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Legislation

Bribery Act 2010

The Government has announced that the Bribery Act 2010 will come into force in April 2011. Under the Act, businesses with a presence in the UK will be liable for bribery committed by employees and third parties providing services on their behalf, anywhere in the world, unless they can show that they have "adequate procedures" in place to guard against bribery. The Government plans to publish draft guidance on what will constitute "adequate procedures" in September 2010, with final guidance expected in early 2011. The Act applies to all commercial organisations and therefore applies to insurers in their own right, and also to their commercial insureds.

Civil Law Reform Bill

The consultation on this Bill, which includes proposed changes to the law of damages and pre and post judgment interest as detailed in last year's report, closed on 9 February 2010. Following the change in Government, there is currently no policy on whether it will be taken forward.

Consumer Insurance (Disclosure and Misrepresentation) Bill

This Bill was released on 15 December 2009 and marks the culmination of the first stage of the detailed review of insurance contract law which commenced in 2006 (see Consultations in relation to the more recent Issues Papers). The Bill seeks to bring the law governing consumer insurance at the pre-contract stage in line with current market practice.

At the heart of the Bill is the abolition of the duty currently imposed on consumers to volunteer material facts, over and above what may have been said in the proposal form, to enable insurers to assess the risk presented. Replacing this duty of disclosure is a requirement on consumers to take reasonable care not to make a misrepresentation. They (the consumer) must take reasonable care to answer insurers' questions fully and accurately.

Three types of misrepresentation are envisaged and the Bill sets out insurers' recourse in each case:

- 1) An honest and reasonable misrepresentation will oblige the insurer to pay the claim;
- 2) A "careless" misrepresentation will allow a compensatory or proportionate remedy for insurers such that they must look at what they would have done had the consumer taken care to answer the question accurately and completely;
- 3) A "deliberate" or "reckless" misrepresentation will allow the insurer to avoid the policy (i.e. to treat it as if it does not exist and decline all claims).

The "reasonableness" of the consumer is assessed by asking whether a reasonable person would have known that the statement was untrue.

The Bill also clarifies the position of intermediaries for the purposes of providing information at the proposal stage. There is a presumption that intermediaries act for the consumer unless it appears that they act for the insurer. Guidance is provided to suggest when an intermediary will act for the insurer.

In addition, the Bill abolishes "basis of the contract" clauses (whereby all answers given by a consumer on a proposal form are turned into warranties, breach of which could, as matters currently stand, allow an insurer to avoid the policy). There are also special provisions for group insurance schemes meaning that a misrepresentation by one member of the scheme will only have consequences for that member and will not affect other members.

Coroners and Justice Act 2009

The Coroners and Justice Act received Royal Assent on 12 November 2009 but a large amount of the Act is yet to be in force. The Act seeks to reduce delays and to deliver a more responsive and transparent service to victims, witnesses and the wider public and to place bereaved families at the heart of the coronial service.

Section 47 of the Act, which came in with immediate effect, introduces a wider definition of the "interested person" who is entitled to ask questions at an inquest. The new statutory definition allows any person "who the senior coroner thinks has a sufficient interest" in a person's death to ask questions which is a significant widening of the law. Sections of the Act yet to be brought into force include the power to transfer an inquest from one area to another to prevent backlogs and the appointment of a Chief Coroner annually to assess coroners nationally and review outcomes and delays.

Dangerous Dogs (Amendment) Bill

This Bill, detailed in our report last year, was presented to Parliament on 1 July 2009 but it was subsequently dropped by its sponsor, Angela C. Smith.

Defamation Bill

Defamation has been the subject of Government scrutiny both before and after the General Election. The previous Lord Chancellor Jack Straw attempted to cap success fees in defamation cases at 10% following publication of Lord Justice Jackson's final report on the Review of Civil Litigation Costs. However the proposals were not popular and were dropped when Parliament rose in March 2010.

Lord Lester of Herne Hill QC then introduced a detailed Private Members' Bill in the new House of Lords session, which passed 2nd Reading unopposed on 9th July 2010. Lord Lester's Bill proposes costs controlling measures but also more substantive reform. In welcoming the Bill the Government Minister Lord McNally committed the Government to publishing a draft Bill of its own in the current session of Parliament (i.e. before November 2011) and outlined plans to conduct informal consultations this summer.

Department of Health White Paper: Equity and Excellence - Liberating the NHS

This White Paper has arrived as the NHS faces the biggest financial challenge in its history – the need

to release up to £20 billion of efficiency savings by 2014, together with the Government's pledge to reduce NHS management costs by more than 45% over the next four years. To deliver the necessary cost savings, the Department of Health will reduce its own functions and (from 2012) start to abolish the 10 strategic health authorities (SHAs) and 152 primary care trusts (PCTs) in England. The White Paper aims to empower GPs, set NHS foundation trusts (FTs) free to innovate and improve the quality and accessibility of information about patient outcomes in the NHS. A new entity, the NHS Commissioning Board, will become responsible for the PCTs' residual role in commissioning primary care services and Local Authorities will have a greater public health role.

The emphasis throughout the White Paper is on removing political micromanagement, bringing decision-making closer to the patient and opening up provision to any private or public sector provider licensed by Monitor. This emphasis on strengthening use of the "any willing provider" model is likely to present significant opportunities to insurers focused on the private sector healthcare market, as well as opportunities to support GP commissioning consortia who will become responsible, and therefore liable, for the decisions they make in commissioning acute, mental health and community services for their local health populations. The new consortia are likely to need support from outside bodies (public and private) and other advisers in commissioning healthcare effectively; another potential market for insurers.

The Government is also promising an "information revolution" in the NHS. Apart from an increase in the range of on-line services, the collection, use and publication of patient survey data and evidence-based outcome measures is to be significantly expanded. All data returns will be centralised in the Health and Social Care Information Centre, which will have lead responsibility for data collection and assuring the data quality of returns. In addition to NHS Choices, a range of third parties will be encouraged to become involved in the interpretation of those data and will, doubtless, be concerned to ensure that they have appropriate insurance cover for liabilities that might arise as a result of those activities.

Finally, in addition to the commitments made regarding efficiency savings, management costs reductions and White Paper proposals, the Department of Health has already conducted a review of its arms-length bodies with the aim of reducing these to the necessary minimum. An exercise is ongoing to identify potential opportunities for greater commercial involvement in the NHS Litigation Authority and NHS Business Services Authority.

Equality Act 2010

After a long and tortuous passage through Parliament, the Equality Act reached the statute book in April 2010 and its core measures will come into force on 1 October 2010. Some provisions will be held back until a later date. The Act sweeps away a vast body of discrimination legislation that has been built up since the introduction of the Equal Pay Act in 1970. The result is a very comprehensive statute which addresses discrimination not only in the workplace but in the provision of goods, facilities and services. The Act not only streamlines and harmonises discrimination law. In a number of material respects it reflects developments in case law in recent years and extends its ambit. So, for example, the law relating to disability has been redrawn so that it will be easier for those with disabilities to establish liability, without having to compare themselves with those who do not have a disability. This concept of discrimination arising from disability is the direct result of a narrowing of the law as a result of the House of Lords decision in *London Borough of Lewisham v Malcolm* in 2008.

The duty to make reasonable adjustments is also given renewed emphasis and makes it clear that it will not be reasonable for anyone subject to the duty to seek to pass on the costs of complying with it to an individual disabled person (except where the Act states otherwise). Employers will be liable for repeated harassment of employees by third parties, such as clients.

Claims for victimisation will also be easier for employees to bring, so that employers will have to be more scrupulous than ever in how they handle allegations of discrimination. Furthermore, the Act widens the powers of employment tribunals to make recommendations in cases where unlawful discrimination has been proven.

The exceptions for age based provisions in pension schemes, permitted by the 2006 Regulations on age discrimination which will be repealed, have not been replicated in the Act. This could present difficult issues for both employers and pension trustees.

From April 2011 the Act will impose a new single public sector equality duty which will continue to cover race, gender and disability but, in addition, be extended to cover age, sexual orientation, religion or belief, pregnancy and maternity and gender reassignment.

The coalition Government has yet to confirm when the extension on the ban on age discrimination beyond the workplace will come into force. It is expected that it will take effect from 2012, when it will cover the provision of services and public functions. Exceptions will be made and some treatment will be objectively justifiable. There are express provisions to deal with insurance policies.

Financial Services Act 2010: Collective Redress and Class Actions

The Financial Services Act 2010 received Royal Assent on 8 April. It gives the Financial Services Authority (FSA) additional regulatory powers against the firms it regulates.

The Act contains an amended procedure under section 404 of the Financial Services and Markets Act 2000, which would allow the FSA to make rules requiring firms to compensate consumers who have suffered loss or damage, under a "consumer redress scheme". The new provisions require an Order to go through Parliament to bring them into force, and there had been speculation that this would happen to enable the FSA to impose a consumer redress scheme in relation to alleged mis-selling of payment protection insurance. However, the FSA's proposals in relation to PPI, published in August, reject the use of section 404.

Curiously, in July the FSA published a guidance note about the use of its powers under the new section 404 provisions, so presumably it expects them to be brought into force soon.

One set of measures which did not make it into the Act were those which proposed allowing class actions to be brought against regulated firms. Although the relevant clauses were lost in the rush to push the Act through before the general election, there were significant voices in favour of those provisions, mainly from the consumer organisations. It would therefore come as no surprise if class actions against financial institutions were proposed again, perhaps at the same time as the legislation to abolish the FSA comes before Parliament in 2011.

Financial Services (Unfair Terms in Consumer Contracts) Bill

This private member's Bill had its first reading on 30 June 2010 and is due for its second reading on 12 November.

The draft Bill has not yet been published, but it is described as "A Bill to ensure that ancillary pricing terms in personal financial services contracts can be assessed for fairness; and for connected purposes". Since the MP sponsoring it is a Liberal Democrat, it may well be similar to amendments proposed earlier this year by the Liberal Democrats when the Financial Services Bill was going through Parliament, seeking to extend the scope of the Unfair Terms in Consumer Contracts Regulations 1999 to allow the price and the definition of the main subject matter of a contract to be challenged under the Regulations where the contract is for the supply of financial services.

Flood and Water Management Act 2010

The Flood and Water Management Act 2010 received Royal Assent on 8 April 2010 and was introduced as a result of the Pitt report, the independent review commissioned following the floods in England and Wales during the summer of 2007. One of the key features of the Act is that the local Unitary Authorities or County Councils are under a duty to implement a local flood risk management strategy, part of which will include keeping a register of structures or features which are likely to have a significant effect on flood risk in their area, for example, sea walls or embankments. Once a structure or feature is registered it can only be altered, moved or replaced with consent from the responsible authority, that being the Environment Agency or County Council. This may lead to difficulties which will affect the development and use of land should it contain, or be designated as, a registered structure or feature. The Act also encourages the uptake of sustainable drainage systems by removing the automatic right to connect to sewers and providing for Unitary and County Councils to adopt sustainable urban drainage systems (SUDS) for new developments and redevelopments.

Local Democracy, Economic Development and Construction Act 2009

The Local Democracy, Economic Development and Construction Bill received Royal Assent on 12 November 2009. However some provisions of the Act, relating to construction projects, will not come into force for some time yet. This is because changes brought about by the Act necessitate consequential changes to the Scheme for Construction Contracts. A public consultation on the proposed changes to the Scheme closed on 18 June 2010.

Once it comes into force, of most interest to insurers may be that construction contracts need no longer be in writing to be subject to the regime of the Housing Grants Construction and Regeneration Act 1996. This is a significant change. The Act also introduces changes to the payment mechanisms required to be incorporated into a construction contract. The overriding interest for insurers, however, will be in ensuring that where insurers are in the role of payer, because an event has occurred on site to which the policy responds and works are being carried out and paid for by insurers, all the requisite payment notices are issued in the proper form and on time. In addition, when dealing with an adjudication, insurers must be aware of the extremely short timescales involved, usually 28 days from reference to decision, which will necessitate swift action.

Personal Responsibility Bill

This Bill, again detailed in our report last year, was presented to Parliament on 15 July 2009 but it was subsequently dropped by its sponsor, Norman Baker.

Snow Clearance Bill

This Bill, to provide immunity from prosecution or civil action for persons who have removed or attempted to remove snow from public places, had its first reading in the House of Commons on 5 July 2010. Its second reading is due on 12 November 2010. The text of the Bill is not yet available, but is likely to be along the lines of previous attempts to clarify the law in this area.

Third Parties (Rights Against Insurers) Act 2010

On 25 March 2010, the Third Parties (Rights Against Insurers) Act 2010 received Royal Assent. The Act follows the Law Commission's report published on 31 July 2001, recommending change to the Third Parties (Rights Against Insurers) Act 1930.

The 1930 Act applies where a person or company takes out liability insurance. If the insured becomes liable to a third party, but has become insolvent, the Act transfers the insured's rights under the insurance policy to the third party and enables them to proceed directly against the insurer. However, the Law Commission's report identified a number of problems with the 1930 Act which meant that it required updating. The 2010 Act has sought to remedy the deficiencies in the 1930 Act.

The key changes implemented by the 2010 Act are: the third party has a right to seek declarations as to the insured's liability to them and as to the insurer's liability under the insurance contract in one set of proceedings; there is no longer an obligation to join the insured in proceedings against the insurer; the legislation reflects developments in company and insolvency law; voluntary liabilities such as legal and health insurance are expressly provided for; and the third party's ability to seek information is clarified.

The insurer retains the right to use the same defences against a third party as they could have used against the insured. However, the third party can now fulfil the insured's contractual duties such as providing notice of the claim; any condition that the insured should provide ongoing information to the insurer will have no effect if the insured was a body corporate that has been dissolved; and "pay first" clauses will be of no effect after a transfer of statutory rights, though that will not be extended to contracts of marine insurance save in cases of death or personal injury.

Welfare Reform Act 2009 and Benefits Changes Affecting CRU/NHS Charges

In June 2010, the Department for Work and Pensions announced as part of its emergency budget settlement an intention to reassess everyone of working age in receipt of Disability Living Allowance (DLA). This is to allay concerns that numbers claiming are steadily increasing and some may be abusing the system, given that currently DLA benefits are mainly decided on the basis of self-reporting need (with only some undergoing medical assessments). It is not clear whether medical assessments will now become mandatory for all DLA awards but, if so, CRU certificates including DLA may decrease going forward.

Further, the Welfare Reform Bill received Royal Assent on 12 November 2009. The Act is aimed at reforming the welfare and benefit system to improve support and incentives for people to move from benefits into work. The key reform is the abolition of Income Support. From October 2010, all in receipt of Incapacity Benefit, Income Support (on the grounds of disability) and Severe Disablement Allowance will be reassessed and moved on to either Jobseekers' Allowance (JA) if they are well or Employment and Support Allowance (ESA) if they are ill. Since both JA and ESA are still off-settable against claims for loss of earnings, this may not have any significant effect.

Orders, Regulations, Codes and Guidance

ABI Code of Practice on Third Party Assistance

Published in June 2010, this is a voluntary good practice guide, intended to strengthen existing protocols and provide guidance for an insurer when they provide, or offer to provide, assistance directly to a person who has had an accident with the insurer's policyholder and may be entitled to a compensation payment for personal injury and associated vehicle repair and hire. There is also an ABI Third Party Assistance Claimant Guide (May 2010).

ABI Good Practice Guide on Buying Insurance Online

The ABI, working with BIBA, the consumers' association Which?, and leading insurance comparison websites, has published a good practice guide on buying insurance online. The guidance applies to insurance comparison websites, insurers and brokers selling general insurance online. Key recommendations include that customers should be able to review key features of their selected policy before they commit to buy; it should be made clear what cover is provided as standard, and which features are sold as any add-ons, such as home emergency cover under household insurance; the level of any voluntary or compulsory excess should be prominently displayed and clearly explained; and customers to whom a quote cannot be offered should be directed to possible alternative sources of help, such as specialist providers.

Civil Justice Council Guidance on the Cost of Care

The Civil Justice Council has published draft guidance on the cost of care. The Council acknowledged the limited guidance in the rules or case law on when and how care experts should be instructed; the most helpful format for their reports; and the factors judges should take into account in deciding these claims. The draft guidance comprises (1) a best practice guidance note, (2) a Care Information Schedule to help parties and the court to decide at an early stage how to progress the care claim, (3) a draft letter for the instruction of a care expert and (4) a template for a care expert's report.

The Serious Injury Committee of the Civil Justice Council have been asked to address the *Roberts v Johnstone* basis for calculating accommodation awards. One of the suggestions is that defendants should fund the mortgage payments for the new property.

Corporate Manslaughter & HSWA 1974 Sentencing Guidelines

February 2010 saw the introduction of the new Sentencing Guidelines to be applied to the Corporate Manslaughter cases and fatalities under the Health and Safety at Work Act 1974 where the failings are found to be a "significant cause of death". The Guidelines do not recommend linking fines to company turnover (something which had been considered in consultation), however, where the offence is under HSWA and is shown to have caused death, the Guidelines state that fines will seldom be less than £100,000 and may be measured in hundreds of thousands or more. For offences under the Corporate Manslaughter Act, the Guidelines indicate that a starting point of £500,000 will usually be appropriate.

There is yet to be a conviction of a company under the Corporate Manslaughter Act 2009 since the adjournment of the *Cotswold Geotechnics* case earlier this year (adjourned until October 2010). Sentences passed under the new Guidelines in relation to fatalities under HSWA however do seem to indicate increased fines and an application of the new Guidelines with fines often in the region of £200,000 plus.

Costs in Criminal Cases Regulations

This year the position as to costs recoverable by a criminal defendant following an acquittal or discontinuance has changed and then changed again. Following the implementation in October 2009 of the Costs in Criminal Cases Regulations, a cap was set on the rates recoverable by a successful defendant, meaning that recoverable costs would be limited to legal rates – significantly lower than those paid out by insurers or at a private/ commercial rate.

In June 2010 however the Law Society successfully judicially reviewed the Lord Chancellor (*R. (on the application of the Law Society) v. Lord Chancellor*) stating that he did not have the powers to make such rules under s.20 of the Prosecution of Offences Act 1985 and therefore the scheme was quashed with immediate effect.

The decision is good news to individual and corporate defendants alike (and their insurers) who will likely now receive the majority of costs back from the courts following success. However, the success should be viewed with caution as it is anticipated that some capping or limit on defendants' costs is likely to be considered again in due course.

CRC (Carbon Reduction Commitment) Energy Efficiency Scheme Order 2010

The Scheme came into operation on 1 April 2010 and the initial deadline for registration with the Environment Agency is 30 September. The Scheme applies to organisations who receive electricity through a settled half hourly meter.

- If an organisation's annual energy consumption from half-hourly meters exceeded 6,000 MWh in 2008 then they are required to register with the Environment Agency as a full participant to the scheme.
- If an organisation's annual energy consumption from half-hourly meters was between 3-6,000 MWh in 2008 then they are required to register with the Environment Agency and make an information disclosure of the total amount of electricity with which they were supplied from half hourly meters during that year.
- If an organisation's annual energy consumption from half-hourly meters was less than 3,000 MWh in 2008 then they are required simply to provide contact details to the Environment Agency and tick the appropriate box on the form.

Failure to register, failure to measure and report on emissions as required, and failure to supply requested information are offences.

Employers' Liability Tracing Office and Employers' Liability Insurance Bureau

The Employers' Liability Tracing Office ("ELTO") is due to go live in 2011, allowing claimants access to a database of EL policies through an online facility (at www.elto.org.uk). All bodies which own current or past EL liabilities for UK employers, including active and run-off insurers, will initially be invited to join ELTO as members on a voluntary basis. Whilst this is currently voluntary, the FSA is consulting on introducing rules requiring EL insurers to publish EL policy data, an obligation which membership of ELTO would then fulfil.

From April 2011, all members will be required to upload new and renewed policies, and old policies with new claims made against them. From April 2012, all members will be required to upload new and renewed policies, with additional information such as a unique reference number for policyholders. From October 2012, ELTO will roll out a sanction regime.

At the time of writing, it remains to be seen whether the Government will proceed with the plans of the previous Government, opposed by the ABI and insurers, to establish an Employers' Liability Insurance Bureau to oversee a pool from which to meet EL claims where no insurer can be identified. The previous Government issued a consultation paper on the ELIB concept in February 2010 but the closing date was 9 May, a few days after the General Election.

Environmental Civil Sanctions (England) Order 2010

The English Regulations came into force on 1 April 2010 (with the Welsh Regulations following on 15 July). They allow for the Environment Agency, Natural England and Countryside Council for Wales to implement the new civil sanctions regime. The aim of the regime is to create a better graduated enforcement system and, more widely, a level playing field in removing competitive advantages for non-compliant companies. The civil sanctions include compliance, restoration and stop notices; fixed and variable monetary penalties; and various undertakings. The regulators may not implement the regime until they have formally published Guidance on how they intend to use the sanctions, including how any monetary penalties will be calculated. Their respective Guidance is expected to be published sometime during autumn 2010 and the Environment Agency at least expects to be using the new regime from December this year, initially mainly in the hazardous waste, water resources and packaging waste sectors.

Financial Services Authority Abolition

The Government has confirmed its plans to abolish the Financial Services Authority, moving prudential regulation of banks and insurers to a new subsidiary of the Bank of England, the Prudential Regulation Authority. The rump of the FSA's functions, such as conduct of business supervision, authorisation of insurance brokers and regulation of markets, will be carried out by a consumer protection and markets authority, which in time may also take on the regulation of consumer credit. Some of the FSA's financial crime functions will be carried out by a new Financial Crime Agency, the details of which will be consulted on separately.

The chief executive of the FSA, Hector Sants, will stay on in his present role and become the first chief executive of the PRA. In the meantime, he has promised that it will be business as usual at the FSA, with the FSA's more intrusive approach to supervision continuing, along with projects such as the Retail Distribution Review.

The formal changes are expected to come into effect in 2013, but the FSA will re-organise itself along the lines of the new structure with effect from 2011. The Financial Policy Committee, a new committee of the Bank of England responsible for macro-prudential regulation, will be established on an interim basis from Autumn 2010.

Fit Notes replace Sick Notes

A change in the law from April 2010 means that GPs will now provide further information in notes they provide about individuals stating not only the condition from which a patient is suffering but also information about how the condition affects the individual, how they might return to work and any support required to enable them to do so.

The new notes still provide evidence as to why an employee is unfit for work (due to illness or injury); are not required until after the 7th day of calendar sickness; and do not have any impact on entitlement to Statutory Sick Pay and employer's obligations under the Disability Discrimination Act. However the new notes remove the "fit for work" option on the old form and replace it with a new format containing two options of "unfit for work" and "may be fit for work taking account of the following advice".

Issues arising out the new notes include whether an employer is bound by GP's advice re: changes at work (they are not) and what to do if an employee wishes to return to work contrary to a note (employers should take care). The overriding message is that clear documentation on responses by an employer should be kept and consideration given as to whether risk assessments and sickness absence policies need reviewing.

Flood Risk Regulations 2009

The Flood Risk Regulations came into effect on 10 December 2009 and implemented the EU Floods Directive (Directive 2007/60/EC) in the UK.

The Regulations place a duty on the Environment Agency and Lead Local Authorities to prepare Preliminary Flood Risk Assessments before 22 December 2011, at which time they will be published by the Environment Agency. There is also a requirement to produce flood hazard and flood risk maps for all sources of flooding which must be published by 22 December 2013. Finally, Flood Risk Management Plans need to be produced by 22 December 2015 which set objectives for flood risk management and establish proposed measures for achieving those objectives.

FSA Statement on "Have Read and Understood Terms"

The FSA has reiterated its warning to firms about the use of terms requiring consumers to declare that they have read and understood an agreement. The FSA believes that such a term is "likely to be unfair because it binds customers to terms which, in practice, they may not have any real awareness of" and therefore in breach of the Unfair Terms in Consumer Contracts 1999. Insurers should review both their terms and conditions and application forms and other documents which might use this type of wording.

Insurance Block Exemption Regulation 2010

The new Insurance Block Exemption Regulation (IBER) came into force from 1 April 2010 and has restricted the conditions allowing pools to benefit from exemption from competition rules which prohibit anti-competitive agreements. Under the old rules, a pool for co-insurance benefited from exemption if the market share of the pool was under 20%, but under the new IBER pools will be exempt from competition rules if they continue to have a market share of 20%. Market share is now calculated by taking the market share of each member (and its associated companies within the pool) and by taking the following into account:

- If a member of the pool (and/or its associated companies) is part of *another* pool in the same market, the market share of *that* pool is taken into account– this was not the case before; and
- Generally the market share held by each member (and its associated companies) on the same market as the pool, is also added – again, this is new.

Other key changes include new definitions of "co-insurance pools" and "co-reinsurance pools" which confirm that IBER does not cover ad-hoc co-insurance or co-reinsurance involving a lead insurer and following insurers in the subscription market. There also a wider definition of "new risks" which are exempt for three years, regardless of the participants' market share. The risk must be genuinely new or, exceptionally, a risk the nature of which has changed materially. If you are part of, or considering participating in, a co-insurance pool you may wish to seek legal advice on whether your pool is protected by EU rules.

IMD2

The Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) is due to report shortly to the European Commission on proposed amendments to the Insurance Mediation Directive. The Commission will then present a proposed revised form of the Insurance Mediation Directive, termed IMD 2, early in 2011.

Among the issues CEIOPS was asked to comment on was consistency of interpretation by member states, for example in relation to scope and exemptions under the current IMD, clarity over the rights of services provided by insurance intermediaries established outside the EEA, improvements to current passporting notification arrangements and greater transparency on the remuneration of intermediaries and mechanisms to ensure management of conflicts of interest.

The Commission also wants to reduce the administrative burden of implementation, for example where the cost of regulation exceeds the benefit. It is also considering harmonising requirements on the knowledge and ability of individuals selling insurance.

JCT Terrorism Update

In December 2009, the Joint Contracts Tribunal issued the JCT Terrorism Update in order to rationalise the position on a contractor's liability for loss or damage on a project resulting from an act of terrorism. The usual default position in the JCT Standard Forms is that terrorism cover is to be provided by the Pool Reinsurance Company Limited (Pool Re) which was established under the

Reinsurance (Terrorism) Act 1993. Since the enactment of the Terrorism Act 2000 many insurers' contractors all risks policies have used the wider definition of terrorism contained in the 2000 Act when excluding losses arising from terrorism. However, Pool Re provides cover pursuant to the narrow definition of terrorism used in the 1993 Act. As a result, there is a gap between the exclusions in the contractor's all risk insurance policy and those risks which are covered by Pool Re. The JCT Terrorism Update limits the contractor's liability (where insurance Option A applies) for damage to works caused by terrorism to that liability covered under the terrorism cover specified in the JCT Contract Particulars. It further limits the contractual obligation of whichever party is to maintain the insurance to obtain terrorism cover as specified in the JCT Contract Particulars. In both cases, the default position is that the cover provided by Pool Re applies. Insurers may, therefore, find that contractors cannot accept exclusions in their all risks insurance policies which go beyond the definition of terrorism in the 1993 Act. Alternatively, contractors will be compelled to address the disparity and obtain cover from insurers, other than Pool Re, which offer broader cover.

Motor Insurance Directive 2009/103/EC

The EU Motor Insurance Directive 2009/103/EC codifies and supersedes all five previous EU Motor Insurance Directives. The Directive obliges all motor vehicles in the EU to be covered by compulsory third party insurance on the basis of a single premium which covers use of the vehicle in all EU Member States. It also abolishes border checks on insurance so that vehicles can be driven freely between Member States.

The Directive aims to protect the victims of road traffic accidents (to include passengers) against unidentified or uninsured vehicles. It enables local victims of accidents caused by vehicles from another Member State to be compensated quickly and efficiently via a private sector network of bureaux and the Green Card System set up by insurers. There is also a mechanism for quick settlement of claims where the accident takes place outside the victim's own country of residence.

The Directive prescribes minimum amounts of compensation for both bodily injury and financial losses, though the issues of civil liability and calculation of damages remain in accordance with the laws of the relevant Member States.

At any time, the policyholder has the right to request a statement detailing the claims involving the vehicle(s) covered by the insurance contract going back 5 years. The insurer must provide this statement within 15 days of any request, thus enabling policyholders to switch more easily from one insurer to another.

Motor vehicles should be registered in the country of residence of the policyholder and/or vehicle owner but may, subject to certain rules, be insured by an insurer established in any other Member State. Insurers willing to provide cross-border insurance services must fulfil certain formalities following from the relevant EU insurance legislation.

Motor Prosecutions - Revised Guidelines on Acceptance of Pleas

These revised guidelines came into force on 1 December and replace those issued in October 2005.

The guidelines set out how prosecutors should meet the dual objectives of protecting the victims' interests together with ensuring fairness to the accused and transparency in the process. As a

general principle, when a case is listed for trial and the prosecution choose to accept a plea before commencement of proceedings, or to offer no evidence on the indictment, the prosecution should explain the position to the victim (or their family), where practicable. The views of the victim or the family may assist in informing the prosecutor's decision as to whether it is in the public interest to accept or reject the plea. The victim should then be kept informed and any decisions made at court explained.

The net effect of these guidelines is that the prosecution should not accept a plea without considering the interests of the victim and any assertion by the defence in a plea in mitigation that is particularly contentious should be challenged. This may be relevant, for example, where a defendant in a driving offence seeks to be sentenced on the basis that a potentially negligent act or omission on the part of a victim driver was a contributory factor to which the court should have proper regard.

Planning Reforms

It is hard to summarise the anticipated reforms to the planning system in a few lines. Regional Spatial Strategies have been revoked, Regional Development Agencies are to be dissolved, planning policies and the national planning framework are all to be revised, procedures for Development Plans to be reformed. On 8 July, the Department for Communities and Local Government published its Draft Structural Reform Plan. The buzz words are "localism" and "open source planning". A Decentralisation and Localism Bill is expected in the autumn, when hopefully more will become clear.

The risk to insurers is in increased claims against planning professionals where they have failed to keep up with all the changes; and claims by developers and others involved in the planning process where delay has meant that planning approval has not been obtained, where it would have been previously.

Rome I

Contracts concluded from 18 December 2009 will be subject to EC Regulation 593/2008 (Rome I) which standardise determining the applicable law for contractual obligations in the event of a dispute. Contracts concluded prior to this remain subject to the Rome Convention.

The applicable law of a contract will be that chosen, provided that the choice is "*clearly demonstrated*" by the contract terms or the circumstances of the case. However, parties cannot contract out of (a) mandatory provisions of a country; (b) the effect of Community law by agreeing non-Member State law where all other elements of the contract relate to one or more Member States; or (c) the law of the country where all elements of the contract are located. The "*clearly demonstrated*" test should provide insurers with some comfort where the risk is placed on the London market or using a London form.

Absent choice, the applicable law should be that of the habitual residence of the party effecting the characteristic performance of the contract unless, from all the circumstances another country is "*manifestly more closely connected*". If it remains unclear, the applicable law should be the law of the country with which the contract is "*most closely connected*".

Rome I expressly applies to contracts of insurance (the Rome Convention excluded insurance) and provides at article 7 specific rules relating to the freedom of choice or method to determine the

applicable law. Reinsurance is exempted from article 7 but is within the scope of Rome I generally.

Solvency II

On 4 May 2010, Michel Barnier, Commissioner for the Internal Market and Services, confirmed the Commission's plans to defer the date on which the Solvency II regime comes into force from 31 October 2012 to 31 December 2012, to coincide with the financial year end of many insurers. This should mean that the new rules will apply to financial years starting on or after 1 January 2013. The amending directive confirming this is expected to be adopted in September 2010.

Consultations, Reports & Reviews

Administrative Redress

On 26 May 2010, the Law Commission published its paper following its consultation on administrative redress – public bodies and the citizen. After possible far reaching proposals (including the introduction of a category of activity which was considered to be truly public and which should be removed from the tort approach; and the proposal to modify the normal operation of the rule on joint and several liability for public bodies) the Law Commission noted that "we accept that we failed to convince many consultees of the need for reform with regard to the impact of private law on public bodies. We also accept that we have not convinced consultees or Government that our proposed changes would be preferable to the current incremental approach of the law in this area".

Damages Based Agreements Regulations 2010

Historically, Employment Tribunal (ET) cases were treated as non-contentious business, so that solicitors could legitimately offer contingency fee agreements, charging a percentage of any compensation or settlement that is secured.

The status of ET cases has now changed so that contingency fee agreements would be unlawful unless permitted by statute. The Coroners and Justice Act 1999 permits the use of Damages Based Agreements for ET cases, subject to appropriate regulations coming into force.

The last Government looked at the use of this type of agreement and said that it was concerned that many claimants did not understand clearly what they would pay and that some of the terms were unfair. It decided to exercise powers to regulate these agreements, despite opposition from claimant lawyers, claims managers and trade unions.

The Regulations came into force on 6 April 2010. They require the representative to provide information to the claimant about other methods of funding their claim, such as legal expenses insurance; the circumstances in which the agreement can be terminated; dispute resolution services provided via the Advisory, Conciliation and Arbitration Service (Acas); details of how costs and expenses can be reviewed; when they are payable and a reasonable estimate of what they will be. The most controversial aspect of the Regulations is the cap on the percentage of damages that can be charged by the representative as his fee. This is set at 35% of the sum recovered by the claimant and that includes VAT.

Default Retirement Age Abolition

On 29 July, the Government announced its intention to abolish the Default Retirement Age ("DRA") of 65, whereby employers can currently require employees to retire on or after their 65th birthday. In a consultation document published by the Department of Business Innovation and Skills, it made clear that no one should be required to retire after 30 September 2011 without justification. In effect, this

will mean that any employer wishing to use the retirement procedure in the interim must give the requisite minimum six months' notice to affected employees on or before 31 March 2011. While many employers have learned to live without a DRA, it is still relied upon by a significant number of employers. There will be important issues for employers to address in the intervening months, to ensure that they manage a range of issues without engaging in age discrimination. In theory, it will be possible for employers objectively to justify requiring employees to retire. However, it is unlikely that in most circumstances employers will be able to demonstrate that compulsory retirement is a proportionate means of achieving a legitimate aim (the objective justification test). The abolition will have a financial impact, with employers having to consider whether and how to adjust the provision of any age related benefits, including insurance benefits and redundancy schemes. New management practices and a fresh approach to flexible working may well be called for.

Insurance Contract Law Review

The Issues Papers released by the Law Commissions since our last report are set out below:

March 2010: Issues Paper 6 on Damages for Late Payment and the Insurer's Duty of Good Faith

July 2010: Issues Paper 7 on the Insured's Post-Contract Duty of Good Faith

July 2010: Issues Paper 8 on the Broker's Liability for Premiums under s53 Marine Insurance Act 1906

Responses on both of the July Issues Papers are required by October 2010.

In relation to the insurer's ongoing duty of good faith, the case of *Sprung v Royal Insurance* states that a policyholder cannot recover for late payment under a policy, even if the insurer wrongfully refuses to pay out on time and as a result the policyholder goes out of business. The Law Commissions propose that insurers should be liable for the consequences of late payment in appropriate cases. It is our position that the law is in need of reform and that this should be in the form of legislative reversal of the decision in *Sprung*.

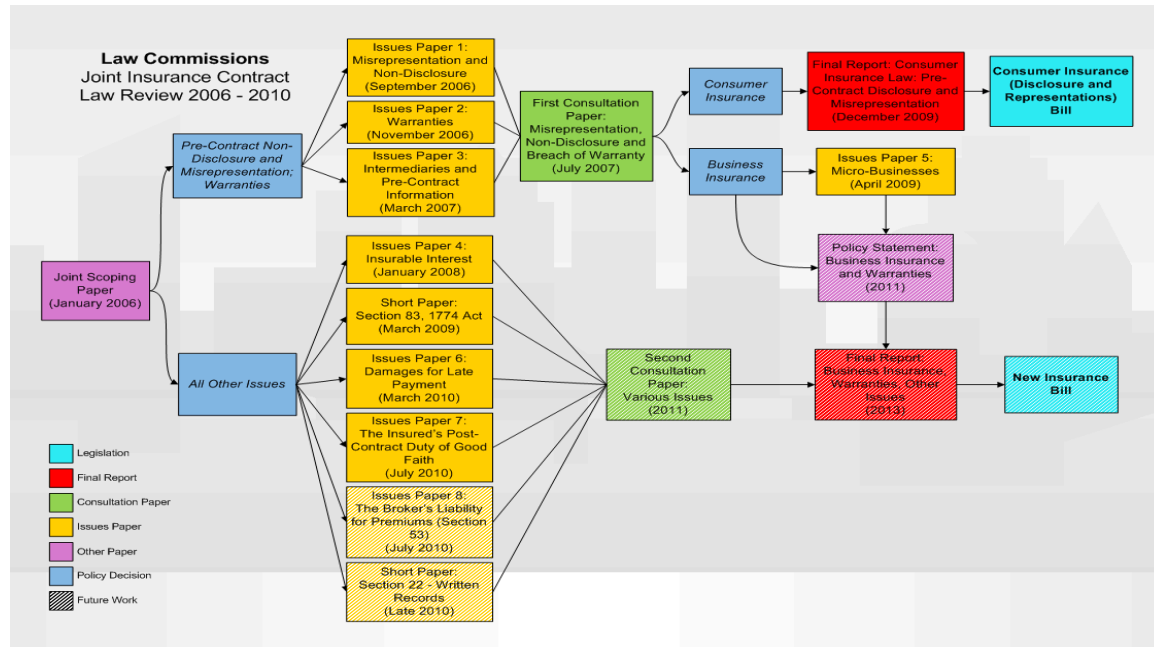
Issues Paper 7 deals with the flip side of the coin and considers the policyholder's duty to act honestly during the lifetime of a contract. This primarily deals with fraud and the remedies which should be available. Whilst s17 of the 1906 Act permits an insurer to avoid the policy and demand money back on any previous claims, the courts are reluctant to allow this and instead apply forfeiture of the entire claim but leave other claims unaffected. The Issues Paper proposes adopting the court's approach. It is our position that, if only the fraudulent claim is to be forfeited, termination of the policy must take effect from the time of the fraud, rather than once the claim has been refused as the Issues Paper suggests. Investigations of this kind can take time and fraud is not an allegation to be made lightly. Insurers should not be pressed into making a decision prematurely and be at the risk of further claims in the interim.

However, there is hope yet for insurers in the form of the Law Commissions' proposal of a fresh right for insurers to recover from the policyholder their reasonable costs of investigating a fraudulent claim. This can be seen as the corollary of the policyholder's right to recover damages for late payment.

There is one further Issues Paper awaited, examining s22 of the 1906 Act (which provides that a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy). Thereafter, there will be a second consultation paper, due to be published in 2011, drawing together a more focused set of proposals from the Issues Papers not dealt with in the Consumer Insurance

(Disclosure and Misrepresentation) Bill (see Legislation above). There will also be a policy paper with recommendations on the law of non-disclosure and warranties for business insurance, involving both small and large businesses.

The position to date and going forward is summarised in the following diagram.



Jackson

Sir Rupert Jackson published his Review of Civil Litigation Costs: Final Report on 14 January 2010. This fundamental review was wide ranging and covered all aspects of civil litigation costs. There are no less than 109 recommendations of which 9 would require primary legislation. Sir Rupert concludes that Conditional Fee Agreements are the major contributor to disproportionate costs in civil litigation and the recommendation made is that success fees and After the Event (ATE) insurance premiums should cease to be recoverable from the losing party. To accommodate that cost to clients in injury claims, it is recommended that general damages for pain, suffering and loss of amenity should increase by 10 per cent. Alongside this is the recommendation that any success fee charged to the client must not exceed 25 per cent of damages (excluding damages for future care or future losses). There is also a recommendation for "qualified one way costs shifting" in cases where ATE insurance is common, thus removing the need for the ATE policy: winning claimants would normally recover their costs, but winning defendants would not normally recover theirs, save where the claimant's conduct justifies it and the claimant has the means to pay.

Further key recommendations are that: figures for fixed costs in fast track personal injury accident cases should be introduced by October 2010; there should be greater incentives to make and accept Part 36 offers; referral fees paid by solicitors to introducers of personal injury and other claims should either be abolished or capped at an appropriate level; and contingency fees should be permitted between solicitor and client, as long as their use is regulated so that the consumer is protected.

On 26 July 2010 the Parliamentary Under Secretary of State for Justice, Jonathan Djanogly, made a written ministerial statement confirming the Government's intention to consult in the autumn on implementing these recommendations. The consultation will be limited to the reform of CFAs, which

has been identified as the proposal that will be taken forward as a matter of priority. If the consultation leads to the recoverability of success fees and ATE premium being removed, primary legislation will be required. The consultation is also likely to cover contingency fees and whether these should be allowed. Fixed recoverable costs are not covered in the consultation but the Government is considering these recommendations. In addition, the Legal Services Board (LSB) has been asked to look at the issue of referral fees, although a recent announcement on consultation by the LSB suggests that they see no reason to change the current system.

Legal Expenses Insurance - Eschig

The Financial Services Authority has written to insurers who provide legal expenses insurance following the European Court of Justice case of *Eschig*. The case concerned the right of an insured, under the 1987 Legal Expenses Directive, to the freedom to choose their own lawyer. That Directive was implemented in the UK by the Insurance Companies (Legal Expenses Insurance) Regulations 1990.

The ruling in *Eschig* contradicts the terms of an undertaking which the FSA obtained against DAS Legal Expenses Insurance Company Ltd in 2006 under the Unfair Terms in Consumer Contracts Regulations 1999 (the undertaking has now been withdrawn), which other insurers may also have relied on.

The FSA has asked affected insurers to write to it by 30 September 2010, telling it what steps they have taken to ensure that the terms of their legal expenses insurance complies with the 1990 Regulations in the light of the *Eschig* case.

Lord Young's Review of Health and Safety Legislation

Lord Young, who was commissioned to review current health and safety law by David Cameron whilst he was still in opposition in December 2009, is due to report on his findings next month. Lord Young is expected to conclude that, although health and safety laws are vital for the protection of workers in hazardous industries, problems have emerged from the burdens they have placed on those working in shops, offices and classrooms where there are relatively minimal risks. The overall aim is to reduce bureaucracy and its associated costs and replace it with common sense and individual responsibility. It is anticipated that the report will also propose curbs on "ambulance-chasing" lawyers; new restrictions on advertisements by claim management firms; and changes to "no-win, no-fee" legal arrangements. The Government is then expected to repeal various parts of the health and safety legislation.

Ministry of Justice Consultation on Court Closures

In a series of regional consultations, the Ministry of Justice published proposals on 23 June 2010 to close some 54 County Courts and many more magistrates courts. The proposals cover all regions of the country and include several courts used by claimant lawyers: Bury, Mayors' and City, Rawtenstall and Salford County Courts are all on the list scheduled for closure as part of the Coalition Government's costs-cutting measures. The consultation closes on 15 September.

Ministry of Justice Consultation on Limitation

The Ministry of Justice announced following a limited consultation that it would not be changing the law on limitation in injury and disease claims as had previously recommended. In brief the main concerns had already been addressed by the decision of the House of Lords in *A v Hoare*.

Solicitors Regulation Authority Review

The Solicitors Regulation Authority has announced a 'root-and-branch' review of the professional indemnity regime for solicitors in private practice in England and Wales. The current regime, introduced in 2000, has come under strain in recent years, particularly as a result of mounting losses in the assigned risks pool. Qualifying insurers have called for a relaxation of the onerous minimum terms and conditions, and more effective regulatory action against firms.

However, any changes resulting from the review will not come into effect until the 2011-12 indemnity period, with the renewal on 1 October 2010 likely to be particularly difficult for firms with ten or fewer partners.

Third Party Funding

The Jackson report was seen to be in favour of third party funding though there was a lack of information provided due to the relative infancy of the market.

On 23 July 2010, a Consultation Paper was released by the Civil Justice Council (CJC) with a draft self regulatory code for third party funding.

The draft voluntary code was drawn up in 2008 and was subject to revision following consultations and the Jackson report which recommended there should be a code with self regulation to be replaced by statutory regulation if self regulation failed or the industry expands. A key element post Jackson was clarification that the funder would be liable for the full amount of adverse costs incurred throughout the life of the funding agreement subject to specific agreement otherwise as set out in the agreement.

The stated purpose for the introduction of a voluntary code of conduct and the establishment of an industry association to oversee regulation is to ensure that the nascent litigation funding industry develops in a fair and responsible way.

The CJC has requested a response by 3 September 2010 as to whether: the current draft code should be endorsed as best practice; the current constitution for an association of litigation funders should be endorsed as best practice; the code or constitution have any impact on any area of business or sector.

The costs of establishing an association, managing membership and maintaining the code would be borne by the third party funding industry itself.

The CJC's options for the future are to: do nothing and risk litigation from funders and other parties seeking reasons such as undue interference/influence or champerty to avoid making payment; introduce formal regulation with no established regulator currently prepared to undertake the role with little chance of the Government funding a new regulator; or introduce self regulation which is the least expensive regulatory option and should it fail then there will be an immediate call for formal regulation

to step in.

Separately, there has been a lot of press and movement in the market during the past year with the number of providers increasing by 20%. The products are all individually assessed with ranges for the minimum amount of the dispute for a party to be funded ranging from £60,000 to £20 million. Virtually all products are modelled on taking a percentage of the damages with a range of options. A funder offering to cover costs for actions with a value of £60,000 for a set fee and interest normally does not provide comprehensive cover for own party's costs.

Third party funding is only a very small part of the market dealing mostly with large commercial actions but there are signs of growth with Harbour Litigation Funding reportedly having raised £60 million to invest in primarily UK based commercial litigations. Juridica 's 2009 results revealed £85 million invested in 22 cases.

Focus on Asbestos-Related Developments

Pleural Plaques

Pleural Plaques are small localised areas of fibrosis caused by exposure to asbestos fibres, found within the pleura of the lung. They are usually symptomless. On 17 October 2007 the Law Lords upheld the Court of Appeal decision in *Rothwell* that the existence of pleural plaques does not constitute actionable or compensatable damage. Prior to that, since the 1980s, people had been able to bring claims for compensation for pleural plaques.

In Scotland, the Damages (Asbestos-related Conditions) (Scotland) Act 2009 received Royal Assent on 17 April 2009, having received support from all parties in the Scottish Parliament except the Conservative Party. The Act is designed to overturn the House of Lords ruling that pleural plaques are not a compensatable injury and re-establishes a right to recover compensation for this condition. The validity of the Act has been challenged by a group of insurers. The initial challenge before the Court of Session failed. The appeal against that decision was heard by the Inner House in July 2010, and judgment is expected in September or October 2010.

In Northern Ireland, the Executive has published the results of a consultation paper on compensation for pleural plaques. In a statement issued on 29 June 2009 the Finance and Personnel Minister recommended that there should be a change to the law to re-instate the right of recoverability of compensation for pleural plaques. The Assembly Government has now produced a draft Bill to ensure that the House of Lords' decision does not have effect in Northern Ireland, in largely similar form to the 2009 Act of the Scottish Parliament. It is consulting on the terms of the Bill, with a view to ensuring that it meets its agreed policy objective: this consultation closes on 6 September and it is expected that the Assembly Government will then move swiftly to support the Scottish Government position.

Following the decision to overturn the Lords' ruling so far as Scotland was concerned, the then UK Labour Government held a consultation on how to proceed in England and Wales, following which it announced, on 25 February 2010, its intention to make payments of £5,000 to individuals in a limited category under an extra-statutory scheme. That category covered those individuals who had already begun, but not resolved, a legal claim for compensation for pleural plaques at the time of the Law Lords' ruling in October 2007. Along with other initiatives outlined elsewhere in this report, such as ELTO and ELIB, Ministers reported that they were "very pleased to announce that the insurance industry will be contributing £3 million towards research into asbestos-related disease".

The new Government has continued with these plans, although there is now some doubt as to whether the research into asbestos-related disease will be put into effect after the Health Minister, Simon Burns, refused to comment on the issue. The payments scheme is now up and running and will remain open for 1 year. Applications for compensation must be submitted by 1 August 2011. The criteria for eligibility under the Scheme are that, prior to 17 October 2007, the party diagnosed with pleural plaques must have: issued a claim form; and/or sent a letter of claim; and/or named a defendant/insurer against which to make a claim; and/or approached a legal/trade union representative about the case and received confirmation that the case was being taken on. In addition they must not have received an interim payment of £5,000 or more, or resolved their case.

In England and Wales there have been a series of attempts, ultimately unsuccessful, to introduce legislation on pleural plaques via Private Members' Bills in similar form to the 2009 Act of the Scottish Parliament. The Damages (Asbestos Related Conditions) Bill was introduced in the House of Commons by Andrew Dismore MP in early 2009 and was unopposed by the Government at 2nd Reading and even more surprisingly at 3rd Reading. At the time of 3rd Reading, on 16th October 2009, there was insufficient time to get the Bill debated in the House of Lords before Parliament rose in November and so the Bill lapsed. An Employers' Liability Insurance Bill also introduced by Andrew Dismore did not pass 3rd Reading and so it too lapsed.

A further Damages (Asbestos Related Conditions) Bill in identical form was then introduced in the House of Lords by Baroness Quin in the new Parliamentary session in November 2009. This was debated and passed various stages in the House of Lords, again unopposed by the Government, but did not receive 3rd Reading before Parliament rose prior to the Election and was not passed in the final days of Parliament. A Damages (Asbestos Related Conditions) No. 2 Bill was also introduced in the House of Commons by Andrew Dismore in January 2010, together with a further Employers Liability Insurance Bill: both lapsed when Parliament rose.

Mesothelioma and Asbestosis Cases

Notwithstanding the attempts to minimise litigation in these cases it remains an area of significant judicial activity. A new master (Master Victoria McCloud) has been appointed to assist with the claims issued in the RCJ mesothelioma list and other asbestos related cases.

A defence of reasonable practicability succeeded in *Reynolds v SoS for Energy & Climate Change*. Successful defences, however, are rare as seen in *Willmore v Knowlsey MBC* where limited exposure to asbestos was not de minimis. In *Sienkiewicz v Greif (UK) Ltd* de minimis exposure and causation was again the issue here in particular with regard to the impact of environmental exposure as well as that in the workplace. (Permission to appeal to the Supreme Court has been granted and the cases are currently listed for 26 to 28 October 2010.)

In *Revenue & Customs v Silcock* the claimant succeeded in establishing at a 'show cause' hearing that her deceased husband had been exposed to asbestos during his employment with the defendant and the risk of exposure was known and arose from his employer's negligence. The defendant successfully appealed. While the judge had been correct in his assessment that the claimant would succeed at trial on the issue of exposure, he had failed to recognise that the burden remained with the claimant to produce credible evidence of negligence.

The judgment provides some helpful clarification regarding the procedure for mesothelioma fast track cases under Practice Direction D CPR Part 3 as follows:

1. Only when the claimant adduces evidence of asbestos exposure and breach of duty does the burden of proof switch to the defendant.
2. When the claimant satisfies the burden of proof, the correct test is whether the defence has some chance of success above the fanciful.

3. It is open to defendants to argue that the claimant's evidence is insufficient for him to succeed at trial and therefore the defendant has a realistic prospect of success. The defendant however must bear the risk of having no evidence to undermine any appropriate inferences from the claimant's evidence.
4. A finding of exposure to asbestos does not entitle the claimant to judgment. While the dangers of low levels of asbestos have been known since 1970, the burden remains on the claimant to show such exposure was in breach of duty.

It is also clear that under CPR Part 3, judgment will not be entered simply because it is not possible to trace any documents or witnesses. The test is not whether the defendant has a positive case. The fast track procedure is there to ensure that swift compensation is made to victims of asbestos exposure where employers can be shown to have taken no precautions to protect their employees from a known danger. It does not represent a change to the ordinary rules of evidence to assist a claimant who cannot point to specific allegations of exposure.

In terms of quantum, recent decisions have allowed periodical payments to a widow for a mesothelioma sufferer due to her higher care needs (*Sloan v Halsen Insulation & Engineering Company Ltd*) and in *Drake & Others v Foster Wheeler Ltd* the claimant successfully recovered the costs of hospice care which was provided at no actual cost.

The Employment Trigger litigation (*Durham v BAI*) appeal proceeded in November 2009 but judgment remains outstanding. In the meantime insurers grapple with whether the 5 or 10 year date for the start of the mesothelioma applies given the current inconsistency between the PL and EL judgments which comment on this issue.

As medical knowledge expands so do the issues for debate in these cases. In *Sabin v BRB*, which considered causation in asbestosis claims, the judgment provided a detailed consideration of the historic medical data to determine this issue. In *Horsley v Cascade Insulation* consideration was made of the impact of smoking.

Miscellaneous

HSE Asbestos Survey

Published on the 24 September 2009, this report provides an updated analysis of mortality among asbestos workers, investigating which causes of death were associated with asbestos exposure.

Mesothelioma White Paper

A White Paper on mesothelioma claims has been launched setting out practical steps risk managers can take to handle mesothelioma claims and identify areas of potential liability. The paper is underpinned by research published in 2008 by the University of East Anglia which confirmed that: 27.5% of cases emanated from mechanical, electrical and process engineering; 11% from the chemical industry; 7.5% from construction; 6.5% from the metals and minerals industry; and 6.5% from the electronic products, electronics and IT hardware sector. The White Paper also contains a legal section on liabilities. To conduct the study, 100 mesothelioma fast-track claims on Senior Master Whitaker's list between September 2006 and October 2007 were selected at random from a total of

592; in total 91 cases were analysed.

New HSE Campaign

In November 2009, the HSE launched a £1.2m campaign to warn businesses and workers about the dangers of asbestos, Britain's biggest workplace killer. About 500,000 information packs were distributed, alongside targeted press and radio adverts. According to HSE figures, a quarter of the 4,000 people dying annually from asbestos-related diseases in Britain are tradesmen such as joiners, electricians and plumbers. Latest figures show that 2,156 people died from the disease in 2007 alone, an increase of 5% on the previous year.

Projections for Asbestos Claims

In line with this trend, more up to date figures were provided on the rising number of asbestos claims at the C5 Asbestos Claims and Liabilities Conference on 27 January, with the High Court in London receiving 574 claims in 2007, 673 in 2008 and 57 for the first three weeks of January 2010. On average 80-90 cases a month are issued in the mesothelioma list. The actuarial profession's UK Asbestos Working Party has also released figures predicting that this increase in asbestos and mesothelioma claims could cost the UK insurance industry £11 billion by 2050. This is more than double previous estimates and does not include any potential liability from pleural plaques.

Civil Procedure Rules

50th CPR Update – 1 October 2009

This Update came into force on 1 October 2009. Details of the main changes introduced were included in detail in last year's update. The key changes included:

- amendments to Part 35 and its Practice Direction (PD) on Experts, clarifying the definition of an expert; providing guidance on the appointment of a joint expert; revising the expert's statement of truth; and ensuring that questions to experts are proportionate and appropriate.
- the introduction of rules requiring notice of after-the-event insurance premiums at the start of all claims and limiting recovery of such arrangements where notice has not been given.
- the extension of the Automatic Orders Pilot Scheme.
- changes to the rehabilitation code at Annex D of the Protocol for Personal Injury Claims.
- an electronic working pilot scheme.

The new Supreme Court also sat for the first time in October 2009. It has been established to achieve a complete separation between the United Kingdom's senior Judges and the Upper House of Parliament, emphasising the independence of the Law Lords and establishing checks and balances between Parliament, Government and the courts.

CPR 51st Update - 6 April 2010

This Update came into force on 6 April 2010. The key changes included:

- a new PD introducing electronic working, to allow proceedings to commence and subsequent steps to be taken electronically in the jurisdictions of the Admiralty, Commercial and London Mercantile Courts, the Technology and Construction Court, Bankruptcy and Companies courts.
- amendments to the Costs PD. Of note is the need to file and serve a costs estimate in fast track cases when filing an allocation questionnaire. There are also amendments to reflect the revocation of the Conditional Fee Agreements Regulations 2000, including a requirement to disclose the relevant details in a conditional fee agreement to enable the court to determine the level of risk undertaken by the solicitor. Section 13.5(4) is amended so that a statement of costs for summary assessment must be filed and served as soon as possible and, in any event, in the case of a fast track trial, not less than two days before the trial and, in the case of other hearings, no less than 24 hours before the time (not the date) fixed for the hearing.
- changes to the time period for filing and serving documents in support of an application.

- Amendments to comply with the EU Services Directive. This allows for service of documents on a party's legal representative who is qualified to practice in England and Wales but is based in another EU member state.

52nd CPR Update – 30 April 2010

This Update came into force on 30 April 2010. The most significant amendment was the introduction of a low value road traffic accident personal injury claims compensation scheme. The new process aims to deliver fair compensation to the claimant as quickly as possible where an insurer makes an early admission of liability. In return, insurers benefit from limited and proportionate costs.

The scheme applies to personal injury claims relating to road traffic accidents which occur on or after 30 April 2010 and are valued (excluding vehicle damage or hire) at between £1,000 and £10,000. The key changes are:

- a new Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents whereby initial notification of claims must be made electronically.
- a new PD 8B which provides a 3 stage procedure with fixed costs and deadlines and a modified Part 8 process where the claim continues through stages 1 and 2 but cannot be agreed and therefore proceeds to court at stage 3.

The fixed costs payable depend on which stage of the process the case reaches before settlement.

- Stage 1 – the claimant solicitor completes the claim notification form and sends it to the insurer who must make a full admission of liability within 15 business days, failing which the claim will be dealt with under the existing Pre-Action Protocol for Personal Injury claims and the usual cost principles will apply on conclusion of the claim (including the previous regime of predictable costs for cases settling pre-issue).
- Stage 2 – if liability is admitted, the claimant obtains a medical report and the process continues with offers and negotiation of a settlement in accordance with a strict timetable.
- Stage 3 – where the parties cannot agree a settlement at Stage 2, the parties best offers become their 'RTA protocol offers' (effectively their Part 36 offers) and an application is made to court for a quantum hearing using a new simplified Part 8 procedure under PD 8(B). Evidence at the Stage 3 hearing is limited and whilst there is the facility for oral hearings, the default position is for a paper determination. Once the Court has made its adjudication, the RTA protocol offers are then considered to determine who has 'won', and additional interest is payable by the loser in addition to any fixed costs, VAT, disbursements and additional liabilities.

The process is controlled at Stages 1 and 2 by a new industry led online portal designed to allow solicitors and insurers to share information quickly, efficiently and securely. However, there have been some initial technical glitches with the electronic portal and reports of delays in some claimant solicitors receiving the necessary log in details / passwords to allow them access. Insurers have reported a downturn in claims volumes since inception of the new process, and it is likely that problems with the portal offers a partial explanation. Claimant solicitors are also having to obtain more information up front, in order to complete all the mandatory fields on the claim notification form which

may also account for the current downturn in volumes.

Children's claims are included within the new process, but must be approved by the court in the usual way. Accordingly, child settlement hearings (previously labelled Infant Settlement hearings) are built into the new Part 8 procedure.

The fixed costs payable under the new process are as follows:

| | | | |
|---------|---|--------------------------------|---------------------------------------|
| Stage 1 | – | investigations | £400 |
| Stage 2 | – | evidence gathering/negotiation | £800 |
| Stage 3 | – | paper hearing | £250 |
| | | oral hearing | £500 (to include £250 advocate's fee) |

An additional fee of £150 is allowed in the case of a child settlement hearing, where counsel's advice on quantum is required.

The process requires insurers to make payments on account of costs at the end of Stage 1 and on account of damages and costs at the end of Stage 2. Either party may enter into a CFA in the usual way: the claimant's success fee will be 12.5% for Stages 1 and 2, with 100% success fee for either side for Stage 3 only.

53rd CPR Update – 1 October 2010

This Update is due to come into force on 1 October 2010. Key changes include:

- a new PD on the Disclosure of Electronic Documents and an accompanying Electronic Documents Questionnaire. The new rules will only apply to proceedings allocated to the multi-track which are started on or after 1 October 2010.

The purpose of the Electronic Documents Questionnaire is to identify the scope of electronically stored information required in an action against the background of the issues identified by the statements of case and the requirement of proportionality. Parties and their legal representatives will be required to discuss the technology needed manage and disclose Electronic Documents before the first case management conference.

The Allocation Questionnaire will also be amended to incorporate questions on whether the parties have agreed the scope and extent of disclosure of electronic documents and, if there is no such agreement, what issues about disclosure of such documents the court needs to address and whether they should be dealt with at the CMC or at a separate hearing.

- The opening of the new Business Court has been delayed and is now scheduled to open for business in 2011. It will deal with commercial disputes, including those heard by the Commercial Court and Technology and Construction Courts.

Part 36

Recent cases have provided guidance on the interpretation and effect of Part 36 in imposing costs sanctions and incentives to parties in proceedings. These can be found in the Appendix under Costs but we deal below with the significant case of *Gibbon v Manchester City Council*.

In *Gibbon v Manchester City Council*, the Court of Appeal had to decide whether Part 36 embodies a self-contained code or is subject to the general law of contract. This appeal concerned an action against the local authority in which the claimant (G) had made a Part 36 offer of £2,500. Although the local authority (M) had initially made lower offers, it eventually offered the full £2,500. G rejected that offer inviting a higher offer of settlement to be made, but failed to withdraw her original Part 36 offer for that amount. When it appeared the value of the claim was increasing, M formally accepted G's Part 36 offer. G argued that acceptance was impossible on the basis that M's initial rejection of her offer made it incapable of acceptance at a later stage. In the alternative her earlier rejection of M's Part 36 offer of the same value amounted to an implied withdrawal of her Part 36 offer.

The court held that Part 36 was drafted to provide certainty and clarity to the ordinary layman. It should be read and understood according to its terms, rather than incorporating all the rules governing the formation of contracts. Part 36.3 (7) clearly states that withdrawal of a Part 36 offer requires express notice in writing in clear terms and an offer can be accepted at any time prior to withdrawal. This is the case regardless of whether the offeree has made a separate offer. Therefore it was impossible to reconcile G's arguments with the language of Part 36, which sets out in unambiguous terms how an offer can be withdrawn, making no provision for an offer to lapse or become incapable of acceptance upon rejection by the offeree. *Gibbon* is therefore significant in confirming that the concept of 'implied withdrawal' does not exist for Part 36, making it essential for a party formally to withdraw a Part 36 offer if no longer wishes to be accepted.

Cases

Full summaries of these cases can be found in the attached Appendix.

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| <p><u>Abuse and Assault</u></p> <ul style="list-style-type: none"> • C v Merthyr Tydfil County Borough Council • MAGA v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church • Raggett v The Society of Jesus Trust • Webster v Ridgeway Foundation School <p><u>ATE</u></p> <ul style="list-style-type: none"> • Kris Motor Spares Ltd v Fox Williams LLP • Michael Phillips Architects Ltd v Riklin • Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc <p><u>Causation</u></p> <ul style="list-style-type: none"> • Harsukhraj Bhatt v Fountain Motors Ltd • Smith v Youth Justice Board for England • Spencer v Wincanton Holdings Ltd <p><u>Costs</u></p> <ul style="list-style-type: none"> • Andrews v Aylott • Drew v Whitbread • Higgins v MOD • Morris v Southwark Council • O'Beirne v Hudson • Pankhurst v White & MIB • Sousa v Waltham Forest • Vector Investments v JD Williams <p><u>Credit Hire</u></p> <ul style="list-style-type: none"> • Accident Exchange v Autofocus • Beechwood v Hoyer • Bent v Allianz • Copley v Law <p><u>Deafness</u></p> <ul style="list-style-type: none"> • Baker v Quantum <p><u>Disclosure</u></p> <ul style="list-style-type: none"> • Arroyo & Others v BP Exploration Co Ltd | <p><u>Disease</u></p> <ul style="list-style-type: none"> • The Corby Group Litigation <p><u>Double Insurance</u></p> <ul style="list-style-type: none"> • NFUv HSBC Insurance (UK) Ltd <p><u>Exclusion Clauses</u></p> <ul style="list-style-type: none"> • Axa v National Westminster & Marsh Ltd • Markerstudy v Endsleigh <p><u>Ex Turpi Causa</u></p> <ul style="list-style-type: none"> • Safeway Stores & Ors v Twigger & Ors <p><u>Fraud</u></p> <ul style="list-style-type: none"> • Barnes v Seabrook & Others • Clarke v Colin Maltby • Dawson v Hargreaves & Zurich • John Christopher Morton v Portal Ltd • Owens v Noble • Sulaman v Axa Insurance PLC • Widlake v BAA • Yeganeh v Zurich plc and Zurich Ins Co <p><u>Health & Safety</u></p> <ul style="list-style-type: none"> • R v EGS <p><u>Interim Payments</u></p> <ul style="list-style-type: none"> • Brown v Emery <p><u>Jurisdiction</u></p> <ul style="list-style-type: none"> • Homawoo v GMF Assurance SA and Others • Jacobs v Motor Insurers Bureau • Voralberger v WGV-Schwabische Allgemeine <p><u>Limitation</u></p> <ul style="list-style-type: none"> • Axa Insurance Ltd v Akther & Darby Solicitors • Dixie v British Polythene Ltd • Harley & Others v Smith & Another • Whiston v London SHA |
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Loss of Profit

- Aldgate Construction v Unibar Plumbing

Non-Disclosure

- Jones v Environcom and Another
- R&R Developments Ltd v Axa Insurance Plc

Notification

- Loyaltrend Ltd v Brit

Nuisance & Negligence

- J A Robinson v P E Jones (Contractors) Ltd
- Lambert v Barratt Homes Ltd
- Linklaters Business Services v McAlpine Ltd
- R v Winter and Winter
- Uren v Corporate Leisure (UK) Ltd & Ors

Policy Coverage

- A C Ward & Sons Ltd v Catlin (Five) Ltd
- Dunlop Haywards v Barbon Insurance Group
- Global Process Systems v Syarikat Takaful
- Horwood & Others v Land of Leather
- Orient Express v Assicurazioni General SpA
- Supershield v Siemens Building Technologies
- Widefree Ltd v Brit Insurance

Product Liability

- O'Byrne v Aventis Pasteur

Road Traffic

- Churchill Insurance v Wilkinson
- Manuel Helmut v Dylan Simon
- Smith & Co-operative Group Ltd v Hammond
- Stanton v Collinson
- Yetkin v Newham London Borough Council

Stress & Harassment

- Connor v Surrey County Council
- Rayment v MOD
- Veakins v Kier Islington

Vibration White Finger

- Vance-Daniels v Corus

Witnesses

- Jones v Kaney

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