
Liability Alert

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Asbestos-related claims and professional indemnity insurance

Asbestos-related risks are now excluded from virtually all professional indemnity (PI) insurance policies. It may be possible for some consultants to buy back some cover (limited both in amount and the risks covered) but it is likely to be expensive.

This is due in part to the hard insurance market which has seen insurers limiting PI cover generally. Insurers are though particularly shy of asbestos related claims because of the extraordinary level of personal injury claims – past, present and expected in the future – arising out of the presence of asbestos (primarily in the United States, but elsewhere too). This has led to reinsurers refusing to cover such risks. With no reinsurance behind them, primary insurers can only offer limited cover.

This will affect all consultants, not just those expressly engaged to undertake asbestos inspections, surveys or reviews (under Regulation 4 of the Control of Asbestos at Work Regulations 2002, which came into force in May 2004, for example); any consultant may come across problems with asbestos in the course of their work.

What cover is available?

The cover that is available varies between insurers and from policy to policy. It may have been possible to buy cover at the last renewal that will not be available at the next renewal: the position is not static.

Some consultants will find that they are not able to obtain any cover, for personal injury or any other claims.

Some consultants may be able to buy limited cover, for example for:

- a costs-inclusive, aggregate amount;
- negligence claims only, ie not for contractual liability that does not arise out of the consultants' own negligence; and
- only to the extent that the claim is:
 - for remediation or rectification costs; and/or

- for diminution in value of buildings or structures arising solely from valuations or surveys carried out in accordance with RICS guidance or other standard market procedures.

In this event, there would be *no cover* for causing:

- o death or bodily injury;
- o diminution in value of land (as opposed to buildings);
- o loss of profits, loss of use or relocation costs;
- o damage to other areas of the property, rather than the area which required reperformance or remediation;
- o delays to project programme (eg as a result of finding asbestos).

Because cover is excluded and then 'bought back, the burden of proof would be on the consultant to show that any claim comes within the cover afforded. The wording of the policy or endorsement is therefore critical.

Moreover, PI insurance is written on a claims made basis, meaning that it is the cover available at *the time the claim is made* that is relevant.

Regulation 4

Regulation 4 applies to non-domestic premises. It imposes a duty to ensure that a suitable and sufficient assessment is carried out in order to ascertain whether asbestos is or is likely to be present and if so, to take appropriate measures. The duty is imposed not only on owners and occupiers but also on those with a contractual responsibility for maintenance and repair (such as facilities managers, project managers, and those considering, reviewing, managing or carrying out any works of maintenance or repair) – the dutyholder. The Regulation sets out specific steps that a dutyholder has to take, both in relation to the assessment and in the event that asbestos is found to be present or likely to be present. Failure to comply could give rise to criminal prosecution for breach of health and safety law. Further, if injury or damage results, it could give rise to civil liability for breach of statutory duty or breach of contract.

What can be done?

Both consultants and their clients need to realistically assess the risks and the availability, or more likely unavailability, of insurance cover.

Consultants will need to:

- o discuss with their brokers the cover they have now and are likely to be able to get in the future;
- o consider the work the practice does, their exposure to claims related to asbestos and the liabilities that the practice is prepared to accept;
- o explain the position to their clients and negotiate appropriate terms of engagement.

Clients will need to:

- o discuss with their consultants the cover they have now and are likely to be able to get in the future;

- consider their exposure to problems related to asbestos;
- consider whether specialists need to be employed;
- negotiate appropriate terms of engagement.

The terms of engagement should, firstly, be clear about the scope of the consultants' duties. Particularly if the consultants are not specialists, it may be appropriate to exclude any responsibility for advising on or carrying out work in relation to asbestos. In the light of the restriction on cover to claims in negligence only, it would not be appropriate for the contract to include any strict liabilities.

Secondly, any limitations on the consultants' liability should be agreed and the terms of engagement reflect the agreement. If the consultants take on no duties in relation to asbestos, it may be appropriate for all liability to be excluded. If some liability is accepted, the contract might limit liability to a fixed amount or to the amount of insurance cover, if any, available to the consultants in the event of a claim (sometimes called an 'evaporation clause'). (This will offer no protection to the consultant for personal injury claims, for which it is not possible to exclude liability.)

Consultants will need to bear in mind that they cannot contract out of or modify statutory obligations under Regulation 4, if they have any. What they might be able to do, however, is limit the circumstances in which contractual liability could arise. Further, limitations in their terms of engagement will not protect them against claims by third parties (unless of course their clients have given an indemnity against such claims).

The CIC's *Liability Briefings*, 'Managing liability through financial caps' (May 2004) and 'Professional indemnity insurance for construction consultants' (January 2004) may be helpful. Both can be found at <http://www.cic.org.uk/liability>.

This *Liability Alert* is for information only, and insurance or legal advice should be taken to cover your particular circumstances. Please note in particular that this *Alert* does not contain a comprehensive summary of the present position on insurance or of the provisions of Regulation 4.

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