

THE RHA REVIEW

ROUTE TO:

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The MacArthur Saga

By Robert N. Hughes, CPCU, ARM

fo·ren·sic 1: belonging to, used in, or suitable to courts of judicature or to public discussion and debate.

(With apologies to Mickey Spillane, rest his soul.)

I spotted her in the hotel lobby that October morning. She was a living doll. She was also a lawyer working for two guys from Minnesota. Faricy and Roen were their names; lawyering was their game. Rebecca Kassekert was her name. She told me she had a job for me. "Here's the story," she said ...

"... it is the 1980s. Asbestos claims have destroyed the mighty Johns Manville and most of the other asbestos products manufacturers. Plaintiffs' attorneys representing parties suffering from asbestos-related disease such as mesothelioma and asbestosis have begun pursuing the companies that sold and installed asbestos-containing products. The liabilities are gigantic. The installer companies' assets are disappearing rapidly. Insurers are running for cover. We represent one of those installers."

I stirred my coffee and tried to pay attention to her story instead of her eyes.

"Here are the players," she went on ...

"Our client is MacArthur Company — a small St. Paul, Minnesota-based, installer — one of Manville's biggest distributors. MacArthur bought the assets of Western Asbestos, a defunct

California asbestos installer. We've hired Brobeck, Phleger & Harrison as our California-based co-counsel.

John Faricy has gotten Johns Manville's insurers to provide \$10 million in coverage to MacArthur.

USF&G — The insurer that Western Asbestos believed wrote its primary liability insurance for 30 years or more.

"If Western MacArthur was unsuccessful in proving up coverage, it would be gone, and there would be no funds to compensate the alleged victims."

Hartford — One of MacArthur's insurers, which maintained their limits had been exhausted.

And there's you, Robert Hughes. We need coverage. We've got no policies."

Okay, I give up. I'm not Mike Hammer, so here's the story.

The Story

In 1986 a California court ruled that MacArthur had acquired all of Western Asbestos' claims when it bought the

assets. Western had no assets. MacArthur's assets were almost gone. USF&G, the insurer that Western believed had insured it for 30 years, claimed it had never heard of Western Asbestos. MacArthur's insurers, principally Hartford, claimed it had already exhausted its policy limits.

Faricy & Roen forced Manville's insurers to create a \$10 million trust fund for Western/MacArthur, which it used to pursue USF&G, Hartford and others. They were joined by attorneys representing the alleged victims.

USF&G continued to claim that it had never heard of Western Asbestos and also claimed that, even if the company had written liability coverage, Western could not prove that the policies contained products/completed operations coverage. Further, even if it could prove that, the policies would have annual aggregate limits for products/completed operations claims,

(MacArthur, continued inside)

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(MacArthur, continued from cover)

so the worst-case exposure for USF&G was about \$30 million.

If Western MacArthur was unsuccessful in proving up coverage, it would be gone, and there would be no funds to compensate the alleged victims.

Western Asbestos had no policies and very scant secondary evidence. All it had was two certificates of insurance from 1949. Keep in mind that the burden of proof for the policyholder in a lost-policy case is that the policyholder must prove the existence and relevant terms of policies. The only physical evidence we had was two certificates of insurance from the late 1940s.

Liability policies cover claims arising from premises and operations, but if injury occurs after the insured has left the premises or relinquished the product, the insured must have products/completed operations coverage.

By contrast, claims from persons exposed to asbestos while the product was being installed would be premises/operations claims and not products/completed operations claims.

“Keep in mind that the burden of proof for the policyholder in a lost-policy case is that the policyholder must prove the existence and relevant terms of policies. The only physical evidence we had was two certificates of insurance from the late 1940s.”

Premises/operations coverage is subject only to per-occurrence limits.

Products/completed operations claims are generally subject to limits per occurrence AND on an aggregate basis. We had some hints, however,

that this might not be the case with Western Asbestos.

So here's what we needed to prove. We needed to prove up the existence and terms and conditions of forty years or more of CGL coverage for Western Asbestos, and we needed to be able to prove that the policies covered products/completed operations claims, with no aggregate limits.

We also needed to prove that the claims that Hartford had paid as products/completed operations claims, subject to aggregate limits, were, at least in part, actually premises/operations claims.

Key Forensic Successes

In 1999, after 13 years of attempting to prove coverage, investigators hired by Brobeck found Franklin Harris, the former chief underwriter for USF&G. Though elderly, Harris' mind was clear, and he was willing and able to testify that he remembered Western Asbestos well. He confirmed that USF&G wrote CGL coverage for Western for

FROM NEAR AND FAR



According to the Insurance Services Office, 13 weather-related catastrophes in the second quarter of 2006 produced as much as \$3.7 billion in claims to property and casualty insurers. By ISO's definition, a catastrophe is an event that causes \$25 million or more in insured losses. Indiana, Tennessee and Texas all had more than \$600 million in P/C claims in the second quarter.



El Paso, TX – Heavy rains in far West Texas during early August resulted in the destruction of more than 300 homes and caused extensive damage to many more in El Paso. More than 15 inches of rain fell on the area in less than a week. According to www.elpasoinfo.com, usual annual rainfall is only 8.65 inches. Insured claims are expected to exceed \$100 million.



New York, NY – According to the Insurance Information Institute, nearly 95 percent of all homeowners' claims in Mississippi and Louisiana have been settled. The I.I.I. says that 658,700 claims in Louisiana have settled for a total of \$10.3 billion, and 334,800 Mississippi claims have settled for \$5.2 billion. Also, almost all (99 percent) of damaged-vehicle claims have settled for a total of more than \$2 billion.



Orlando, FL – The American College of Forensic Examiners will hold its 14th national conference September 21 to 23 at the Buena Vista Palace in Orlando. Keynote speaker is Barry Scheck, co-founder of the Innocence Project. Also speaking will be our own Robert Hughes, who will team with Joseph Miller and Thomas Beaver to present “The High-Profile Case and the Compensated Expert.”

(MacArthur, continued from opposite)

decades, that the policies provided products/completed operations coverage and that there were no aggregates. USF&G attempted to characterize him as a nice old man with an imperfect memory who didn't know what he was talking about. That didn't fly, however, and the jury believed every word of his testimony.

A Brobeck paralegal, a museum buff, stumbled across a new collection donated to the Baltimore Museum of

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Industry. Dubbed the "USF&G collection" it contained thousands of documents from USF&G's files, including underwriting manuals, claims manuals, claims files, etc. All of the documentation explained that EVERY USF&G CGL policy automatically contained products/completed operations coverage. The documents also included samples of policy wordings that were described as "common terms and conditions" for all USF&G-issued CGL policies.

Faricy & Roen were able to obtain documents relating to St. Paul's due diligence in the acquisition of USF&G. One memorandum revealed that executives for St. Paul knew very well

that USF&G had written CGL coverage for Western Asbestos for decades and that the earlier policies had no aggregate limits. The memo insisted that USF&G's exposure was between \$30 million and \$50 million at most.

After being retained as a consulting expert in 2001, RHA attacked the huge volume of documentation known as "drafting history" that was produced by the ISO and its predecessor organizations. The documentation contains millions of pages of information regarding the intended interpretation and application of the insurance policies issued by member companies such as USF&G. We were able to locate numerous documents in which the ISO confirmed that, while most CGL policies contained aggregate limits for products/completed operations, the policies issued on the West Coast did not. This enabled us to ratify Frank Harris's testimony.

RHA also discovered hundreds of documents in the ISO materials that confirmed that injuries to persons who were first exposed to asbestos while a policyholder was conducting installation operations at a site would be covered under the premises/operations section of the CGL, with no aggregates.

RHA was also able to produce samples of standard policy forms. I testified that the rules of the ISO and its predecessor organizations required their members/subscribers to use these forms. Therefore, these are the forms that USF&G would have used. This satisfied the policyholder's second burden of proof ... the terms and conditions.

I also testified that the 1949 certificates of insurance were standard industry documents that were commonly used and relied upon by

policyholders, their customers and insurers alike.

The Result

The case went to trial in the spring of 2002. After three months, I was called to testify in Western MacArthur's rebuttal presentation. I testified for two days. The next week USF&G settled for \$987 million. In December of the next year, Hartford, the company that had maintained its policy limits had been exhausted decades before, settled just prior to trial for \$1.14 billion. All of

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the money remaining after the lawyers were paid has been placed in a trust for the benefit of past and future claimants.

To date, more than 6,000 persons have made claims against Western MacArthur for asbestos-related illnesses.

Oh, yeah, Rebecca got married. 

Robert N. Hughes is founder, chairman of the board, and chief executive officer of Robert Hughes Associates, Inc. Mr. Hughes served as the lead insurance expert in the Western MacArthur trial.

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New RHA Associate

Please join us in welcoming Derwood K. Winfree, CLU, CEBS, to the RHA group of experts and consultants.

Derwood has a very strong background in employee benefits, health and life insurance, defined-benefit pension plans, ERISA and employee-benefit TPA operations.

He was most recently senior field consultant for the National Rural Electric Cooperative Association. His duties with NRECA were to advise on its

health and welfare benefits, defined-benefit pension plans, defined-contribution plans and 401(K) plans. Prior to that he was with Fleming Companies, Inc., where he was the trustee of its partially self-insured ERISA plan.

Derwood is an accomplished speaker and often participates in conventions, workshops and retirement-planning events.

Please contact us if you would like Mr. Winfree's full CV. 

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