



CLIENT ALERT

10 July 2009

Compensation for Pleural Plaques Update

Summary

On the 17 June 2009 the Damages (Asbestos-related Conditions) (Scotland) Act 2009 came into force. This Act, which applies to Scotland only, allows pleural plaques sufferers to raise actions for damages in Scotland where they have been negligently exposed to asbestos. Similar legislation is also being considered south of the border. These developments are of importance to those involved in commercial due diligence, particularly those involved in acquisitions of industrial and manufacturing businesses.

Scotland

On 17 October 2007 the House of Lords decided in *Rothwell v. Chemical and Insulating Company Limited and Others* that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages. Although *Rothwell* is an English case, and therefore not binding in Scotland, it is a persuasive authority.

In order to prevent the House of Lords decision from applying in Scotland the Scottish Parliament passed the Damages (Asbestos-related Conditions) (Scotland) Act 2009 on 11 March 2009. It provides that asbestos-related pleural plaques, asbestos-related pleural thickening and asbestosis are actionable personal injuries for which damages can be claimed. The Act came into force on 17 June 2009 and the provisions are retrospective, except for claims settled or determined prior to the Act coming into force. Furthermore, in relation to timebar, the period between 17 October 2007 and 17 June 2009 will not count towards the three year limitation period for commencing an action under the Act. It should be noted that although the Act makes asbestos-related pleural plaques actionable pursuers will still require to prove loss in order to obtain an award of damages.

The Act has not been without controversy. It is currently the subject of a judicial review by a number of insurers in the Court of Session in Edinburgh. They argue that it is in breach of the European Convention on Human Rights and is contrary to the general legal principle that compensation is only payable where physical harm has been suffered. The hearing is expected to conclude this month. In the meantime actions being commenced under the 2009 Act are being sisted (frozen).

England & Wales

In England and Wales the Ministry of Justice is currently consulting on what to do as a result of the *Rothwell* case. The initial consultation closed on 1 October 2008 and the Ministry of Justice has indicated that it will publish a response paper on its proposals as soon as it has an opportunity to consider all the responses. Amongst the consultation questions were whether the law of negligence should be changed in relation to pleural plaques and whether the Government should bring in a no-fault financial support system for those diagnosed with pleural plaques.

In addition to the Ministry of Justice Consultation the Damages (Asbestos-related Conditions) Bill, a Private Member's Bill in very similar terms to the Scottish legislation, is currently being debated in Committee in the House of Commons. This is not a Government backed Bill, however, and as such it is unclear at this stage how far it will progress.

Practical Implications

These developments are clearly of significance to insurers and reinsurers of asbestos related liabilities. It is not safe to assume that the Rothwell judgment will stand, even in England and Wales. This has clear implications for reserving strategies. The judicial review proceedings in Scotland are highly unusual and speculative. (Re)Insurers will need to look again at allocation and aggregation issues if Rothwell is effectively overturned in all or part of the UK. There may also be tricky issues about the application of English law policies to Scottish claims if the law in Scotland and England is different.

Contact Us

For further information, please contact:

Charles Gordon

Partner

+44 (0)20 7796 6541

charles.gordon@dlapiper.com

David Murphy

Partner

+44 (0)20 7796 6431

david.murphy@dlapiper.com

John Curran

Partner

+44 (0)20 7796 6287

john.curran@dlapiper.com

DLA Piper Regulatory & Government Affairs Group

[Find out more](#) about DLA Piper's global Regulatory & Government Affairs group.

This bulletin is intended as a general overview and discussion of the subjects dealt with. It is not intended, and should not be used, as a substitute for taking legal advice in any specific situation. DLA Piper UK LLP will accept no responsibility for any actions taken or not taken on the basis of this publication. If you would like further advice, please contact one of the partners listed above.

IMPORTANT NOTE TO RECIPIENTS: We may supply your personal data to other members of the DLA Piper global organisation (which may be situated outside the European Economic Area ("EEA")) so that we or they may contact you with information about legal services and events offered by us or them subject to your consent.

It is our policy not to pass any of your personal data outside of the DLA Piper global organisation or use your personal data for any purposes other than those indicated above.

Regulated by (1)The Solicitors Regulation Authority, (2)The Law Society of Scotland

DLA Piper UK LLP(1) and DLA Piper Scotland LLP(2) are part of DLA Piper, a global legal services organisation, the members of which are separate and distinct legal entities.

For further information please refer to www.dlapiper.com/structure

A list of offices can be found at www.dlapiper.com

DLA Piper UK LLP is a limited liability partnership registered in England and Wales (registered number OC307847)

A list of members is open for inspection at its registered office and principal place of business 3 Noble Street, London EC2V 7EE