

Lead-Based Paint

2007 Casualty Loss Reserve Seminar

Emerging Mass Tort Claims

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Disclaimer

My comments at the conference/seminar are illustrative only and do not represent the official position of Swiss Reinsurance America Corporation, nor are they intended to refer to any specific pending matter.

Where are we

- Lead paint litigation is beginning to fade
National Law Journal, August 20, 2007
- Today everyone is exposed to environmental lead
US Department of Health and Human Services Agency for Toxicity and Disease Study

Where are we going

- With the plaintiffs success at the trial level in Rhode Island and at the appellate level California, it seems as though momentum is building behind lead paint litigation.

Mealey's Litigation Report: Lead January 2007

- Which is it? Where are we going?

Lead is everywhere

- Lead Paint in Toys, Jewelry manufactured in China
- 1 Potentially hazardous amounts of lead have recently been found in the following types of consumer products by the United States Consumer Product Safety Commission

Where

organic chocolate candies, imported candy wrappers, vinyl lunchboxes, water pipes, food packaging, paint on children's toys including baby rattles, toy jewelry, enameled or ceramic pots and dishware, crystal decanters, hair dyes, ammunition, stained glass, automobile batteries, make-up, pool cue chalk, colored newsprint, candle wicks, and imported kettles.

Mealey's Litigation Report: Lead January 2007

Insurance

- Insurance
- The universe is expanding
- Don't worry about the universe, you're in Brooklyn
- Will they get to insurance?
- Hurdles/Coverage Defenses

Background

- Personal injury lawsuits
- Public nuisance lawsuits

Lead Poisoning

- New York Family receives \$12.75 M Settlement in Lead Poisoning Case

A Brooklyn family will receive more than \$12 million in a lead settlement with the City of New York and various landlord defendants - the largest lead-paint settlement in state history

Mealey's Litigation Report: Lead June 26, 2007

Health Effects

- Studies have shown that ingesting lead paint chips or dust can cause mental retardation, physical problems and death, particularly in young children and developing fetuses.

Defendants

- Property owners / Landlords
- Municipalities
- Housing Authorities
- Lead Paint/Pigment Manufacturers
- Manufacturers of Products with Lead Paint

Product Liability - Who

- Identify the Product
- "In all tort cases, the plaintiff must prove that each defendant's conduct was an actual cause, also known as cause-in-fact, of the plaintiff's injury,"
“Lead pain: Missouri High Court: Causation not Shown in St. Louis Case”, Mealey's Litigation Report: Lead June 13, 2007

Product Liability

- A bedrock principle of products liability law is that the plaintiff must prove that the defendant was an actual cause of his or her harm. Many cases have been dismissed on summary judgment for a lack of evidence identifying which defendant's product the plaintiff was exposed to.

Product Liability/Causation

- actual causation can be established only by identifying the defendant who made and sold that product, as opposed to the city's contention that actual causation could be established simply by showing that the defendants contributed to the public health hazard via evidence of "community wide marketing and sales of lead paint."

Product Liability

“Market-Share Liability; Column; Courts first accepted the theory in DES litigation; Theory not accepted in lead paint and firearms cases”

J. Russell Jackson, *The National Law Journal*,
7/9/07

Alternative Theories of Liability

- Market share liability/risk-contribution liability
- Enterprise liability
- Public Nuisance

Bodily Injury

- “Asbestos and DES cause a signature injury, lead does not”
Paint & Suffering, CLAIMS, Sept. 1993
- Where did the exposure come from?

Arguments Against Paint Industry

- "Everyone else has come to the table to solve this problem," Hines said. "The federal government, the city, the property owners and the landlords are there, but the missing element is the industry that created this poisonous, toxic time bomb."
"Lead paint suit fails".

Milwaukee Journal Sentinel, June 23, 2007

Insurance Coverage?

- Issues/Defenses
- “As Damages”
- Duty to Defend
- Trigger
- Allocation
- Limits
- Etc.....

“So Who Pays”

“So, Who Pays?”

So, in lead paint cases, which insurers pay?

The answer depends on the facts and the evidence. The key is not to assume that all policies within the time frame of the allegations in the complaint are on the hook.

“So Who Pays”

At the outset of a claim, a cost sharing agreement will allow for the payment of defense. Thereafter, as the facts are developed and evidence is gathered, decisions can be made as to indemnity obligations and ultimately resolution of the claim.”

“Outside Counsel; News; Lead Paint Cases: Which Insurers Pay?” Louis G. Adolfsen, 28 September 2006, New York Law Journal

Limited Exposure

- Lead paint litigation is beginning to fade

National Law Journal, August 20, 2007

- With the plaintiffs success at the trial level in Rhode Island and at the appellate level California, it seems as though momentum is building behind lead paint litigation.

Mealey's Litigation Report: Lead January 2007

Where are we going?

- No where fast, probably
- Too many hurdles – no legs
- Conservative trend in courts
- Too many threshold legal problems
- Not enough deep pocket defendants
- Too many defenses for insurers

Then again?

- But the then again? is what makes the our role, actuaries, claims, attorneys, finance people, interesting.

Welding Rods Case Study

ARPC, Inc.
Casualty Loss Reserve Seminar
San Diego, CA

September 10, 2007

Discussion Topics

- I. Review of Current Status of Welding Rod Litigation**
 - A. Overall Status**
 - B. MDL Proceedings**
 - C. Other Recent Milestones**
 - D. Status of Studies**

- II. Case Study – Forecast for Single Defendant**
 - A. Estimating Exposed Population**
 - B. Incidence of Key Disease(s)**
 - C. Propensity to Sue**
 - D. Quantifying Awards**

Current Status of Welding Rod Litigation

- Since January 2006, the total number of cases pending against welding defendants has dropped more than 50%.
- All five welding fume trials in 2006 resulted in defense verdicts, including cases in Illinois, Texas and Arkansas.
- Defendants have won 16 of 17 trials to date.
- Plaintiffs have moved to dismiss more than 3,100 cases in the federal MDL in the past eighteen months.
- MDL “proof cases” have been withdrawn in increasing numbers by plaintiffs.

* From “Welding Fume Litigation Status Report, August 2007”, Welding Rod Defense Network.

MDL Proceedings

- In July 2005, a federal panel consolidated over 3,800 cases under the US District Court in Cleveland.
- Plaintiffs have moved to dismiss more than 3,100 cases.
- A December 31, 2006 deadline for a Case Administrative Order resulted in more than 1,000 plaintiff dismissals.
- Fraud and weak medicals forced dismissal and replacement of dozens of cases in the MDL sampling exercise.

Other Recent Milestones

- The MDL is requiring agreement on dismissal of many “peripheral” defendants.
- Plaintiff’s failure to read warnings is grounds for summary judgment for the defense (Boyd case, July 2007).
- Over 20 cases scheduled for trial in state courts in 2007 have been postponed, dismissed or otherwise moved off the trial calendar.

Status of Studies

- Only one scientific study, published in 2000, even remotely indicates a link between welding rods, manganese and the onset of Parkinson's disease.
- The following studies found no causal link between manganese exposure and the arising of Parkinson's disease.
 - ✓ 2007 European Commission Study of 959 individuals
 - ✓ 2007 Article reviewing pathology studies on manganese and Parkinson's
 - ✓ 2006 Swedish study of 50,000 welders
 - ✓ 2006 U of Pittsburgh medical study of 12,595 welders in Caterpillar plants
 - ✓ 2006 South Korean study of welders in the shipbuilding industry
 - ✓ 2005 Frigerio study of 392 workers in Olmstead, MN
 - ✓ 2005 South Korean study of 776 workers exposed to manganese

Case Study: Methodology

- Step 1 – Determine the exposed population.
- Step 2 – Estimate timing and number of individuals who may develop Parkinson's Disease within the exposed population.
- Step 3 – Estimate the number who will actually file a claim.
- Step 4 – Calculate the likely award per case.
- Step 5 – Calculate the total likely award across all cases.

Step 1 – Determine Exposed Population

- Source of Welder occupation statistics – Bureau of Labor Statistics.
- Cut-off year for employment is defendant-specific.
- Conversion is required to transform welder employment totals to living population total as of date of forecast.
- As of the 2004, ARPC estimates 2.9 million welders were still alive.

Estimated Number of Employed Welders

Time Period	Average Annual Employment
Pre-1930	205,000
1930's	185,000
1940's	299,000
1950's	336,000
1960's	367,000
1970's	409,000
1980's	424,000
1990's	433,000

* From US Bureau of Labor Statistics

Step 2 – Estimate Arising of Parkinson’s Disease

- Because of the lack of established causality, ARPC uses the general US incidence rate of arising of Parkinson’s Disease.
- Over the next 40 years, ARPC estimates that approximately 200,000 welders would develop Parkinson’s Disease.
- The timing of the arising of Parkinson’s among welders was assumed to be the same as the arising of the disease nationally.
- The forecast assumes NO causal link between Parkinson’s disease and welding.

Estimated Incidence of Parkinson's Disease

Among US Welders

Time Period	Parkinson's Cases
2004 to 2013	47,000
2014 to 2023	49,000
2024 to 2033	53,000
2034 and Later	53,000
TOTAL	202,000

Step 3 – Estimate Propensity to Sue

- Client-specific data is used for this calculation. Assume for example that 5,000 claims had filed alleging manganism or Parkinson's-like diseases in the past three years.
- ARPC's incidence model from Step 2 indicates that approximately 14,000 welders should have developed Parkinson's Disease during this 3-year period.
- Therefore, a reasonable estimate of the propensity of Parkinson's victims to sue the company was 35.7% (5,000 / 14,000).
- Similarly, over the same period, assume another 2,000 claims were filed asserting lesser diseases.
- Therefore, a reasonable estimate of the propensity to sue for lesser diseases is approximately 40% of the Parkinson's rate, or 14.3% (2,000 / 14,000).
- We assume these rates remain constant over the forecast period.

Step 4 – Estimate the Value per Case

- In a recent effort, ARPC conducted jury verdict research to establish a reasonable award for Parkinson's and the less serious illnesses.
- We elected to use three impairment types to estimate the average jury award to be \$766,703.

Plaintiff Jury Verdicts 2000 to 2004

<u>Impairment Type</u>	<u>Number of Plaintiffs</u>	<u>Average Verdicts</u>
Allergies	2	\$755,500
→ Behavioral/Cognitive/Neurological Dysfunctions - 1	123	\$757,627
Behavioral/Cognitive/Neurological Dysfunctions - 2	325	\$10,769
Cancer	10	\$5,435,517
Dizziness/Fatigue/Headaches/Nausea	10	\$3,700
Emotional Distress/Post Traumatic Stress	3	\$33,667
Immune Deficiencies, Respiratory Dysfunctions	3	\$907,124
Other	1	\$110,000
→ Parkinson's-like Symptoms	7	\$892,857
→ Parkinson's Disease	1	\$1,000,000
Respiratory Dysfunctions	115	\$76,178
Total/Average	<u>600</u>	<u>\$285,890</u>
Behavioral/....1 and Parkinson's Only	131	\$766,703

Step 4 – Estimate the Value per Case (Cont'd)

- ARPC further adjusts the verdict average to account for the discounted value of settlements versus trial awards and the defendant's allocable share of their claimants' ailments.
 - ✓ Experience in the asbestos litigation and settlement arena indicates that settlement values are about one-third of jury verdicts.
 - ✓ The company's "market share" was estimated to be 23%.

Estimate of Average Parkinson's Award

Average Trial Verdict Award	\$767,000
Discount for Settlement	x 33%
Discount for Market Share	x 23%
Net Average Award	<u>\$ 58,215</u>

Step 4 – Estimate the Value per Case (Cont'd)

- The value of minor impairment cases has been shown in other arenas (asbestos, Fen-Phen, Silicone Breast Implants) to be around 4.3%.
- For this example, ARPC estimates the award to such cases to average \$2,500.

Estimate of Average Minor Disease Award

Average Trial Verdict Award	\$767,000
Discount for Settlement	x 33%
Discount for Market Share	x 23%
Net Average Award	<u>\$ 58,215</u>
Discount for Minor Impairment	x 4.3%
Net Average Minor Award	<u><u>\$ 2,500</u></u>

Step 5 – Estimate Total Value of Future Compensation

- Only a certain percentage of the claims filed will actually be compensable.
- Claims may be invalidated based on (1) failure to prove exposure to the client's products as well as (2) inadequate qualifying medical proof.
- ARPC assumed a range of possible rates for compensation and applied those rates to the predictions generated through Step 4.

**Forecast of Amount Required to Settle All Pending
And Future Manganese-Related Claims
(\$Millions)**

<u>Claim Type</u>	<u>Total Number of Claims</u>	<u>Settlement Amount</u>	
		<u>Nominal</u>	<u>Present Value</u>
Future Claims			
10% Compensable	95,245	\$395	\$110
20% Compensable		\$789	\$220
40% Compensable		\$1,579	\$442
Pending Claims			
10% Compensable	12,155	\$28	\$25
20% Compensable		\$57	\$49
40% Compensable		\$113	\$98

Case Study: Methodology

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Emerging Mass Tort Claims

Summary

Sandra C. Santomenno

September 10, 2007

Summary Remarks – Items to consider

- Years of exposure will be as long as 75-100 years ago – that data may not be in your development triangle
- Claim data should be separated out of regular reserve data
- Work with your claims dept. to determine how many of your insureds are potentially exposed to the litigation
- Work with the claims dept. or claims counsel to try to gather data for an alternative forecast (i.e. use a frequency/severity approach and overlay with coverage terms and exposure years)