided in combination with workers' compensation insurance in a single policy, generally covers claims that the insured's employees bring against the insured for bodily injury arising out of and in the course of the claimant's employment with the insured. Thus, the purpose of employers' liability insurance is to provide coverage for employee claims that are not covered under the applicable workers' compensation scheme or workers' compensation insurance. Employers' liability insurance may also impose a duty to defend on the insurer, meaning that the insurer will have to provide the insured with a defense to the employee's claim.

Employers' liability policies may contain provisions that insurers will argue exclude or limit coverage for Employee Asbestos Claims. For example, some employers' liability insurance policies purport to exclude coverage for claims brought against the insured a certain period of time, often three years, after the policy period expires. Insurers with such a provision in their policies may assert that any Employee Asbestos Claims brought after the relevant time period are time-barred. In addition, some policies may require that an employee's "last day of last exposure" to the conditions causing an occupational disease occurs during the policy period. Insurers may argue that this provision limits the available coverage to the policy in effect when the employee was last exposed to asbestos in the course of the employee's employment with the insured. Furthermore, some policies may include asbestos exclusions.

It is important to note, however, that these provisions do not appear in all employers' liability policies, and even when they do, their wording often varies and the application of these provisions may also vary. Further, if coverage is limited or unavailable under a policyholder's employers' liability policies, the absence of coverage under such policies may permit a policyholder to pursue coverage under its umbrella liability policies, as discussed below. As

⁵ Employees who found themselves unable to recover from their former employers nevertheless often pursued tort claims against non-employer asbestos defendants that the claimants alleged were responsible for their asbestos-related bodily injuries.

⁶ See *Folta*, 14 N.E.3d at 728 (finding that the exclusivity bar does not apply to an employee's potential claim that becomes time-barred before he ever learns of it); *Tooev*, 81 A.3d at 865 (concluding that the workers' compensation statute was not intended to apply to disability or death from occupational disease manifesting more than 300 weeks after the last occupational exposure); *Gidley*, 717 P.2d at 24 (finding that an employee's common law remedies were preserved when an employee was not eligible for workers' compensation).

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a result, policyholders facing Employee Asbestos Claims should evaluate carefully the coverage potentially available under their employers' liability policies.

General Liability Policies

In addition to employers' liability policies, which provide coverage specifically for claims brought by employees, policyholders may also find coverage for Employee Asbestos Claims under their general liability policies. General liability policies typically provide coverage for claims alleging bodily injury, and these policies are the most common source of coverage for asbestos claims brought by non-employees. However, general liability policies often exclude coverage for claims related to bodily injury of any employee of the insured arising out of and in the course of the employee's employment by the insured. On the other hand, not all general liability policies contain such an exclusion. Additionally, some general liability policies may contain an endorsement that deletes the policy's employee claims exclusion and specifically and expressly provides for employers' liability coverage under the policy. Finally, primary general liability policies typically contain a duty to defend that the policyholder can seek to invoke if the employee's claim is potentially covered under the policy. Accordingly, policyholders should review their general liability policies to determine whether any of their policies may potentially provide coverage for Employee Asbestos Claims.

Umbrella Policies

Policyholders may also look to umbrella or other excess insurance policies for coverage for Employee Asbestos Claims. Although these policies may contain some of the exclusions and limitations discussed above, an insured may nonetheless successfully pursue coverage under certain umbrella policies. In particular, umbrella policies often provide "drop-down" coverage excess of a retained limit when coverage is not provided by underlying insurance policies. Thus, if coverage is available under the wording of an umbrella policy but not the wording of an underlying primary general liability policy or employer's liability policy, the umbrella policy may drop down to provide coverage excess of the amount of a retained limit. Furthermore, an umbrella policy that drops down may impose a duty to defend on the insurer. Such umbrella insurance could prove valuable to the policyholder, particularly if retentions are modest and limits substantial.

Policyholders Should Act Promptly

Policyholders with historical operations in Illinois and Pennsylvania now may face Employee Asbestos Claims for the first time, joining those in Montana who had already been at risk for such claims. These policyholders should act now to evaluate their potentially-applicable insurance policies. By proactively identifying these policies and carefully considering their terms, policyholders may be able to secure coverage for this emerging species of asbestos claims.

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Authors:

Paul E. Del Vecchio

paul.delvecchio@klgates.com

+1.412.355.6243

John M. Hagan

john.hagan@klgates.com

+1.412.355.6770

Ngofeen Mputubwele

ngofeen.mputubwele@klgates.com

+1.412.355.8915

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