

# Emerging Liability Risks – A Practical Accumulation Example

---

Wilhelm Zeller

11<sup>th</sup> Annual Liability Regimes Conference

Keeping the Floodgates Shut? Mastering Accumulation  
and Bodily Injury Exposures in a Rapidly Changing Environment

4–5 November 2015, Rüschtikon

A high-angle photograph of a massive concrete dam. The dam's surface is composed of large, rectangular concrete panels with visible vertical joints. A wide, light-colored concrete walkway runs along the top edge of the dam, bordered by a low metal railing. Several people are walking along this path, providing a sense of scale. The dam is situated next to a body of dark blue water. The overall scene is bright and clear.

# Emerging Liability Risks – A Practical Accumulation Example

Wilhelm Zeller, Rüschtikon, 4 November 2015

# Agenda

## Emerging Liability Risks – A Practical Accumulation Example

**A useful product turning into the  
largest tort case in U.S. history**

The evolution of a tort liability

“It ain’t over until...”



## A (not so) brief history of asbestos

- Asbestos mining existed more than 4,000 years ago.
- Asbestos had many desirable physical properties.
- The word “asbestos” means “inextinguishable” hence its remarkable properties of resistance to fire, heat, electrical and chemical damage, sound absorption, tensile strength, and affordability.
- As a result, its use was extremely widespread, particularly for electrical and building insulation.
- During WWII millions of workers were brought into the U.S. shipbuilding industry which exposed them to asbestos.



*Estimates suggest that during 1940-1979, the worker population exposed to asbestos may have exceeded 13 million.*

## Asbestos was not a 'miracle' fiber

- Asbestos was used from the turn of the century until the early 1970s in nearly every aspect of manufacturing and incorporated into thousands of products because of its unique properties.

→ *No one foresaw the chain of events that has led to the longest running and most expensive tort litigation in U.S. history.*

## The emergence of health issues

- Health issues related to asbestos exposure can be found in records dating back to Roman times.
- It is now known that prolonged inhalation of asbestos fibers can cause serious and fatal illnesses such as lung cancer, mesothelioma and asbestosis.
- By the 1980s and 1990s asbestos trade and use started to become banned, phased out or heavily restricted in many countries.
- The insidious characteristic of asbestos-related illnesses is the long latency period; manifestation of the disease can take decades after first exposure.



*The typical latency period of mesothelioma can span 30 years or more.*

# Agenda

## Emerging Liability Risks – A Practical Accumulation Example

A useful product turning into the  
largest tort case in U.S. history

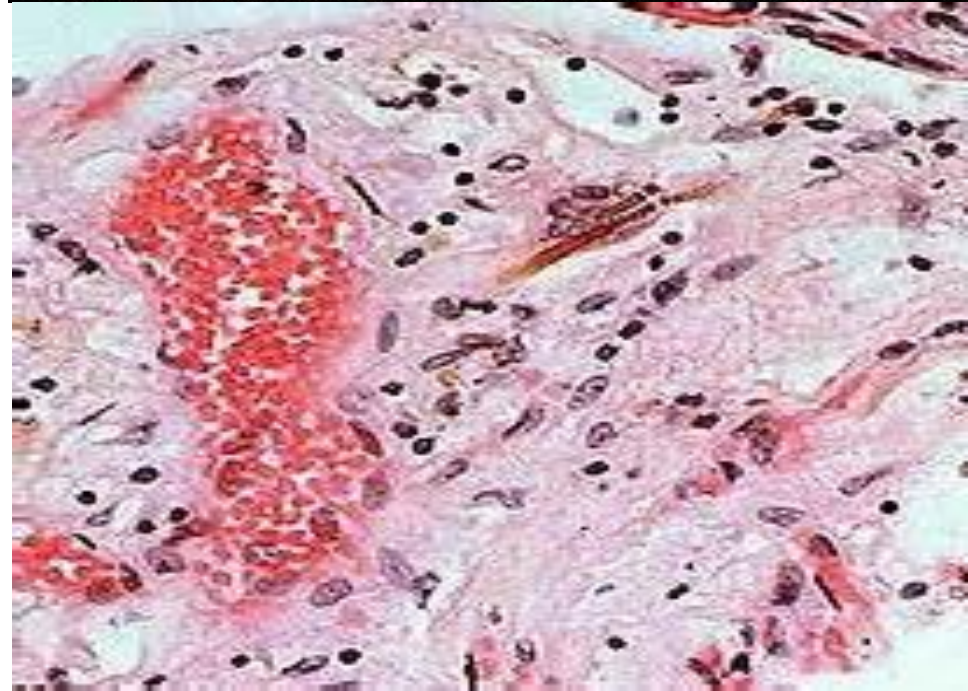
**The evolution of a tort liability**

“It ain’t over until...”



## The Evolution of Asbestos Liability

- 1964: Dr. Irving Selikoff published his seminal study linking the development of asbestosis, mesothelioma and lung cancer in asbestos workers to the inhalation of asbestos particles.
- At this time the sole remedy for work-place related diseases was under the Workers' Compensation system.
- These compensation amounts were relatively modest.
- In order to find a "deep pocket" for the hundreds of thousands of workers affected, the law had to be changed.





## Historical Progression of Available Recovery

- 1973: Workers Compensation as avenue of recovery was expanded:  
*Borel v. Fiberboard Paper Products Corporation*: The Fifth Circuit upheld the *Borel* trial court ruling which EXTENDED the doctrine of strict product liability to asbestos related diseases.
  - 1978: This was expanded to include manufacturers: *Barker v. Lull [20 Cal.3d417]*
- Tens of thousands of asbestos cases followed.



# The search for the “deep pocket”: The maximization of liability-insurance coverage

- The insuring agreement of typical CGL policies:

*“The company will pay ... as damages because of bodily injury or property damage caused by an occurrence.”*

- What is the OCCURRENCE triggering coverage in asbestos-related claims?



# Exposure Theory

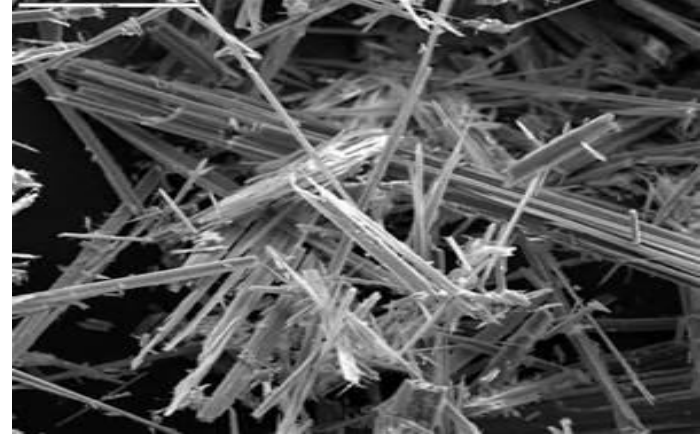


*Policy is triggered on the **date of first contact of the injury-producing agent.***

In *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6<sup>th</sup> Cir. 1980), the court found that the occurrence was the contact of asbestos fibers with the lungs, notwithstanding the fact that it took time to develop a disease.

- The court acknowledged that the exposure theory did not provide insurers with a method to monitor risk and charge appropriate premiums.
- The exposure theory did not allow insurers to end possible losses (outside of coverage limits).
- The exposure theory limited recoveries to claimants because purchased policy limits were low.

# Manifestation Theory



*Under the Manifestation Theory, there is no trigger of coverage until the disease **'manifests' itself.***

- In *Eagle-Pitcher Industries v. Liberty Mutual Insurance Company*, 682 F.2d 12 (1<sup>st</sup> Cir. 1982), the court adopted the manifestation theory to find coverage.
- The incidence of 'manifestation' itself has been broadly interpreted to maximize coverage.
- It became clear that courts intended to adopt interpretations to find solvent carriers and coverage.
- And, limits purchased under these policies were much higher, but product liability claims were still subject to AALs.

## Continuous Trigger Theory



*The date of the occurrence **starts with exposure and ends with manifestation.***

- All insurers participating over this span of time were held liable.
- *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. 1981), held that continuous trigger was “the most efficient doctrine” (Efficient meaning essentially broadest sweep of coverage)
- Now all policies in effect over a period of decades had to respond, BUT . . .
- Policies were still subject to AALs.

## Products vs. Non-Products Claims



- A new liability topic emerged in the 2000s regarding whether asbestos bodily injury claims fall outside of the products coverage in CGL policies.
- In 2001, twenty thousand claimants asserted that the asbestos claims were 'non-products' claims from installation activities and were NOT subject to any aggregate limits of liability.
- The aspect was that the liability policies offered **unlimited coverage** for asbestos bodily injury claims for installation operations.

## An unforeseen tidal wave:

What was once thought to be an exclusive Workers' Compensation Claim expanded to:



- Manufacturers
- Premises Owners
- Installers
- Finance Entities: Banks
- Retailers of asbestos products
- Alleged corporate conspirators
- ***AND INSURERS***

# Aggregate extension clause



- A seemingly innocuous reinsurance clause

*As regards liability incurred by the reinsured for losses on risks covering on an aggregate basis, this agreement shall protect the reinsured excess of the amounts as provided for herein in the aggregate any one such aggregate loss up to the limit of indemnity as provided for herein in all any one such aggregate loss.*

- These clauses were introduced in the 1930s or 1940s in the reinsurance of primary policies that covered unexpected fluctuations in the insured's potential liability in respect of a large number of comparatively minor bodily injuries.
- Key issue with the clause is the unexpected emergence of small claims, like in occupational diseases cases, which would not trigger the excess of loss treaty on an individual basis, but would do so if aggregated as per the "aggregate extension clause."



# Agenda

## Emerging Liability Risks – A Practical Accumulation Example

A useful product turning into the  
largest tort case in U.S. history

The evolution of a tort liability

**“It ain’t over until...”**

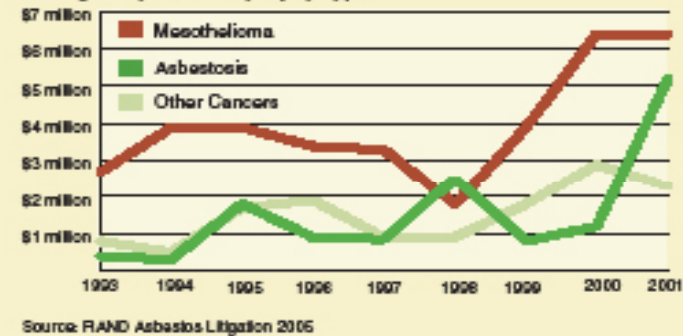


## Many Years Later

*The entire commercial liability industry had to pay for asbestos related diseases.*

### Jury Awards Have Soared in Recent Years, Especially for Mesothelioma

Average Jury Awards by Injury Type



- By 1990, the average compensation per claim was \$64,000
- In recent years, considerable spikes:
  - \$6M for Mesothelioma
  - \$5M for Asbestosis
  - \$2M for Other Cancers
- In 1985 a (then pessimistic) actuary estimated the cost for the next 30 years to be USD 38bn.
- In 2005, the *Economist* estimated the total cost of asbestos litigation (not: insured losses) in the United States to exceed USD 250bn.

## The \$64,000 Question

*What if insurers had to reserve the ultimate amount of asbestos losses as of 12/31/2015?*

- U.S. insurers have been funding asbestos liabilities on a pay as you go basis for nearly a decade with losses around USD 2bn annually.
- In 1984, General Re, (the largest, highest capitalized and profitable insurer in the U.S.) had capital and surplus at 12/31/1984, that was far exceeded by the casualty reserve adjustments in the following 24 months.
- What if other reinsurers had also attempted to reserve the ultimate cost of their casualty claims...?

Q&A

