Vol TWO//ALARM Special

upfront

the insurance edition

MAINTAINING A FRAUD STRATEGY ON LIMITED RESOURCES

We are constantly being told that claims fraud is increasing, that the problem is ever growing but that detection rates are improving. What does this mean? Furthermore, with budgets being dramatically cut, is it possible to maintain a fraud strategy following the Government spending review?

A Problem?

Fraud detection techniques are clearly improving but are they keeping pace with an ever growing problem? In 2006 detected fraud stood at £500 million and in 2009, this stood at £730 million. Estimates suggest however that undetected fraud in 2006 stood at £1.6bn rising to £2bn in 2008. Is the problem getting better or worse? Unfortunately, statistical data can provide estimates but nothing more. External factors which are unique to the current climate are skewing years of statistical data upon which predictions are based.

The economists talk of the recession starting in late 2007. The unemployment rate however did not start increasing rapidly until the first quarter of 2009 and this continued to rise well into 2010/11. Other factors also cause a lag before statistical data demonstrates the harsh financial realities faced by many. It may take some considerable time before households really feel the impact of the recession, with standards of living being maintained by utilising extended credit and whilst households run down savings or redundancy payments. This is expected to result in "desperation fraud", where fraud is committed by those needing to make ends meet or "lifestyle fraud", where fraud is committed to ensure that a previous lifestyle is maintained. The consensus is that, despite the recession having been with us for some time, the full effect has not yet been seen in terms of the numbers of suspected fraudulent claims.

The inevitable result of this is increased opportunistic fraud from those who previously would not have countenanced claiming. Consequently, the traditional methods of fraud investigation may not assist in isolation.

Co-ordinated fraud however is, and remains, a significant problem but the significant gains to be had by commercial fraud rings are fiercely guarded by those concerned.

Is it a problem?

Is it a growing issue?

Regrettably, on both counts, undoubtedly so.

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MAINTAINING A FRAUD STRATEGY ON LIMITED RESOURCES (continued)

The Cost Benefit

This brings its own difficulty. If traditional fraud investigation methods are less effective in isolation to catch the opportunist and if more sophisticated methods of fraud investigation are required to identify the significant and inevitably more costly fraud rings, the cost of fraud investigation will surely be high would it not? Not necessarily so.

Fraud investigation techniques are improving. The availability of intelligence and the willingness to share information is improved however, with the volume of claims increasing and the inevitable drain on ever stretched resources with diminishing staff numbers, the balance is a difficult one to strike between the cost of investigating such claims and the inevitable cost of not doing so.

Many have historically advocated a blunt and "across the board" fraud screening approach. Whilst seemingly commendable, this approach is now seen as the blunt and wasteful tool it always was.

Forbes' Anti-Fraud Unit has, for many years, advocated a more focused and bespoke approach. The message that we have been advocating is that:-

- No one size fits all where fraud investigation is concerned.
- It is neither necessary nor practical to direct resources bluntly to all claims.
- A focused fraud strategy based on bespoke fraud indicators is a more effective working practice.
- A fraud strategy for one public sector organisation will not necessarily be appropriate for another.

Historically, there were many who identified a method of profiling claims and claimants; regrettably such an approach has been proven to be ineffective. Having the breadth of experience of working for a significant number of public sector organisations countrywide, Forbes' Insurance Department can call upon decades of experience to demonstrate that the issues facing a rural authority are different from those of an inner city authority which are in turn, significantly different from those of a coastal/touristic authority. Inevitably, the composition of claims and the profile of claimants reflect that diversity of population.

Only by working in close partnership with local authority clients for decades can Forbes' Insurance Department demonstrate how this has enabled bespoke fraud indicators and fraud investigation tools to be tailored to the needs of individual client authorities.

By using this bespoke approach, it enables legitimate claims to be processed more quickly resulting in fewer complaints and, more crucially, significantly reduced costs. It also enables those claims which are of concern to be identified more effectively and more quickly meaning that those scarce resources available to clients are spread less thinly and are used in a more focused way. Focussing resources does not dilute the fraud offering but has been shown to enhance it.

It is clear that having no fraud prevention strategy is not an option. Having a focused and efficient fraud strategy is the key. Tackling fraud need not break the bank but not tackling fraud probably will.

For more information and to discuss a no cost fraud review, please contact the head of our Anti-Fraud Unit, Chris Booth on 01254 222452 or email chris.booth@forbessolicitors.co.uk

Recent Developments in Mesothelioma Cases

Siobhan Hardy examines mesothelioma cases with minimal exposure to asbestos following the Court of Appeal's ruling in Sienkiewicz and Willmore, and looks at what else is on the horizon for mesothelioma cases from a Defendant's perspective.

As if last years confusion from the Court of Appeal on mesothelioma trigger litigation was not enough this year has already brought significant further developments in relation to mesothelioma cases.

A lost cause for Defendants?

In the first place we received the Supreme Court's judgement in the Willmore and Sienkiewicz cases (Sienkiewicz v Greif (UK) Ltd and Willmore v Knowsley MBC, 9th March 2011).

These cases raise the important question of what test should be applied in cases of low level, single Defendant exposure to asbestos.

It is well known now since Fairchild, that where two or more sources can be found that have exposed the mesothelioma suffering Claimant to asbestos, in breach of duty, all that the Claimant has to do is to establish that an exposure to asbestos resulted in "a material increase" in the risk of mesothelioma occurring. This exception to the usual rule, that a Claimant has to show that on the balance of probabilities the exposure caused the disease, arose because on current medical knowledge it is not possible to show which asbestos fibre caused it.

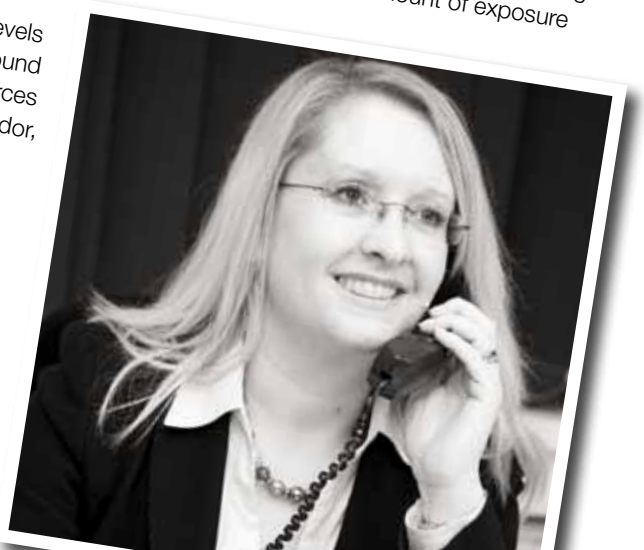
Since the Compensation Act 2006 it has also been clear that where there has been exposure from more than one source, all a Claimant has to do is show that one Defendant has exposed them to asbestos in breach of duty, to be able to recover from the Defendant in full.

The recent cases of Sienkiewicz and Willmore relate only to a single possible source of exposure in breach of duty, and the only other possible cause was environmental. The question was, should the Fairchild test of material contribution still apply in these cases. If not, was it right that there should have to be a doubling of the risk of developing mesothelioma for liability to attach. If Fairchild applied, what amount of exposure constitutes material risk?

In Willmore the Claimant alleged exposure to low levels of asbestos whilst at school in the 1970s. It was found as a fact that there were two possible low level sources of asbestos. One, from work to ceiling tiles in a corridor, and secondly, from storing broken tiles in the girls' toilets.

In Sienkiewicz the Claimant had worked in a factory and was exposed to low levels of asbestos as she walked around it. She lived in Ellesmere Port so there was an increased environmental risk of exposure in any event.

> These cases raise the important question of what test should be applied in cases of low level, single Defendant exposure to asbestos.



The Supreme Court rejected the Defendants' argument that the Fairchild exception did not apply and that there needed to be a doubling of the background risk of mesothelioma in such cases and alternatively that anything less than a doubling was not enough to satisfy the "material increase" test of Fairchild if it did apply.

The Supreme Court decided that Fairchild did apply and that any exposure other than that which is de minimis is sufficient, even if that exposure is in itself less than the background exposure.

The Court did not give us any real guidance though, on what would be de minimis and what would be sufficient to allow liability to attach. In fact, the Supreme Court specifically said that it would be for the judge on each case on the particular facts to decide.

What is clear is that low level asbestos exposure claims are going to be very difficult to defend. Lord Brown, in this case, said that "mesothelioma claims must be considered from the Defendant's perspective a lost cause".

In fact, the Supreme Court suggested that unless it can be shown that exposure is insignificant compared to exposure from other sources, then any exposure will be considered sufficient to have materially increased the risk, for example, in the Willmore case, where there was no known environmental risk. Defendants will need to make extensive enquiries to try to ascertain alternative sources of exposure. Once again in such cases the onus is on Defendants to disprove, rather than the Claimant to prove, the case.

Disease and Illness Pre Action Protocol

On the 6th April 2011 a new protocol for the pre action handling of disease and illness claims was introduced. This should help Defendants as the Claimant will now be required to provide earlier information including a detailed work history. This will include the work history from HM Customs and Excise, details of any relevant exposure during his employment or self employment, and details of any ABI insurance tracing. It is also recognised that expert evidence will probably be needed on apportionment and there is a recognition that, despite the urgency of these claims, especially where the mesothelioma victim is still living, that it may not always be possible to provide a full insurance history within the envisaged 30 days.

And finally.....

For those of you waiting for the Supreme Court's decision in the Trigger litigation, we have some way to go. The matter will not be heard until December this year so do not expect the judgment to be handed down until we are firmly into 2012!

For further information please contact Siobhan Hardy on 0113 386 2686 or email siobhan.hardy@forbessolicitors.couk

CONTINUING TO SUCCESSFULLY DEFEND HIGHWAY CLAIMS AFTER BUDGET CUTS

Following the government comprehensive spending review, local authorities are faced with having to decide how best to use their resources by inevitably making cuts to key front line services in order to balance the books.

How does this impact on local authorities in being able to defend highways claims brought against them and what is the Courts' attitude to a "resources argument" being put forward?

The main litigation area for local authorities is highway claims, where they tend to self fund such claims. We have all seen news headlines showing the state of the highway network across the country. The headlines highlight the reality of what is happening on the ground in terms of the difficulties many local authorities are facing in being able to comply with the existing national code of practice for highway maintenance management. The recent Audit Commission report found that highway authorities were planning to cut their road budgets by between 10 and 40 per cent. The situation has worsened in recent years with severe winter spells where roads have deteriorated further with the resultant reactive patch repairs being unable to cope with the usage and underlying condition of the road. The lack of funding and resources does mean that long term planned maintenance schemes are either cut or scaled back whilst highway authorities are carrying out reactive repairs. The planned schemes are a cheaper alternative in the long term than the increasing costs of reactive repairs which are currently being undertaken and increasing in number. A false economy many may think.

A recent Asphalt Industry Alliance report found that compensation claims over potholes have risen 13 per cent in England over the past 10 years, 25 per cent in Wales and 87 per cent in London. The estimated cost of repairs to the highway caused by potholes was put at £13 billion. Given the state of the economy, local authorities are faced with the reality of having to balance the books with highway budget reductions being the norm and a consequence.

Highway authorities are under a statutory duty contained within section 41 of the Highways Act 1980 to maintain the highway at public expense. In effect this has meant keeping the state of the highway in a condition so as to make it reasonably passable without danger for ordinary traffic. Historically, highway authorities have either adopted the national code of good practice or had their own codes setting out their own procedures usually bettering the national code standards.

How will this change?

Firstly, the resources issue impacts on requiring immediate budgetary cuts. This has tended to fall on reducing staffing numbers either through voluntary retirement or redundancy. It seems obvious but worthwhile saying that reducing staff numbers from those involved in ensuring the statutory duty is fulfilled will create real difficulties and have a real impact on the highways authority's ability to satisfy its own code of practice and thus its ability to defend such claims based on the section 58 special defence available to them. As highway inspectors leave the authority, whilst many are prepared to continue to assist in historical claims where their involvement is vital, there will be the handful where they no longer wish to assist. This has an evidential impact on being in a position to defend such claims in the event they became litigated and the matter proceeded to trial. The Courts usually expect highway inspectors involved in the inspection procedure to be giving evidence in order to add credibility to the special defence.

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Many highway authorities who have often had their own codes of practice for highway maintenance will need to be looking at their own codes to consider whether they can reduce the burden of cost by reducing their standards to the national accepted standards. Any variation clearly needs to be documented and risk assessed to avoid the obvious claim by the Claimant that it followed as a result of the accident.

The recent Court of Appeal case of Wilkinson v City of York Council [2011] 18/1/2011, sets out guidance as to how the Courts will consider and decide on cases where arguments are being put forward that they had to vary the standards from the national code due to budgetary considerations.

Briefly, the facts of the case involved a cyclist who fell from her bike in May 2006 when her front wheel hit a pothole. The Council inspected the road on an annual basis. This was challenged by the Claimant as being too infrequent and inadequate in accordance with the national standards. The Council had clarified the reason for the departure was due to financial constraints including limited manpower.

The matter eventually proceeded to the Court of Appeal. Lord Justice Toulson, delivering the leading judgment, held that whilst accepting the national code was not a statutory document but simply a guide, any variation from the national code should be derived following a risk assessment and not simply based on financial considerations. In considering the special defence afforded by section 58, the Court held that this involved an objective judgment based on risk and "it afforded a defence to a claim for damages brought against a highway authority which was able to demonstrate that it had done all that was reasonably necessary to make the road safe for users, not an authority which decided that it was preferable to allocate its resources in other directions because other needs were more pressing than doing what was reasonably required to make the roads safe." The Court found that the annual inspection was thus inadequate.

The importance of ensuring that highways are correctly classified is highlighted by the above case. There are likely to be more challenges to the adequacy of their frequency of inspections. Highway authorities should have regard to the classification definitions and guidance within the national code and should ensure that a proper and adequate risk assessment is undertaken based on locality, traffic levels and other relevant factors where they are able to justify the setting of an inspection frequency.

Lord Justice Toulson highlighted the fact that it was up to Parliament to allow financial resources to be taken into account within section 41 as they had allowed in other sections of the Highways Act. An example being section 41(1A), relating to the "duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice". This does allow the Courts to take into account policy considerations and factors relating to financial and manpower resources. Highway authorities usually set out their winter maintenance policy and procedure in a code where resources are often a reason why different categories of highway are given different priorities for gritting or snow clearance purposes.

There are other considerations such as repair timescales, manner of inspections and definition of safety defects which also need to be taken into account.

The highway budgets are likely to be squeezed or even further reduced over the next few years. Ensuring that highway authorities have in place the procedures and policies which are reflected on the front line will be a vital factor in maintaining the success which many Councils have enjoyed over recent years in being able to defend such claims.

If you require further information, practical advice on your own codes of practice or to discuss any of the issues arising from this update please contact Ridwaan Omar on 01254 222457 or email at Ridwaan.omar@forbessolicitors.co.uk.