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A not-so-simple solution

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Derek Adamson discusses the current issues with the Third Parties (Rights against Insurers) Act 2010, & suggests some improvements

On 1 August 2016, the Third Parties (Rights against Insurers) Act 2010 (the 2010 Act) came into force. This well-intentioned legislation 80 years after its predecessor of the same name (the 1930 Act) was supported by insurers and claimants as it streamlined the process for recovery of damages in long-tail disease litigation. The new statute permits an action against the insurer of an insolvent tortfeasor directly rather than restoring the insured company and obtaining judgment before being able to enforce against the insurer. The legal costs of restoration and the resultant delay would be avoided. A win-win for all… or so it seemed.

During 2017, as the impact of the new law bedded in, two issues relating to mesothelioma and asbestos-related lung cancer claims emerged.

A key transitional provision is that where the insolvency event and the incurring of liability both take place before 1 August 2016, the 1930 Act continues to apply.

Issue 1: *claims under the 2010 Act may not be seen for 5–10 years*

This concerns the delay such claimants will face in exercising their rights under the 2010 Act. The law on date of injury in such cancer cases has the effect that it will be several years before victims can use the 2010 Act if the employer's insolvency pre-dates 1 August 2016. This was confirmed by *Redman v Zurich Insurance plc* [2017] EWHC 1919 (QB).

Since many insolvent employers who exposed employees to asbestos were dissolved prior to commencement of the 2010 Act and, secondly, liability will be incurred to a new mesothelioma or asbestos-related lung cancer victim five or ten years before diagnosability, it will be some years before the 2010 Act is triggered by any such claim. This seems contrary to the intention of legislation aimed at simplifying the process by which such disease victims could recover compensation.

Redman confirms that liability is 'incurred' when actionable injury is suffered and the victim's cause of action is complete. Date of actionable harm will probably be either five or ten years prior to diagnosibility (onset of symptoms), depending on whether the view of Burton J in *Trigger* (angiogenesis) or the *Bolton* approach (first malignant mutation) respectively is held to be the law. Thus, the employer of a claimant who develops symptoms in 2017 will have *incurred liability* either in 2007 or 2012.

Issue 2: *insurers' claims for a contribution*

The other issue concerns insurers' rights to seek a contribution from other tortfeasors or their insurers if sued directly under the 2010 Act. It may be too late to restore the employer to the register making subrogated claims impossible and the law is uncertain as to whether a claim for contribution could be made directly against the insurer of another tortfeasor.

Sections 1029 and 1030 of the Companies Act 2006 enable the restoration of companies to the register. Except for a personal injury claim, application for restoration must be made within six years of the date of dissolution. When bringing a personal injury claim, an application for restoration can be made at any time.

Currently, when bringing a mesothelioma claim the claimant restores a dissolved defendant company to the register. On settlement, the insurer pursues a subrogated claim in the name of its insured against any other tortfeasor.

If, under the 2010 Act, a claimant sues an insurer direct, this course of action is now unavailable to the insurer as the company will not have been restored. Should the insurer wish to restore its insured to the register to pursue a contribution, the insurer is not able to restore the company at any time. This is because in a claim for a contribution, arguably, the underlying liability is not for damages for personal injury but is a claim in respect of the financial outcome of a personal injury claim. Further, although it is arguable in law that the contribution action is similar in kind to the underlying action, this does not fit particularly well with the specific wording of the Companies Act 2006.

The simplest solution would be to amend the Companies Act 2006 to enable insurers sued direct under the 2010 Act to benefit from the same unlimited timescale as personal injury claimants. This would put the insurer seeking a contribution back into the current position.

Another approach is to create a mechanism by which an insurer could pursue the insurer of a joint tortfeasor directly, without restoring the company at all or exercising rights of subrogation. This may require either an amendment to the Civil Liability (Contribution) Act 1978 (to permit claims for contribution between non-tortfeasors in respect of liabilities assumed prior to 1 January 1979) or an extension to the right of equitable contribution derived from *Zurich v International Energy Group Limited* [2015] UKSC 33 (to permit direct rights of contribution between insurers notwithstanding they are insuring different insureds).

Conclusion

The 2010 Act is an example of legislation supported on all sides whose full impact was not foreseen. The solution seems to me to be simple – we need:

1. An amendment to the 2010 Act to enable mesothelioma/lung cancer claimants to benefit from the simplified procedure under the 2010 Act as soon as possible;
2. An amendment to the Companies Act 2006 to enable insurers to restore dissolved companies to the register at any time in cases where those insurers have been sued directly under the 2010 Act.

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