Legal Report 10|07

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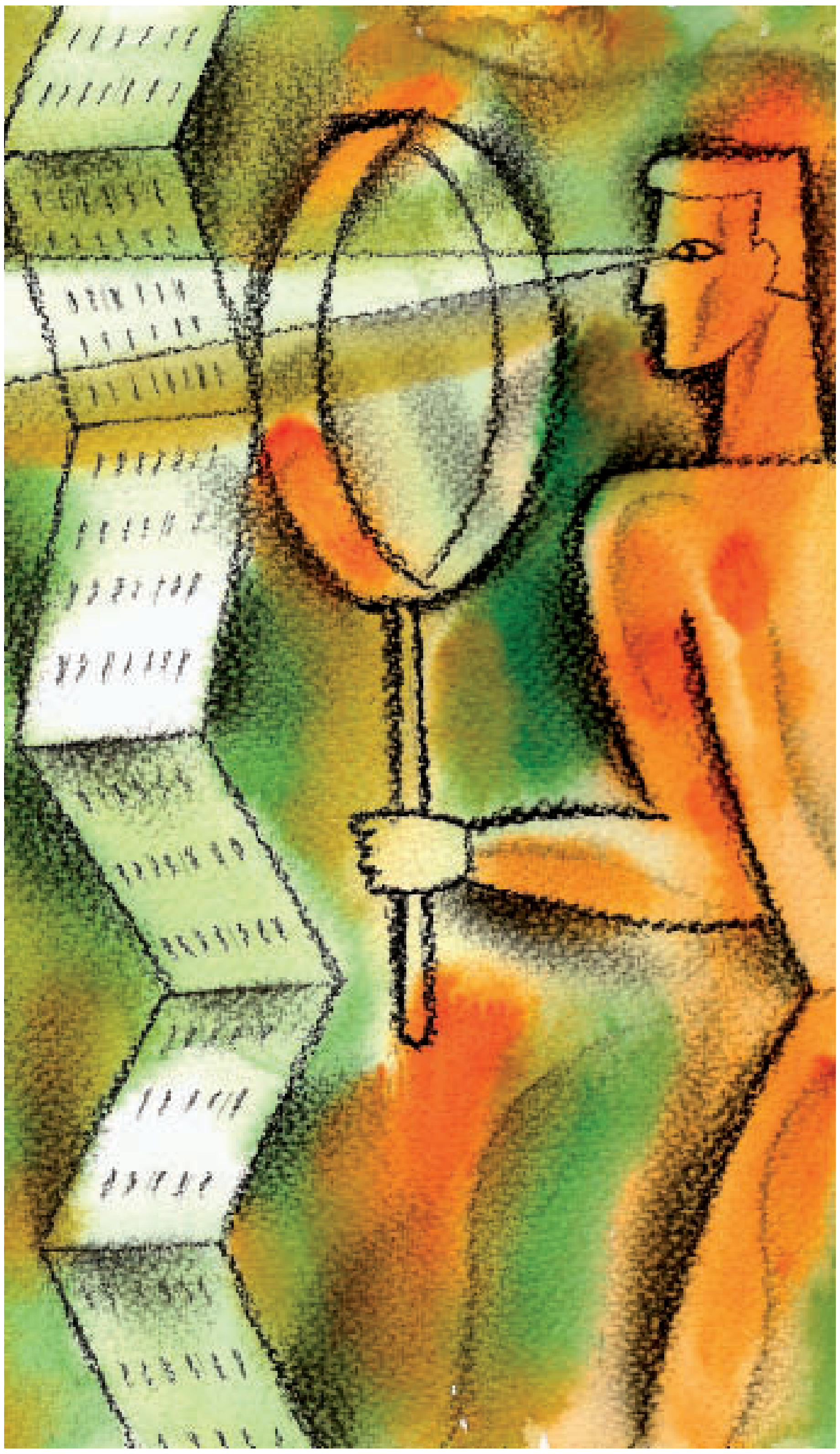
Questions that could put brokers in the firing line

A review of insurance contract law recommends shifting insureds' responsibility to brokers. Ling Ong and Michael Walkington explain

The Law Commission has published its consultation paper on insurance contract law, covering the issues of misrepresentation, non-disclosure and breach of warranty by the insured.

For consumer insurance, the commission provisionally proposes that there should be no duty on the person seeking insurance to disclose information about which questions were not asked.

This is a consumer-friendly proposal reducing the obligation of disclosure from the current obligation to disclose everything that might be relevant, even where the insurer has asked no questions about it.



Reduced responsibility

Where a broker is involved in consumer insurance of this kind, his responsibility may therefore be reduced. Thus he may not need to help the consumer to identify all information, however obscure, that might be material to an insurer.

Another consumer-friendly proposed change is that an insurer would be able to avoid a policy for misrepresentation or non-disclosure on only one ground. This is where a reasonable insured would have appreciated that a fact that was stated inaccurately or was omitted from an answer, would be one that the insurer wanted to know about.

Nevertheless, the Law Commission also recognises that the less well-informed an insured is, the less he would know about what the insurer is likely to be interested in.

But where a broker is involved in the placing, there will be a greater likelihood that an insured will appreciate the importance of a piece of information.

Brokers should not relax and think they can rely on the duty in consumer insurance becoming less onerous.

One knotty issue the Law Commission has sought to address is who should bear responsibility if an intermediary completes the information in a proposal form incorrectly and the insured then signs off on it.

Insurer's agent

The commission proposes that an intermediary is deemed the insurer's agent where it acts for only one or a limited number of insurers, rather than reviewing the market as a whole on behalf of a potential insured.

Where the broker is the insurer's agent generally, he will remain so while completing the proposal form. In that way, any mistake made by the broker in completing the form will not be blamed on the insured and will not enable the insurer to avoid the policy.

As far as the insured signing the proposal form is concerned, the paper proposes that a consumer insured's signature on a proposal form that has been completed incorrectly should not be regarded as conclusive evidence that the insured knew what was in the proposal.

In those circumstances, there would be a greater onus on the broker to ensure that insureds read the document carefully, check all the answers and confirm their understanding of the impact of any incorrect answers. Otherwise, the broker may be in the firing line for claims from insurers who are disgruntled by having to pay up on claims based on inaccurate proposal forms.

The Law Commission and many others feel that the statutory embodiment of insurance contract law, the Marine Insurance Act 1906, has been creaking for some time.

For example, s19(a) of the Act provides that the agent must disclose to the insurer "every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him".

The commission now proposes that, in business insurance, where a broker breaches this provision, the insurer should no longer be entitled to avoid the policy but should instead have a right in damages against the broker.

Deeper pockets

From the brokers' perspective, this may be an unattractive prospect in that insurers may be more inclined to litigate than the average insured and may have deeper pockets to fund claims against brokers.

Brokers should therefore consider more carefully than ever whether they have any additional information which they need to impart to insurers when placing a business risk.

The Law Commission document is only a consultation paper and comment should be sent by 16 November.

It is therefore uncertain which of the proposals may become law. IT

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Covering a sub prime hit

Simon Goldring and John Bruce look at how the US sub-prime losses will affect the insurance market

Sub-prime is big news. It is estimated that the losses in the financial markets will exceed $100bn (£49BN) and, rather ominously for the insurance market, there are already at least 10 class actions in the US against the directors of financial institutions.

Even in the UK's more benign directors' and officers' (D&O) risk environment, shareholders in Northern Rock, an indirect sub-prime casualty, are forming an action group ostensibly to bring proceedings against the directors claiming the creation of a false market.

So, will sub-prime be a disaster for the insurance market? Some research suggests it may not be. Although the financial institutions may have lost up to $100bn, Lehman Brothers' equity research team has estimated the impact of sub-prime on both D&O and errors and omissions (E&O) insurers may be limited to $1bn (£0.49bn).

The reasons are: sub-prime lenders typically purchase low D&O insurance cover, often limited to $50m (£24m); US mortgage brokers do not typically buy D&O insurance; the credit rating agencies (which seem likely litigation targets) tend to self-insure both for E&O and D&O; and, while some hedge funds purchase D&O cover, many do not.

That said, other analysts are predicting insurance losses of $5bn (£2.4bn). Either way, the sums are substantial.

Sub-prime started as a US problem, arising from certain lenders' appetite to provide mortgages to high-risk borrowers on low incomes and with poor credit ratings.

An increase in US base rates led to an increase in repossessions and, crucially, this coincided with a fall in property values. This meant the lenders were not able to recover their loans, and therefore suffered losses.

Sub-prime has become a global problem because the losses did not rest with the sub-prime lenders. These lenders typically packaged bundles of sub-prime loans and sold them into the financial markets, raising more money to lend to more sub-prime borrowers.

Those bundles of sub-prime loans were then sliced and diced by investment banks into different mortgage-backed securities.

> 'A drop in a company's share price will precipitate, usually within a matter of days, a securities class action in the US. This does not happen in the UK'

The credit ratings agencies were consulted on to how to structure the mortgage-backed securities to achieve the best credit rating. These securities were then sold into the secondary market, such as hedge funds, structured investment vehicles and conduits.

So, how does the sub-prime problem translate into D&O claims?

There are a number of class actions in the US against financial institutions whose share prices fell as a result of their exposure to the sub-prime market.

At the moment, these securities class actions are mainly restricted to US sub-prime lenders and certain real estate investment trusts (Reits). These class actions allege that the directors failed to disclose their companies' exposure to losses in the sub-prime market, thereby creating a false market.

The other high profile securities class action is against Moody's. Many commentators have suggested rating agencies will be litigation targets.

Regulatory investigations

This is certainly true for claims by the investors in the mortgage-backed securities rated by the agencies, but these will not typically result in D&O claims. There cannot be securities class actions against rating agencies other than Moody's, because none of them is publicly listed.

As a result, although rating agencies are the focus of a lot of criticism, their most immediate D&O exposure is likely to come from regulatory investigations.

The other litigation targets are mortgage brokers, investment banks, and hedge funds, but so far there has not been a slew of D&O class actions against them.

The possible actions against mortgage brokers and hedge funds seem more likely to be E&O based, although there may be scope for D&O actions depending on the facts of each case.

Regulatory investigations will, however, be a source of woe for all the above financial institutions. The SEC in the US is investigating whether Wall Street firms pressured the rating agencies to give top ratings to sub-prime bonds. And it is also looking at allegations of mis-pricing of securities, accounting errors and insider trading. These actions may impact D&O policies and are notoriously costly to manage.

In Europe, property prices have held up, which means there is a lower incidence of direct sub-prime losses, so any potential claims are likely to focus on the European financial institutions which invested in and advised on US mortgage backed securities. The answer probably has two parts – first dealing with civil claims and the second dealing with regulatory investigations.

As for civil claims, there will be fewer D&O claims in Europe than in the US. This is partly because the sub-prime losses are currently concentrated in the US. But this would remain the case even if there were more direct sub-prime losses in Europe, because the European litigation landscape is more benign than the US litigation landscape.

The reasons are the differences in: culture; litigation funding; the availability of (opt-out) class action procedures; and substantive law. Although the first three may be gradually changing, the difference in substantive law between the US and Europe remains marked, and acts as a barrier to large claims.

Take D&O claims as an example. As mentioned above, a drop in a company's share price will precipitate, usually within a matter of days, a securities class action in the US. This does not happen in the UK because UK directors owe their primary duties to the company and not to shareholders or investors. The result is that in the UK, there have been no common law judgments against directors in favour of shareholders arising from misstatements contained in company reports.

Further, there is no English statute equivalent to the Exchange Act of 1934, which is the foundation of the majority of US securities class actions. The closest UK statutory provision is s463 Companies Act 2006, but this creates a liability only to the company and not to shareholders, and essentially only where the statement was dishonestly made.

Minority shareholders

As a possible counterbalance, a new derivative action procedure in the UK became effective on 1 October. This is intended to make it easier for minority shareholders to bring a claim in the company's name (and for the benefit of the company) against directors.

Although there may be some early tests of this new procedure, our view remains that there will not be a flood of new claims, but there will inevitably be a long term effect.

As for regulatory investigations, we consider these will be relevant to European financial institutions, and these could trigger D&O notifications. The FSA conducted research into the direct sub-prime market long before the resulting credit crunch hit the newspaper headlines last month.

Indeed, the FSA has already investigated and fined the chief executive of a sub-prime mortgage broker concerning the implementation of risk management procedures, and we expect this regulatory activity to increase over the coming months. IT

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Limiting the damage

Mark Shaya and Andrew Morgan report on a recent judgment that limits the scope of liability for product cover

How much will a product liability policy cover economic losses arising from a product defect? That has been the subject of several judgments and has received further consideration and clarification in a recent case.

The judgment by the Court of Appeal in *Horbury Building Systems v Hampden Insurance NV* stresses the need for losses to be directly linked to the defective product supplied.

Cases such as *AS Screenprint v British Reserve Insurance Co [1999]* and *Rodan International v Commercial Union [1999]* concerned the question of insurers' liability for the economic losses of third parties arising from the sale of defective products.

But *Horbury Building Systems v Hampden Insurance [2004]* presented a new problem: what if the product supplied might result in damage to third party property leading to precautionary measures being taken? Are those losses covered by the standard product liability insuring clause?

Horbury concerned the supply of interior fittings and services to a cinema complex in Manchester operated by a company, AMC.

The main contractor for those services was Galliford, which sub-contracted the installation of partitions and ceilings to the claimant, Horbury.

As a result of the use of unsuitable washers, sections of a suspended ceiling were not sufficiently secured, ultimately causing the ceiling of one auditorium (cinema 6) to collapse.

Horbury had installed the incorrect washers in five out of 16 auditoria. AMC voluntarily closed the entire cinema complex given the risk of similar collapses. Galliford settled the claim brought by AMC and subsequently pursued Horbury under its contract. Horbury claimed under the product liability section of its policy.

Retail losses

A dispute arose between Horbury and its insurer in respect of the extent of cover for economic losses caused by closure of the entire cinema complex, for example, loss of ticket sale revenue and other retail losses.

The policy included the following insuring clause: "The company will indemnify the insured against liability at law for damages and claimants' costs and expenses in respect of injury to any person and loss of or damage to property occurring within the territorial limits during the period of insurance and caused by any products after they have ceased to be in the custody or under the control of the insured."

The policy contained the usual exclusions for assumed contractual liability and for the costs of repairing the defective products supplied.

Prior to Horbury's liability being ascertained and therefore before the basis of any liability had been established, or the factual basis of any such liability had been found or agreed, Horbury sought a declaration as to the extent of the cover provided by the policy.

Approving the decision of the deputy High Court judge at first instance, the Court of Appeal drew upon the reasoning of the *AS Screenprint* and *Rodan* cases. It was not sufficient to establish that the losses suffered had some connection with the insured event.

To allow such recovery would convert the insurer's liability from one of product liability to one extending to general contractual liabilities.

The Court of Appeal rejected the insured's argument that the insuring clause provided cover that is co-extensive with the liability of the insured. Any recoverable loss had to have been caused by the physical damage. It was found that the policy did cover "liability for the physical consequences of the collapse of cinema 6 and such economic losses as were caused by that physical damage".

The parties were in agreement that if the defects in the suspended ceiling of cinema 6 had been discovered before any collapse, and the collapse had been prevented, Hampden would not be liable for Horbury having to pay damages for profits lost by closing cinema 6.

Accordingly, Hampden would not be liable if, in such a case, the rest of the complex had been closed to see if faults were repeated elsewhere, and Horbury held liable in damages for the resulting loss of profits.

To allow such recovery would convert the insurer's liability from one of product liability to one extending to general contractual liabilities

That must be because, in relation to both cinema 6 and to the rest of the complex, such damages would not be in respect of damage to material property.

The mere existence of a defective product and the risk of future physical damage were not damage to physical property and as such the insurer's liability did not "embrace the losses resulting from the wider closure". Any losses caused by AMC's preventative actions were therefore not covered.

Lord Justice Keene went on to highlight two further reasons in support of his conclusion. The first was that the insurer had not relied upon the general law of tort in support of its argument, but would have instead pointed to its contractual liability to the insured.

The second was that a "contractor is not liable in tort to the buyer or occupier of a building if a defect is discovered before any personal injury or physical damage is caused by the defect...it is only if the defect causes damage to other property that damages may be recovered…".

As referred to above, this dispute took place prior to Horbury's liability, for which cover was sought, had been determined.

The court was willing to make a declaration as to the extent of cover provided by the policy, however. Lord Justice Keene observed that making such a declaration when the claimant did not seek to identify whether liability to a third party was based in contract or tort, or the party to whom it would be so liable, left "a great deal to be desired from the point of view of the court".

Despite these reservations it appears that the court will nevertheless make declarations relating to the scope of a liability policy where the issue is sufficiently defined.

The decision in *Horbury* gives certainty as to the basis and extent of insurers' liability in this area and demonstrates that the court is unwilling to impute any liability beyond that contemplated by the policy. As a result a product liability policy will be given a narrow interpretation. IT

→ Mark Shaya is associate partner at Davies Arnold Cooper and Andrew Morgan is a trainee solicitor

Jonathan Coatman warns that the new corporate manslaughter law will require senior management to adopt clear and well-documented health and safety procedures

Management safety processes under scrutiny

After almost 10 years of lobbying, corporate management can be held accountable for deaths proved to have been caused by breaching their duty of care.

From 6 April 2008 many organisations will have to reconsider their attitude to health and safety when the Corporate Manslaughter & Corporate Homicide Bill becomes law.

It is also a prime opportunity for insurers to help insureds by offering real added-value to their insureds.

The main focus of the Act is to establish the grounds upon which an organisation, rather than an individual, can be found guilty of corporate manslaughter (corporate homicide in Scotland).

Moving away from the need for a guilty individual "controlling mind" to be identified, an organisation will be guilty of the offence if the way in which its activities are managed or organised by its senior management amounts to a gross breach of the duty of care and that breach results in the person's death.

The prospect of individual liability under the Act is specifically excluded.

The intention behind the identification of the activities of "senior management" is not to let individual directors off the hook. Rather it encourages companies to adopt an approach to health and safety that permeates the organisation rather than being concentrated in a single department or individual.

All company directors will now be required to take an active interest in these matters and to ensure that health and safety is a prime consideration in their business.

If they fail in this respect, and a fatal accident arises from a "gross breach" of their duty of care, they could end up in court.

Breach of a duty of care is to be regarded as "gross" if the organisation's conduct falls "far below what can reasonably be expected of the organisation in the circumstances".

Factors for consideration include: whether the organisation failed to comply with any relevant health and safety legislation and if it did, how serious a failure that was and how much of a risk of death it posed.

Another factor is the extent of the organisation's compliance with relevant health and safety guidance (undefined in any way) and whether the evidence shows that there were "...attitudes, policies, systems or accepted practices within the organisation that were likely to encourage any such failure".

In addition to an unlimited fine, the Act introduces a power for the courts to impose a remedial order on a convicted organisation to force it to resolve any management failure that may have been a cause of death.

The Home Office anticipates that the new Act will result in the number of prosecutions for the offence rising from the current one or two a year to around 13.

Investigation effort

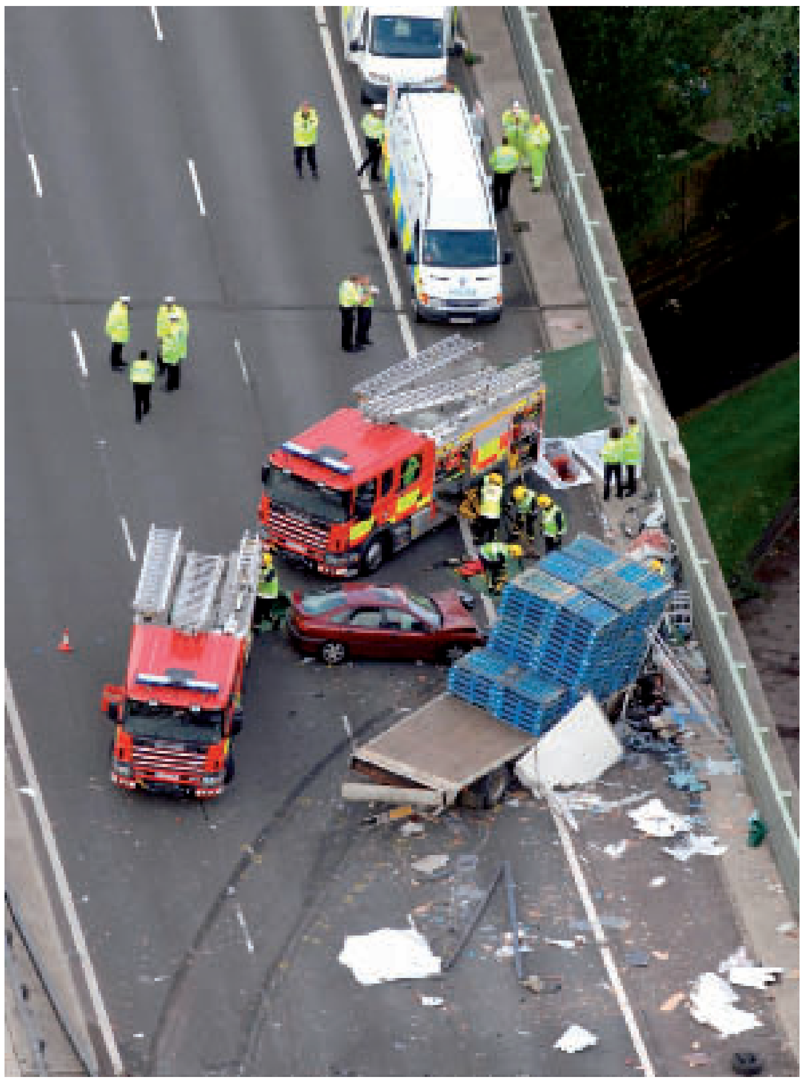
The cost of prosecuting and defending these actions will inevitably rise from current levels given that the the investigation required to identify the "management and organisation of activities" and "attitudes, policies, systems or accepted practices within the organisation" seems likely to require a great deal of time and effort.

This is not to mention disruption to the day-to-day working of the organisation in question during the period of investigation.

It is also arguable that companies will more easily be found guilty of the offence when the conviction of a director with direct responsibility for the breach of duty is no longer a prerequisite to the conviction of the company for the offence of manslaughter.

Fines are likely to be set at a level at least equal to those currently levied on organisations found guilty of breaches of the Health & Safety At Work Act that result in a fatality.

But perhaps of greater concern is the stigma likely to be attached to an organisation found guilty of the new offence and the potential consequent impact on its reputation, from the level of its insurance premiums to its ability to hire staff and tender for work.



The new legislation highlights the importance of addressing health and safety issues at a high level within any organisation

All directors and other "senior managers" must ensure as best they can that their organisation has in place a robust set of health and safety procedures, along with the appropriate structure, staff competencies, organisational culture and internal and external auditing framework to enforce and maintain them.

Senior managers must be able to demonstrate not only clearly documented safe working procedures, appropriate risk assessments, relevant training and so on, but also that these processes were stringently applied across the organisation and regularly reviewed to ensure that they were at all times a good fit to changing circumstances.

That is to say that they are "managing the activities" of the organisation as the Act implies.

Evidence will be required of these internal reviews and it may also prove necessary periodically to call upon the services of external health and safety and risk management assessors in order to benchmark an organisation's endeavours against best practice.

Many liability insurers are able to provide such a service to their clients already.

Particularly important is to ensure that these procedures are communicated to employees and other potentially affected persons in a clear and effective mannner so as to help formulate the necessary "attitudes...and accepted practices" within an organisation.

The Act also effectively requires organisations to make, and for their own sake, record every effort to keep abreast of developments in health and safety in their line of business.

Although the Act fails to define the sort of "health and safety guidance" to which an organisation might be expected to have referred, the H&SE website* provides a useful starting point, with its facility for searching by industry type or health and safety topic.

Insurers should bear in mind that organisations charged with the offence will need to co-ordinate their response at board level.

The senior executives whose management of activities will be implicated will demand the highest (and likely most expensive) quality of legal representation.

Defence of a prosecution will require investigation that mirrors, if not exceeds, the extensive nature of that conducted by the Crown Prosecution Service and with few organisations likely to be willing to plead guilty before a full hearing, at least in the early days when there is little case law to set the appropriate standard, legal bills will be high.

Initial hit

Cover is likely to be afforded by employers' and public liability policies without any inner costs limit and, as such, insurers in those areas may take an initial hit on claims' costs.

The good news is that the explanatory notes to the Bill state: "There is no question of liability where the management of an activity includes reasonable safeguards and a death nonetheless occurs".

With the provisions of the Act not due to come into force until April of next year there is time yet for organisations to address any shortcomings in their governance structure, policies and systems, and for insurers to work with them to rectify these.

It must be recognised, however, that company-wide attitudes and accepted practices may take more time to change. **IT**

➔ **Jonathan Coatman is claims controller of QBE Insurance (Europe)**

** The H&SE website is at www.hse.gov.uk/index.htm*

Transferring books of business the easy way

Tim Goggin explains how Part VII provides a mechanism to transfer books of business without involving policyholders

The use of Part VII of the Financial Services and Markets Act 2000 to effect insurance business transfers has become increasingly widespread, with over 40 transfers completed in the last 18 months alone.

Put at its simplest, Part VII provides a mechanism under which an English court can order that a portfolio of insurance contracts written by one insurer will be transferred to another on a specified date without any individual policyholder consents having to be obtained.

For companies which are continuing to write new business, but also seeking to consolidate their European operations or to move within Europe, there are now other ways to do it, other than the Part VII route.

It is possible to merge two EEA insurers which are public companies to form a European company (also known as a Societas Europaea or 'SE'). And by December this year the possibility of cross-border mergers will also exist for private companies under the EU's cross-border mergers directive.

Those mechanisms may be well and good for transferring an entire company, but to transfer part of a company's operations, Part VII is the tool for the job.

And with the advent of Solvency II, the packaging and disposal of particular books of business will be on the increase. They will want to get out of volatile lines of business to secure better capital treatment in an era when capital requirements are more closely aligned to the risk profile of a group's business.

For run-off, Part VII often has clear advantages over rival exit strategy tools. A Part VII transfer allows one insurer to transfer a portfolio of policies to another without having to get individual policyholder consents.

Primary liability for the policy is removed from the balance sheet of the company transferring the business; it is as if it never wrote the policy. The company taking on the new business takes on all the risks..

Compare that to a firm seeking to achieve finality through 100% reinsurance. If it cedes a risk of 100%, it acquires the credit risk of the reinsurer not being there when it comes to make the claim (which it might want to bring decades from now).

Does the reinsurer's AA or AAA rating speak for its position in 20 years' time?

> A Part VII transfer allows one insurer to transfer a portfolio of policies to another without having to get individual policyholder consents

Part VII also compares well with commutations, where much time and expense is involved in having to deal with individual policyholders or cedants. It would be a considerable corporate success if commutations were used to achieve a complete exit.

How does it compare with the solvent scheme? The difficulties for solvent schemes following the case of the British Aviation Insurance Company where creditors opposed a scheme of arrangement, have been widely discussed.

The main difference between a Part VII and a scheme of arrangement is that a scheme involves a compromise of policyholders' claims. Under Part VII generally no claim is compromised. It is just transferred elsewhere. So there can be no argument that a Part VII is forcing policyholders to take back risk that they thought they had transferred to an insurer. So Part VII should be a less contentious procedure in most cases.

Sompo's transfer

Earlier this year the court sanctioned the transfer of four international books of reinsurance business from Sompo Japan Insurance to Transfercom , a subsidiary of Berkshire Hathaway formed specifically to receive the transfer.

The books of business in question were originally written by Sompo in Japan at a time when Sompo did not have a branch in the UK, although the majority of the business was broked in the London market.

Each of the books consisted of contracts with cedants in a number of different jurisdictions. Sompo relocated the business from Tokyo to its London branch in January 2006.

The judge confirmed that he had jurisdiction to sanction a transfer in these circumstances, and that given the proportion of the business governed by English law he was prepared to exercise his discretion to sanction the scheme, even though a significant proportion of the transferring contracts were governed by other jurisdictions .

This is a helpful judgment for the London market, where business to be transferred will often have an international element, and for those outside London who wish to use Part VII to exit books of international business they have written.

The reinsurance directive has to be implemented by all member states by 10 December 2007.

It requires each member state to provide a mechanism that allows a reinsurer in one member state to transfer its business to a reinsurer in another in a manner which binds cedants throughout the EEA.

The Treasury issued a consultation paper last week on how the UK will implement this: it is proposing to implement the directive in a way which will narrow Part VII's scope.

A transfer of reinsurance business carried on by a UK branch of a pure reinsurer incorporated in another EEA state will no longer fall within the court's jurisdiction under Part VII, falling instead within the jurisdiction of the reinsurer's home state regulator.

The position is different for an EEA firm which writes both direct and reinsurance business, which will still be able to avail itself of Part VII for the reinsurance business of its UK branch.

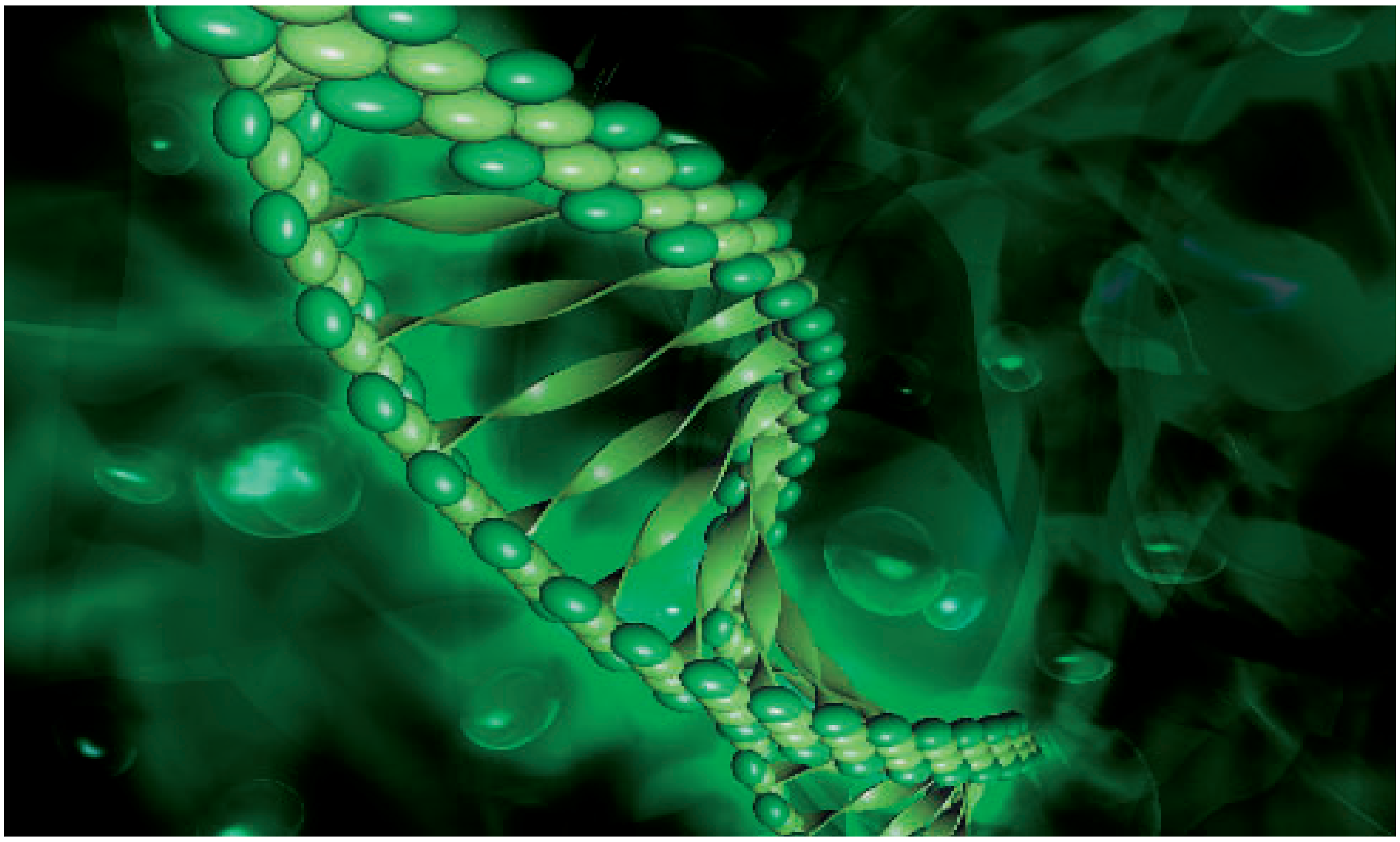
The Treasury has also been consulting on some other proposed reforms to Part VII. First is to amend the way that a Lloyd's member is defined to allow those who ceased underwriting before 23 December 1996 to use Part VII (rather important for Phase 2 of the Equitas deal).

Also it wants to make clear that outwards reinsurance can transfer (which few in the market has doubted for about four years). It is of course useful to have this on the statute book. **IT**

➔ Tim Goggin is a partner in Lovells corporate insurance practice

DNA raises the claims bar

A DNA test that identifies whether particular toxins have caused cell damage could have a considerable impact on litigation in disease claims. Kieran Jones and Kathleen Potter report



DNA testing is regularly in the news in connection with criminal investigations, but such testing has not been prevalent in the UK for disease claims.

Unsurprisingly those involved with the research say the new technology could have a potentially massive impact on compensation claims. They claim that DNA testing can reveal whether an individual has suffered harm as a result of exposure to a toxin.

The testing identifies how up to 36,000 parameters of an individual's DNA are affected by a chemical, so scientists can tell with 99.9% certainty if a person was harmfully exposed to a particular toxin.

The techniques allow researchers to scan an individual's DNA to establish whether specific genes have been altered due to such exposure.

This type of testing will be crucially important in identifying the cause of diseases, such as certain types of cancer, for which there are a number of possible causes – with work-related exposure to chemicals being just one.

Admissible evidence

The admissibility of such scientific evidence in court cases in the US has been endorsed by the American Bar Association. In the England and Wales system the provision of such evidence is controlled by Rule 35 of the Civil Procedure Rules and, broadly, it will be for the court to decide having considered the methodology and basis for findings whether such evidence is admissible.

This of course presupposes that claimants will be willing to undertake DNA testing. While this is unlikely to be particularly invasive, there are certain public perceptions surrounding such testing and there may be suspicions as to how the results are used.

It could be argued that there should be no reluctance on the part of a claimant to undergo such tests. Virtually all medical examinations,within the context of disease litigation, require tests to be undertaken – be it a lung function test in a case of asthma or an asbestos-related condition, or an audiometric test for deafness.

DNA testing, if introduced, could objectively prove causation. But causation is complicated in disease claims.

For a claimant to succeed in recovering damages he does not simply have to prove causation, but must prove negligence or breach of duty. In a fair proportion of these cases a claimant may succeed, but may have more difficulties in proving that a defendant's breach caused the condition.

Likewise, a defendant who has no argument or breach may be found liable to pay damages, despite the fact that the claimant's condition could have been caused by a number of factors, other than exposure at the hands of the defendant.

The technology should also be of use in class action-type litigation, where it can prove difficult to distinguish those claimants who have genuine claims.

The propensity, now, is for all who have been exposed to potentially harmful substances to pursue claims regardless of the fact that their individual extent of exposure is likely to have varied.

Deserving claimants

In practical terms this results in similar levels of compensation being paid to all, whether affected by the exposure or not, and can lead to the more deserving claimants losing out.

With the new techniques it should be possible to identify which individuals were actually harmed and should be compensated.

Presumably, mass screening would be necessary as opposed to the current approach of relying on epidemiological evidence.

The prospect of being able to identify the impact of substances on DNA also gives rise to an interesting debate in respect of latent conditions, which may not have shown up.

> There are certain public perceptions surrounding DNA testing, and there may be suspicions as to how the results are used

We await the decision of the House of Lords with the pleural plaques test case litigation, but arguments will no doubt be pursued on behalf of claimants who, on testing, demonstrate changes to specific DNA which may act as a marker of their exposure.

Do we therefore face the prospect of widespread DNA screening to identify whether genes have indeed been altered?

The impact of testing is unlikely to be restricted solely to the issue of whether an individual was exposed to chemicals or not, and the effect of that exposure. It is also likely to lead to issues of the wider use of genetic information.

For example, where a claimant had a pre-disposition to the condition that he ultimately developed, it may be argued on behalf of the defendant that it was the pre-disposition, rather than the exposure, which caused the injury.

Likewise, there may be information available from DNA samples which may help reduce the value of a claim, if it could be shown that regardless of a defendant's actions a claimant would have had limited life expectancy.

A developer of the DNA testing technique, Bruce Gillis, is keen to point out that only the condition being investigated is tested for, and only the DNA relevant to the exposure is tested.

It would appear that there is the ability for others to undertake wider tests and there is likely to be some debate about how DNA evidence is used. IT

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