

**Practical Application of Latent Claims in the Claims Unit:  
Liability Issues Arising Out of Latent Claims  
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## **What is a latent claim?**

Latent diseases or defects are those that are dormant, hidden, present but not evident or undeveloped but capable of growth. Thus, latent claims are those that develop over time and thus inherently over more than one policy period. These are claims therefore that Claims Professionals despise and their panel lawyers relish. They require in-depth investigations and pages of advice.

Latent claims occur from a myriad of sources. These sources can cause either latent personal injury or latent material damage. Some of the most frequently discussed sources are:

- Asbestos
- Silica
- Mould
- Tobacco
- Lead
- Farming chemicals
- Pharmaceuticals
- Radiation/electrical
- Molestation
- Latex
- Loud noise
- Construction defects
- Infrastructure design defects
- Genetically modified food
- Mobile phones

There are, however, constantly emerging potential new sources of latent claims and old sources where the injury or damage is slowly revealed.

## **Increasing Focus**

Why has there been a recent focus on latent claims? One answer is the costly experience of asbestos claims. This experience has made the insurance community aware that other similarly widely distributed products may have the potential to cause latent disease. Another reason is that advances in science and epidemiology have made it possible to discover the causative connections between products and injuries, which were previously undetectable.

## **The risk that a latent claim will have mass impact**

While individual latent claims cause concern due to the lapse of time before the claim is made, it is the mass impact of hundreds of claims from a source unknown to have been causing disease or damage that is the greatest concern.

There has been an increase in recent years in mass torts primarily because of advances in manufacturing, distribution and marketing so that as a result more people over a wider area utilise more products and services. (see "Report of

the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States” 187 F.R.D. 293 (1999)). Thus, the mix of latency and mass impact is of particular concern to the insurance industry.

While asbestos is the most widely known latent disease with a mass impact, there is constant evidence of emerging mass latent claims. A recent example includes hearing loss. Recent studies have found that up to 75% of people who frequent clubs and pubs experience significant hearing loss later in life. Such reports have caused concern for work place safety experts, who now urge remedial action to address this emerging latent injury while noting that 84,000 people in Australia work in the pub and club industry. (see “Noise in WA Music Entertainment Venues” by Jingnan Guo and Pam Gunn, WorkSafe Western Australia).

It is therefore foreseeable that in the future there may be mass public liability claims against pubs for failing to warn patrons of the potential danger of loud music or professional indemnity claims against those who install sound systems in pubs for failing to limit the decibels of the sound systems they install.

Already, we have seen the first claims against MP3 player manufacturers for failing to limit the volume on their devices. This may not appear to be a latent claim, since the iPod was introduced in November 2001 and the first claim against Apple was filed in February 2006, nonetheless over those four years and three months, Apple may well have had various differing liability policies in place. This also has significant mass potential since as at 2006 there were 155 million MP3 players in the world, with 27% of China’s 1 billion people reporting they intend to purchase an MP3 player in the coming year.

## **Issues for the Claims Department**

Thus, the increased incidence of latent claims and the increased potential for these to be mass torts means these claims are extremely problematic for the insurance industry. They are, however, uniquely problematic for the claims departments due to the inherent complexity of latent claims. The complexity includes issues related to indemnity, liability, causation, investigation and communication with underwriting, product development and claims.

### ***Indemnity***

The first indemnity issue for the claims department is: Which policy applies? When these claims are reported, a well-considered examination of the law with regard to triggers at that particular point in time must be undertaken. With the law in this area currently in development, the indemnity decision relating to the proper trigger may lack certainty, which, no doubt, will lead to litigation.

It may also be possible, if there is significant doubt, to consider commercial settlement with other insurers in other years. This adds to the complexity, however, in that when more than one policy is agreed to respond to the claim there will be different limits of insurance, different exclusions, different excesses

and different reinsurers. In addition, this results in the commercial application of the U.S.-style triple trigger, even though that is not the law in Australia.

The second indemnity issue for the claims department is: Can you even find a copy of the policy? If not, does anyone exist who knows what the standard policy terms were for your company at the time? If not, are there experts who can credibly testify as to the standard terms in the industry at the time? These second two are not strong evidence for a court, but they can guide the claims professional in their decision making.

Further complicating the indemnity decision is that latent injury and damage is an extremely difficult area for there to be certainty as to when any of the triggers occurred, even if the proper trigger can be agreed. Exposure can occur over many policy periods. Manifestation may be slow and therefore difficult to pinpoint in time. Finally, if the current law in Australia is that the injury occurs when the asbestos fibre penetrates the lining of the lung, what will the claims professional do to ascertain that date?

Thus, the potential that the indemnity decision will take considerable time to resolve is great. This then leads to the claims professional needing to consider whether the insured, even if advised to act as a prudent uninsured, is capable of adequately funding the defence of the claim. In this situation a reservation of right must be considered.

One final pitfall awaits the claims professional who determines that the policy does not respond to the latent claim. That potential pitfall occurs if the insurance company provided continuous cover to the insured with changing policy terms that created a gap in coverage for the latent claim, of which the insured was not aware. Potential litigation can arise as a result of these decisions including allegations of failure to act in utmost good faith.

### ***Liability, Causation and Investigation***

Once indemnity is confirmed, the issues of liability and causation are the next areas of complexity for the claims department. In latent claims due to the remoteness in time from the activities that later caused the injury or damage liability and causation are often difficult to ascertain. Key witnesses and documents are often gone. Memories are distorted.

An example is the paint manufacturer sued for failing to warn about the hazards of lead paint that was applied to a home 50 years ago. How can the claims professional be sure that the insured was the paint supplier for the house? What if the insured is the contractor who conducted the sanding back of the paint 50 years later and failed to use proper dust controls and now want to cross-claim against the paint manufacturer?

The investigations in latent claims therefore need to be significantly broader and more creative than that in a normal claim. There needs to be an understanding of distribution channels for product liability claims. When buildings fall down

and roads collapse, subsequent partners to the now deceased insured architect need to be encouraged to check archive files for contracts and copies of plans and calculations.

In addition, consideration needs to be given to potential intervening causes of the injury or damage. Has smoking caused the disease, rather than the product your insured manufactured? Was there geological change that caused the building foundation to be undermined rather than a latent design defect? Creativity, consultation with experts and common sense is needed to determine the potential intervening causes.

### ***Media Attention***

Media attention can create a perception a level of public hysteria around latent claims. Such fear can lead to class actions, or as in the case in WA, claims for the fear itself.

Thus, the potential for media exposure should be carefully considered and addressed before it occurs.

### ***Notifications***

There is the potential to obtain information earlier in the claims cycle, which can be extremely beneficial in the defence of a latent claim. This potential includes a system for retaining underwriting documentation and files. It also includes a process for ensuring notifications are properly investigated and information retained and accurately archived so it is accessible when claims are made.

### ***Communication with Underwriting and Product Development***

An important key to the successful management of latent claims is to ensure there is regular communication among the Underwriting, Product Development and Claims Departments. This will ensure that newly discovered sources of latent claims are addressed in proposals and policies.

### ***Current Claims that become Latent Claims***

There are a variety of situations where there may be a claim immediately following an incident, a non-latent claim, and later when a latent condition emerges. An example is an explosion where the immediate property losses are understood as soon as the explosion occurs, but the long-term respiratory claims are not known until years later. In this situation, there are steps the claims department can take to try to prevent double dipping in claims.

First, standardised releases need to be examined to determine if they cover future claims arising from the same event. Second, full considerations should be given to the potential for a latent claim to arise, so that the potential can be a part of the settlement negotiations. Rarely will a court uphold an earlier

settlement of “all claims” if the court finds the claimant had no understanding that later a latent claim might arise.

### **Conclusion**

No doubt more latent claims will emerge as science allows for causation to be tracked back through the years, but beyond the black and white law in latent claims, the claims department, as with all situations, needs to consider practical approaches to these claims. While the risk is considerable, the opportunity to be creative and therefore to successfully manage latent claims is great.