Litigation

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English Law Reinsurance Contracts May Not Cover Asbestos or Other U.S. Liabilities

by Raymond L. Sweigart

In the words of the Court of Appeal in Faraday Reinsurance Co Ltd v Howden North America Inc & Anor *[2012] EWCA Civ 980 (20 July 2012), "it would be idle to pretend that the English courts and the American (including the Pennsylvania) courts see eye to eye on the question of the liability of insurers to respond to asbestos claims. The English courts do not accept the triple trigger of liability, nor do they accept that insurers are liable if the relevant trigger does not occur within the strict time limits of the policy."*

The *Faraday* court continued: "In *Wasa v Lexington Co, [[2009] UKHL [2010] A.C. 180],* the House of Lords held, for example, that a reinsurance contract, if it is governed by English law, does not respond to an American insurer which is required to pay in response to American notions of insurer-liability, unless it can be shown that the insurer's liability arose during the currency of the English policy. In these circumstances it is inevitable that differing conclusions may be arrived at by courts in England from those that would be arrived at in (at any rate some) states in America."

In *Faraday*, an excess insurer brought proceedings in England for a declaration that an excess layer policy provided no liability cover to the named insured for asbestos claims. More specifically, Faraday sought declarations that (a) the policy that insured Howden is governed by English law and subject to the jurisdiction of the English courts; (b) as a matter of English law, effect must be given to the periods under each policy; (c) under each policy, Faraday would be liable to indemnify Howden only insofar as the personal injury or property damage happened (or occurred) during (and not before or after) the relevant policy period; and (d) Faraday is liable to indemnify Howden in respect of legal liability only insofar as (i) claims were made against Howden during the relevant policy period or (ii) claims have subsequently been made against Howden which arise out of any circumstances which could reasonably have been expected to give rise to a claim under the policy, and as to which Howden became aware during the relevant policy period. The insured, Howden, had been involved in coverage litigation against lower-layer insurers on asbestos claims in Pennsylvania since 2003 and related mass tort proceedings by victims of asbestos had been underway against Howden since 1999. Until very recently, however, Faraday and its predecessor in interest had not been involved. Upon receiving notice from Howden that claims would be made under a 1998

policy, Faraday commenced proceedings. The ultimate underlying substantial issue between the parties arose because of the differences of approach by the Pennsylvania courts and the English courts to the insurance of asbestos-related claims.

The first difference is whether exposure to a hazardous condition is itself an injury. Under English law (see *Bolton MBC v Municipal Mutual Insurance Ltd* [2006] 1 WLR 1492 not overruled in *Durham v BAI* [2012] 1 WLR 867) it is not. Under the laws of a number of U.S. jurisdictions including Pennsylvania, a theory of multiple triggers of periods of insurance cover, running from and including exposure to manifestation, has been followed: see e.g., *Keene Corporation v Insurance Corporation of North America* 667 F.2d 1034 (1981), and in Pennsylvania, *J.H. France Refractories v All State Insurance Co* 626 A.2d 502 (PA 1993).

The second difference is that, under English law but not in many U.S. jurisdictions, the period clause of an insurance policy is considered a fundamental, material provision: see *Municipal Mutual Insurance Ltd v Sea Insurance Company Ltd* and others [1998] Lloyd's Rep. IR 421 at 435-6 – "the stated period of time is fundamental and must be given effect to" – and *Wasa International Insurance Co v Lexington Insurance Co* [2009] UKHL [2010] A.C. 180 at [3], [39], [74] and [77].

A third difference between English and Pennsylvania law involves applicable principles of conflict of laws. The English approach to determining the applicable law is concerned only with the circumstances at the time of contracting, whereas the approach in the United States may permit consideration of factors applicable or arising at the time of the dispute.

Ultimately, *Faraday* is only an appellate decision not to review the High Court's allowance of service and acceptance of jurisdiction over the proceedings and may not be additional substantive precedent on the actual grounds of dispute noted. Nevertheless, it is important for U.S. insureds who have excess cover placed in the English market under English law contracts to be aware of the quite significant differences in approach and competing "notions of insurer-liability" and the potential implications for both resolution of coverage disputes as well as the forum in which those disputes may ultimately be addressed.

If you have questions, please contact the Pillsbury attorney with whom you regularly work or the author:

Raymond L. Sweigart (bio)
London
+44.20.7847.9607
raymond.sweigart@pillsburylaw.com