Ministry of Justice
Pleural Plaques Consultation

Response from Thompsons Solicitors

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About Thompsons

Thompsons is the UK's most experienced trade union and personal injury law firm. It has a network of 28 offices across the UK, including the separate legal jurisdictions of Scotland and Northern Ireland.

Thompsons only acts for trade union members and the victims of injury, never for employers or insurance companies. At any one time, the firm will be running 70,000 personal injury claims.

The firm participates regularly in government consultations on legislative issues.

We acted throughout the Pleural Plaques Test Litigation on behalf of Unite the Union in the lead test case of *Johnston v NEI International Combustion Limited* and also represented Mr Grieves, one of the other three appellants in the House of Lords.

Introduction

We welcome the government's consultation on pleural plaques and the Prime Minister's determination to take action. The government has demonstrated its concern for asbestos victims by a number of recent initiatives:

- Acting promptly to remedy an injustice by introducing section 3 of the Compensation Act 2006 following the House of Lords decision in Barker.
- Introducing Part 4 of the Child Maintenance & Other Payments Act 2008 so that all mesothelioma victims are entitled to an up front, lump sum state benefit payment regardless of the circumstances in which they were exposed to asbestos.

Similar decisive action is called for now to remedy the injustice of the House of Lords decision which ended the right to compensation for those who have developed pleural plaques.

We understand that government needs to look at a variety of options to restore compensation to people with pleural plaques and we respond to those. We understand too that the government will be criticised by the insurers if it chooses to reverse the House of Lords judgment. But we suggest that reversing the decision would be the correct thing to do.

Accepting the fact regrettably that, legally, the longstanding right to compensation for pleural plaques has been dismissed by the courts, there remain strong *moral* and *political* reasons why people with pleural plaques should be compensated.

The Right to Bodily Integrity

Pleural plaques are a violation of bodily integrity. They are a form of irreversible scarring of the lining of the lung caused by asbestos exposure. The importance of this principle was commented on by Hale LJ (as she then was) in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266 at 284:

> *"The right to bodily integrity is the first and most important of the interests protected by the law of tort, listed in Clerk & Lindsell on Torts, 18th Edition (2000), para 1 - 25. "The fundamental principle, plain and incontestable, is that every person's body is inviolate": Included within that right are two others. One is the right to physical autonomy: to make one's own choices about what will happen to one's own body. Another is the right not to be subjected to bodily injury or harm. These interests are regarded as so important that redress is given against both intentional and negligent interference with them".*

The medical profession's understanding of the significance of pleural plaques was summarised in the expert evidence given in the pleural plaques test litigation by two of the most eminent consultant physicians in the UK: Dr Rudd and Dr Moore-Gillon.

A summary of Dr Rudd's evidence to the Scottish Parliament Justice Committee is contained in **Appendix 1**.

The following points are worth emphasising:

- Pleural plaques are permanent and irreversible fibrotic changes to the structure of the pleura.
- Pleural plaques have the capacity to increase in size and to calcify.
- Pleural plaques can (in rare cases) cause breathlessness if they become confluent over a large area.
- Pleural plaques are dose related. This means that not all those exposed to asbestos will develop pleural plaques because there is a threshold of exposure below which a pleural plaque will not occur. While virtually all urban dwellers have asbestos fibres in their lungs the incidence of pleural plaques is very uncommon without a history of occupational exposure to asbestos.
- Diagnosis of a pleural plaque enables a doctor to assess more accurately the risks of other asbestos-related diseases both malignant and non-malignant. Dr Moore-Gillon's view was that an individual with pleural plaques has at least a 1% risk of developing malignant mesothelioma and people who have been heavily exposed to asbestos have a risk of mesothelioma more than 1,000 times greater than the general population. This is so even though the plaques themselves do not cause mesothelioma.
- On diagnosis most people with pleural plaques experience anxiety and some develop psychologically induced breathlessness. Anxiety levels are highest in those trades in which they have seen former colleagues die. Some develop anger or feelings of helplessness as well as anxiety and a small number develop psychiatric illness.

For over 20 years, following a trilogy of High Court decisions in the 1980's, pleural plaques were recognised as a compensatable injury. The Courts accepted that pleural plaques, together with the increased risk of developing asbestos related malignant disease and the resulting anxiety that followed diagnosis amounted to significant harm and actionable damage.

By deciding that 20 years of established legal practice should be overturned, the majority in the Court of Appeal and the unanimous view of the House of Lords was based on separating the pleural plaques from the increased risks of malignancy and divorcing both from the anxiety in order to conclude that as separate entities they were not significant in their own right.

Having decided this, the Lords held it was not permissible, as a matter of law, to combine the separate parts to achieve the threshold of minimal damage necessary to found a cause of action. The House of Lords concluded that was the correct legal approach.

The Law Lords may have decided the law correctly. But their decision makes no sense to people with pleural plaques. Erudite legal reasoning does not make the problem go away.

For those with pleural plaques the problem is real and permanent.

- they went to work and they were negligently exposed to asbestos
- the fibres permanently penetrated their lungs
- they know of workmates or others who have suffered or died from asbestos related disease
- on being diagnosed with pleural plaques themselves they have the evidence that their lungs have been damaged by asbestos
- they worry that they may face the fate of developing fatal illness and what will become of them and their families if they do.

For them, the pleural plaques, the risks of fatal illness and the anxiety are all part of the same thing – the harm that has been inflicted on them by negligent employers. The Law Lords' intellectual reductionist sophistry has deprived people with pleural plaques of a remedy and left them feeling angry, powerless and belittled.

Thompsons response to the questions:

Q1: Do you think that the proposals to raise awareness of the nature of pleural plaques will help allay concerns?

Thompsons is in favour of people being provided with information in plain English about any industrial disease, including pleural plaques. However, we call for the government to produce what evidence there is that other information campaigns have allayed concerns about health related issues.

We question whether this will quell the genuine concerns of people with pleural plaques who understand only too well that they have been exposed to asbestos and have witnessed fellow workers or friends die from asbestos related disease.

It is our view that giving people the correct facts with the intention of allaying concerns with no intention to compensate them is nothing short of patronising and will fail in its objective. They have been patronised already by negligent employers, opportunistic claims farmers, the Appellate court judiciary and a hostile insurance industry.

Giving information is also beside the point. Allaying concerns is no substitute for compensation.

Unless this proposal forms part of a wider response which restores the right to compensation, it offends the principle that the polluter should pay.

Information leaflets should not be used to deter people with pleural plaques from making a claim, whether under a restored right to sue for compensation or any other means.

It is in our view essential that, if there are to be information leaflets, trade unions, the TUC and asbestos victim support groups must be fully involved with the drafting and targeting of public information literature.

Q2: What are your views on whether it would or would not be appropriate to overturn the House of Lords decision on pleural plaques?

The House of Lords declared the law. But that is not the same as deciding what is fair and just. Where there is a divergence between the common law and justice it is the responsibility of Parliament to remedy it.

Failure on the part of government to restore the right to compensation will perpetuate the remediless legal wrong created by the Law Lords and allow employers who negligently exposed workers to asbestos (and their insurers) to evade liability for the harm evidenced by pleural plaques. The Law Lords themselves recognised this undesirable consequence of their decision and commented:

> Lord Scott: *"I share the regret expressed by Smith LJ that the claimants, who are at risk of developing a harmful disease and have entirely genuine feelings of anxiety as to what they may face in the future, should be denied a remedy."*
>
> Lord Hope: *"But the conclusion that none of the appellants has a cause of action against his negligent employer strikes, for me at least, a somewhat discordant note."*

By allowing this state of affairs to remain it will send the wrong signal to employers who may see it as a licence to take risks with workers' health in relation to exposure to harmful substances.

Employers liability insurers who brought the legal challenge to end the right to compensation for pleural plaques, and who have benefited financially from the outcome, will be emboldened in their strategy to erode the rights of asbestos victims and other injured workers.

Examples of this have occurred already, including *Owen v Esso Exploration & Production UK Limited* (Case number 5AB00270) a successful challenge in Liverpool County Court to a claim for symptomless asbestosis and asbestos-related pleural thickening

By redefining the boundary of actionable damage to position pleural plaques as a condition not deserving of compensation the Law Lords decision has created opportunities which defendants and their insurers have seized upon to argue that other types of personal injury should not be compensated. Instead of clarifying the law of negligence the Lords' decision has created instability by precipitating satellite litigation. This stands in direct contradiction to the insurers' claim that reversing the House of Lords judgment would interfere with the operation of the law of negligence.

We say that overturning the decision by legislation would restore the stability which existed for over 20 years before the pleural plaques test litigation began.

The Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12) was introduced in the Scottish Parliament on 23 June 2008. It sets out a framework for legislation which, if enacted throughout the UK, would remedy the injustice of the House of Lords decision by restoring the right to compensation for pleural plaques and clarifying the right to compensation for other forms of asymptomatic asbestos related benign disease which have come under attack since the House of Lords decision.

We urge government to bring forward legislation to achieve the same objectives as the Damages (Asbestos-related Conditions) (Scotland) Bill. The consequences of choosing not to do so have already been acknowledged by the Parliamentary Under-Secretary for the Ministry of Justice, Bridget Prentice on 23 January 2008:

> *"It would be unacceptable in such a situation for people in one part of the United Kingdom to receive compensation and others in another part not to do so. That would be inequitable."*

For those reasons we firmly believe that the only fair and just response from government is to legislate to reverse the House of Lords decision and restore the right of people with pleural plaques to sue for damages.

Q3: Do you consider that no fault financial support for pleural plaques would be appropriate? If so, what would the rationale for this be? If not, please give your reasons.

It is not clear to us why the government would want to set up a no fault scheme when it could overturn the Lords' judgment and when the insurance industry has the funds to pay claims.

Deloitte estimated that the House of Lords ruling may reduce future claims to insurance companies by up to £1.4 billion in relation to their UK asbestos liabilities.

http://www.deloitte.com/dtt/press_release/0,1014,sid%253D%2526cid%253D175806,00.html

Insurers who collected premiums from employers at the time workers were being exposed to asbestos made reserves against the risks.

To avoid any dispute about the process insurers typically follow when establishing and releasing non-life insurance reserves, and to scotch any attempt to suggest that the insurance industry has not had substantial funds released by the House of Lords pleural plaques decision, Thompsons commissioned chartered accountants Grant Thornton to produce a report.

Attached as **Appendix 2**, the report provides a detailed explanation of the reserving process with a focus on long-tail non-life insurance such as Employer's Liability business.

The report makes clear that the Incurred But Not Reported reserve (IBNR) - the amount held by insurers to cover claims which have occurred but which the insurer has not yet been notified – will, as a result of the House of Lords pleural plaques decision, be reduced to zero and released as profit unless those IBNR reserves are used to pay compensation to people with asbestos-related disease.

When and how it is released may vary from one insurance company to another, but released it will be, and those millions of pounds would provide ample funding for any scheme.

Insurers may well use the current crisis in the financial markets, and in particular the near collapse of AIG, to argue that they cannot afford either to pay compensation to people with pleural plaques if the judgment was reversed, or even to fund a scheme. It would be a misrepresentation of the way that the market operates if the insurance industry were allowed to get away with such an argument.

Insurers are in the business of insuring against risk. Our report from Grant Thornton confirms that they will have reserved funds against the risk of having to pay compensation in pleural plaques claims. The industry cannot now say it is “unable” to pay for liabilities it accepted.

It is a fact of our economic system that there will always be good times and lean times for companies. In lean times their shareholders will not be paid. That is a risk shareholders take. The insurance industry must not be permitted to soften the blow of the lean times or the current financial climate by paying dividends to shareholders with reserves that should be used to compensate asbestos victims.

No fault financial support

In the alternative to overturning the House of Lords decision, (and only if there is a clear and unequivocal decision by government not to do so) we would support a no fault scheme funded by insurance industry reserves but only if an Employers’ Liability Insurance Bureau is established to provide a safeguard which guarantees that the victims of workplace accidents and occupational disease obtain compensation where the employer is uninsured or the insurer cannot be traced.

These are ways to ameliorate the impact of the House of Lords decision, to show clear compassion for sufferers and protect the rights of injured working people.

The insurance industry claims to be “committed to making sure that people who are effected by the deadly effects of asbestos, get their compensation quickly” *(Nick Starling, ABI BBC Radio 4 PM News 17 October 2007).* There is an opportunity now for them to demonstrate that commitment and to save any cost to the taxpayer.

We note however that Steve Thomas, UK technical claims manager at Zurich, told Post Magazine (17 July 2008) that he was “struggling to understand how the government could get insurers to contribute."

Given Zurich’s “hailing” of the judgment when it was announced this comment is hardly surprising. (http://www.insuranceage.com/public/showPage.html?page=iage_breakingnews_story&tempPageName=477881)

Employers Liability Insurance Bureau

There is an urgent need for an insurance fund of last resort. This consultation is an ideal opportunity to take steps to establish one. By doing so the government will create a permanent legacy for the benefit of injured working people.

We raised the notion of an ELIB in November 2006 in our response to the Department of Work and Pensions consultation on Improving Mesothelioma Claims Handling: A Long Term Solution.

http://www.thompsons.law.co.uk/ltext/improving-mesothelioma-claims-handling.htm

The recent repeal of regulation 4(4) of the Employers Liability (Compulsory Insurance) Regulations 1998 requiring employers to retain ELCI certificates and the ongoing mesothelioma "trigger issue" litigation makes it imperative that this long overdue issue is addressed now.

We set out below what we consider are compelling reasons in support of an Employers Liability Insurance Bureau (ELIB) funded by the insurance industry.

The parallels between Employers Liability Compulsory Insurance (ELCI) and Road Traffic Act (RTA) insurance are striking.

The comparison with Motor insurance

- It is a criminal offence under section 143 Road Traffic Act 1988 (RTA) to drive a motor vehicle without insurance.
- The statutory obligation to have RTA insurance created a captive market for the insurance industry.
- The Motor Insurance Bureau (MIB) was established in1946 as a company limited by guarantee following a recommendation by the Cassell Committee in 1937.
- Since 1974 it has been compulsory for all UK insurers selling motor insurance to be signatories to the MIB agreements.
- The MIB meets the liability to pay compensation for claims for personal injury under the terms of the MIB Uninsured Drivers Agreement and the Untraced Drivers Agreement.
- The EC Directive on Motor Insurance (84/5/EEC) requires that all member states must operate similar funds.
- The MIB guarantees that people injured by negligent drivers obtain common law damages for personal injury or death caused by the negligence of uninsured and untraced drivers.

Employers Liability Insurance: the current position

- It is a criminal offence under section 5 of the Employers Liability (Compulsory Insurance) Act 1969 for employers to fail to insure and maintain insurance in respect of employees' bodily injury and disease.
- The statutory obligation on employers to have and maintain EL insurance since 1 January 1972 has created a captive insurance market
- The introduction of compulsory EL insurance was resisted on the grounds that prior to 1969 over 90% of employers obtained insurance voluntarily.
- When an employer goes out of business and was either uninsured or the insurer cannot be traced there is no fund of last resort to meet the employer's liability to compensate the injured worker.

- The problem of uninsured employers and untraced insurers is particularly prevalent in long tail disease claims such as mesothelioma where as many as one in ten claims may fail because the employer no longer exists and insurers cannot be identified.
- The success rate in tracing historical EL insurers under the voluntary ABI scheme is around 30%

We put forward the following arguments in support of an ELIB:

- The similarities between RTA and EL insurance are obvious:

  a) both are compulsory

  b) failure to comply is a criminal offence

  c) insurers collect premiums from a captive market
- The poor success rate of the voluntary ABI scheme for tracing historical insurance policies in long tail disease claims shows a failure on the part of EL insurers to keep proper records. An ELIB would impose a greater incentive on insurers to maintain comprehensive records and concentrate their efforts to locate historical policy details.
- The government has recently repealed the regulation 4(4) of the ELCI regulations requiring employers to retain copies of EL Insurance certificates for a period of 40 years. The concerns raised by the TUC, Trade Unions, asbestos victim support groups and the ABI about the repeal of this regulation would be overcome by creating an ELIB.
- EL insurers achieved an estimated windfall saving of £1.4 billion following the challenge they brought to end the right to compensation for pleural plaques. They claimed to want to use their reserves to pay compensation people with what they regard as "serious asbestos-related diseases". They can do so by contributing their reserves to funding an ELIB.
- An ELIB is a nil-cost initiative for government and would ensure 100% recoupment of the new lump sum payment to mesothelioma victims under the Child Maintenance & Other Payments Act 2008 thus generating an income stream from which government can fund ongoing payments.
- The outcome of the challenge which certain EL insurers have raised in the EL "trigger issue" litigation would not prejudice claimants and would instead become a matter confined solely to disputes between insurers.

Establishing an ELIB will cost the taxpayer nothing. It is hoped and expected that it would be supported by an insurance industry which claims to be "committed to making sure that people who are affected by the deadly effects of asbestos, get their compensation quickly" (*Nick Starling, ABI BBC Radio 4 PM News 17 October 2007)*.

There is no logical reason or persuasive argument why an insurance fund of last resort should not be established. It would guarantee that workers injured or killed by negligent, uninsured employers have the same right to obtain compensation from an ELIB as people injured or killed by uninsured drivers have from the Motor Insurers Bureau. No other single measure would better serve to protect the interests of injured workers and, in particular, asbestos victims and their families.

It is our submission that the formation of an ELIB must be regarded as an integral part of a coherent policy response to this consultation and that by acting upon this initiative the Government has the opportunity to deliver a permanent legacy to protect the rights of injured working people.

Establishing liability for future mesothelioma claims

A frequent complaint by government and insurers is that the court process in personal injury claims takes too long. We agree and have engaged fully with industry and government attempts to reduce delay.

In particular we have welcomed and embraced the fast track regime pioneered by Senior Master Whitaker in the Royal Courts of Justice.

There is an opportunity here, if there is to be any no fault scheme for pleural plaques, to reduce demand on the courts and distress for families.

Before the House of Lords judgment, those with pleural plaques not only had the opportunity to obtain compensation but also, importantly, were able to establish liability against a defendant employer whilst they were well and could recall details of who they worked for, when and the conditions of exposure with that employer.

By their decision, the House of Lords has removed not only the right to compensation but the ability of those with pleural plaques to establish negligence against the culpable employers.

Whatever option the government chooses (reversal or a scheme), people with pleural plaques must be able to establish liability for the negligent exposure to asbestos which has caused their condition. Should they go on to develop mesothelioma this will reduce the time it takes for courts to deal with their claim when they are terminally ill because it will require the claimant only to prove the diagnosis of mesothelioma and the value of the claim.

It will increase the chance of a mesothelioma claim being brought to a conclusion while the sufferer is still well enough to benefit from the compensation.

And it will reduce the amount of heartache that families experience in mesothelioma cases when liability issues are routinely disputed.

It would be hugely unfair to leave liability unresolved until claimants are sick or have died. To many of them, the safeguard of knowing liability had been established was worth at least as much as the compensation for pleural plaques itself.

If the insurance industry is genuine in its stated commitment to dealing with claims brought by the sick and dying as quickly and fairly as possible then it cannot oppose the right of people with pleural plaques to establish liability in order ultimately to reduce delay in mesothelioma claims.

Lessons can be learned from the miners' compensation schemes. If a claimant can prove employment between certain dates, with an employer who was insured and the identity of that insurer is known, and it is known and accepted in other claims to be a workplace and a job with asbestos exposure, then there is no reason for the insurers not to admit negligence. Those admissions could be in the form of standard documentation available for use in any future court case.

The consultation does not ask for views on eligibility for compensation from a fund. The insurers should either have to pay for a consultant's report following diagnosis or accept evidence from a claimant of that diagnosis.

However, the costs of a commercial CT scan/x-ray should specifically not be payable (see our comments on scan vans within Q5 below).

Those whose cases were struck out or discontinued following the October judgment must be included in any new arrangement.

Q4: If a no fault payment scheme were to be introduced:

Thompsons' response to the subsections of this question is qualified by the view that any no fault compensation scheme must meet the following minimum expectations:

- It must not in any way interfere with the right of claimants to sue for damages for personal injury or death in the event that they subsequently develop any actionable asbestos-related condition.
- There should be no provision for full and final payments which allow claimants to sell out the right to sue for damages for personal injury or death in the event that they subsequently develop any actionable asbestos-related condition.

- Claims generated by ‘scan vans’ and claims farmers should not be permitted.
- A no-fault scheme for pleural plaques is, in itself, not an adequate response. It must be accompanied by an ELIB which would provide a comprehensive and permanent safeguard to meet unsatisfied judgments for compensation for all workplace injuries and occupational disease.

a) which of the above two schemes should be introduced, and why?

There is no justification for, or logical distinction between, the two proposed approaches. The distinction is arbitrary and divisive.

Any scheme must compensate people who are diagnosed with pleural plaques before and after 17 October 2007 (and those diagnosed at any time in the future) and include all cases which were struck out or discontinued as a consequence of the House of Lords decision.

b) what level of payment would be appropriate?

There should be a fixed sum of compensation paid in every case.

The amount should be no less than £5,000 based on the mid point of the most recent Judicial Studies Board Guidelines bracket of £4,000 and £6,000 and the assessment of Lady Justice Smith who considered quantum in the pleural plaques test litigation in the Court of Appeal. In her judgment she concluded:

> *”I would say that, in a typical case of a claimant with pleural plaques and anxiety about his future health, the award should usually be about £5,000. I would suggest that the bracket for the usual range of cases should be £4,000 to £6,000 but that judges should feel free to go outside that bracket for particular reasons. In the present cases, I do not feel able to distinguish between the claimants. They appear to be typical cases and £5,000 would seem appropriate.”*

There should be an annual RPI increase in compensation commencing with the effect from the Court of Appeal decision in January 2006.

c) how should the scheme be funded?

It should not fall on the government exclusively to fund a scheme.

It should be funded by the insurance industry with a pro rata contribution from government to the extent that government departments have liabilities as employers of workers exposed to asbestos during the course of employment in former nationalised industries.

Any scheme should have statutory effect so that is binding on insurers. It could create a legislative right to compensation for pleural plaques with the provision that, for so long as the insurers fund the scheme voluntarily, the right will not be enforced in the courts.

d) what limitation period should apply for each option?

Three years from the date on which the claimant became aware of the diagnosis of pleural plaques caused by asbestos exposure.

Impact Assessment

Q5: Do you have any estimates regarding:

a) the number of people currently diagnosed with pleural plaques?

b) the future number of people who will develop pleural plaques?

We refer to the evidence given by Consultant Physicians Dr Rudd and Dr Moore-Gillon during the High Court trial of the Pleural Plaques test litigation.

Pleural plaques are by far the most common respiratory effect of asbestos inhalation.

Incidence is the number of people who develop the condition each year.

The Surveillance of Work-related and Occupational Respiratory Disease project (SWORD) project is the only reliable source of data collection in the UK about the incidence of occupational respiratory disease. The SWORD project data suggested about 900 (rounded up to 1,000) new cases of pleural plaques per year.

The number of people diagnosed annually with mesothelioma during the same period was about 1,500.

Virtually all new cases of mesothelioma were diagnosed, whereas the majority of people who have pleural plaques are not diagnosed. Those who are diagnosed with pleural plaques usually become aware as a result of an incidental finding on a chest x-ray carried out for other reasons.

The reasons for the SWORD project under-reporting cases of pleural plaques include:

- the condition is usually symptomless
- patients with pleural plaques are not always referred to consultants
- doctors do not always inform patients about the pleural plaques

If routine screening for pleural plaques was carried out by x-ray the numbers diagnosed would be higher and if CT scan screening was carried out the number diagnosed would be higher still.

It is impossible to give a precise estimate of the incidence of pleural plaques. Only a very broad brush approach is possible.

Between 10% and 20% of people diagnosed with mesothelioma had pleural plaques. The estimate may vary and will depend on the occupational group.

The incidence of pleural plaques in the UK was estimated at between 3,000 to 6,000 at the lower end and 7,500 to 15,000 at the upper end. The agreed range was between 3,000 to 15,000 people develop pleural plaques each year.

For people diagnosed with pleural plaques the increased risk of developing mesothelioma is usually between 1% to 5% depending on the level of asbestos exposure.

Thompsons own data reveals that between 2004 and 2008 we were instructed in 1,582 pleural plaques cases, with the largest annual case intake being 617 during 2005. None of these cases were referred by claims farmers or generated by scan vans.

The subsequent reduction in pleural plaques claims has, without question, been due to the House of Lords decision and has no bearing on the number of people being diagnosed.

Claims Farmers & 'Scan Vans'

We would support any proposal to make claims farming using CT scan facilities a criminal offence.

The commercial activities of claims farmers who offered free CT scans as a means of generating substantial numbers of pleural plaques claims are well known. They profited from those claims by charging referral fees to solicitors, selling After the Event (ATE) insurance and taking deductions from successful claimants' compensation.

We believe the scale on which claims were generated and the method of generating them was a material factor in precipitating the challenge from the defendants and insurers which ultimately ended the right to compensation for pleural plaques.

Certain claims farmers conducted a campaign of advertising targeted principally at former shipyard workers but also other occupational groups with a known history of unprotected asbestos exposure.

We are surprised that such widespread screening activities using mobile CT units was permitted under the Ionising Radiation (Medical Exposure) Regulations 2000 and the Justification of Practices Involving Ionising Radiation Regulations 2004.

It is therefore with interest that we note at paragraph 65 of the consultation that:

> *"Initiating an x-ray or CT scan purely based on a wish to demonstrate pleural plaques would not be justified, as pleural plaques are benign and do not impair lung function. The regulations governing the use of ionising radiation apply equally to the NHS and the private sector. Compliance is monitored by a specialist inspectorate within the Healthcare Commission and they are empowered to enforce the regulations. If a private "scan van" were offering x-rays purely for the purpose of assessing eligibility for compensation then the Healthcare Commission could be asked to investigate."*

If the Healthcare Commission is to conduct an investigation Thompsons is willing to assist by providing information.

Q6: Do you have any estimates regarding the future distribution of pleural plaques cases, including the period of time over which people will develop pleural plaques?

Any estimate would be limited to extrapolating our historical claims experience based on acting for trade unions and their members and would not necessarily be representative of the future distribution of pleural plaques cases

We do however consider that the estimates in the impact assessment appear inaccurate and exaggerated compared to the data gathered by the SWORD project referred to in Q5 above.

Q7: Do you have any estimates regarding the number of people diagnosed with pleural plaques prior to the House of Lords decision and who have not received compensation?

We can only comment on the basis of our own case-holding data. As at the date of the Court of Appeal decision on 26 January 2006 Thompsons had 855 ongoing pleural plaques cases. Since then we have received instructions in a further 586 cases.

We currently have 1441 cases for clients with pleural plaques who have not received compensation.

Appendix 1

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RMR/ar

11th September 2008

Euan Donald

Assistant Clerk, Justice Committee

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EH99 1SP

Dear Mr Donald

Re: Pleural Plaques

I reply to your request for my views on the bill which aims to restore the right to damages for pleural plaques. As a physician who has specialised in asbestos related diseases of all types for more than 25 years and who has treated thousands of patients with mesothelioma and lung cancer, I should like to draw the attention of Members of the Scottish Parliament to some points.

1. Pleural plaques are pathological change in the membrane which surrounds the lung, caused by inhalation of asbestos fibres.

2. The plaques themselves usually do not cause symptoms although they may cause discomfort, pain and breathlessness in exceptional cases when they are very extensive.

3. Pleural plaques are detected on chest x-ray in less than 1% of the general population and when they are present enquiry almost always reveals a history of asbestos exposure.

4. People with pleural plaques are at risk of developing diffuse pleural thickening causing breathlessness, asbestosis of the lungs causing breathlessness, lung cancer which is usually fatal and mesothelioma, a cancer which can occur in the lining of the chest cavity or in the lining of the abdominal cavity which is almost invariably fatal, usually within 12 to 18 months of the first symptoms.

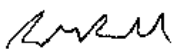
5. People with pleural plaques who have been heavily exposed to asbestos at work have a risk of mesothelioma more than one thousand times greater than the general population. The risk for those more lightly exposed is less but still significant.

6. People with pleural plaques commonly experience considerable anxiety about the risk of mesothelioma and other serious asbestos diseases. It has been suggested that the anxiety is a result of lack of information about the true nature of plaques and that all that is needed to dispel the anxiety is a full explanation. It has also been suggested that the anxiety is caused or contributed to by the fact that damages are payable in respect of plaques. While these factors may come into play, they are not responsible for all or even most of the anxiety.

7. Explanation that the future risks arise from the asbestos exposure which caused the plaques and not from the plaques themselves is a fine distinction that means little to the person without scientific training. It is the discovery of the plaques that has led to the situation in which an explanation of the future risks is necessary. For those who have been heavily exposed to asbestos the truth about their future risks is not in fact reassuring. To be told your present condition is benign but there is a 10% risk that you will die prematurely of mesothelioma and that your risk of lung cancer may be 40% or more, as in the case of a heavily exposed smoker, is not likely to set your mind at rest.

8. Despite the best intentioned and comprehensive reassurance offered by doctors that plaques are harmless, often the person diagnosed with plaques knows of former work colleagues who have gone on to die of mesothelioma after being diagnosed with pleural plaques. Patients have sometimes been told to look out for new symptoms and report them to their doctor. Every ache or pain or feeling of shortness of breath renews the fear that this may be the onset of mesothelioma. The anxiety is real for all and for some has a serious adverse effect on quality of life.

Yours sincerely



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Appendix 2

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For the attention of : Mr Tom Jones

Dear Sirs

The purpose of this letter is to provide an explanation of the process insurers typically follow when establishing and releasing non-life insurance reserves, with a focus on long-tail non-life insurance such as Employer's Liability business. We understand that you are going to include this letter as an Appendix to your response to the Ministry of Justice's Consultation Paper CP 14/08 on Pleural Plaques.

Our explanation in this letter is generic in nature and based on our experience of processes typically followed by insurers for a variety of classes of business and types of claims, although the actual reserving approach and reserving philosophy can vary significantly between different insurers.

In order to understand the process insurers typically follow when establishing and releasing non-life insurance reserves, it is important to firstly understand the different types of reserves insurers hold. These reserve types are explained below.

What is a reserve?

A reserve is an amount of money held by an insurer to pay future expected claims as and when they become due. Insurers set the level of reserves so that the total reserves held are at least equal to the expected cost of future claims.

Insurers typically hold a number of different types of reserves. The different types of reserves can be categorised at a high level into "premium reserves" and "claims reserves". Premium reserves relate to the unexpired period of a policy and are only held during the period of a policy. Claims reserves relate directly to the expected costs of claims and are usually held both during and after the period of a policy.

Premium reserves

- The **Unearned Premium Reserve** ("UPR") is the amount held by insurers which represents the proportion of the premium applicable to the period of cover still remaining in respect of an insurance policy.

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- The **Unexpired Risk Reserve** ("URR") is held in addition to the UPR when the remaining proportion of premium is deemed insufficient to cover the claims that are expected to arise during the remaining period of cover. This situation arises when the premium which was charged for the policy is anticipated to be too low.

Claim reserves

- **Outstanding Claims (or Case) Reserves** ("OCR") are reserves which are held that relate to a specific insurance claim and which are usually assessed individually by a claims handler based on the precise details of the individual claim. In addition to the expected indemnity payment, the OCR also typically includes an amount for the claims handling expenses which are expected to be incurred in relation to the claim.

- The **Incurred But Not Enough Reported reserve** ("IBNER reserve") represents amounts held by the insurer in addition to the OCR where the OCR is expected to be insufficient. An IBNER is typically held when claims handlers have consistently been shown to under-reserve for future claims. The IBNER reserve can also be negative, such that it represents a reduction in the OCR held, where the OCR is thought to be overly cautious and in excess of that required to pay all expected future claims.

- The **Incurred But Not Reported reserve** ("IBNR reserve") is the amount held by insurers to cover claims which have occurred but which the insurer has not yet been notified. The relative size of the IBNR reserve varies according to the type of business which has been written. This reserve is often also referred to as the "pure IBNR reserve", to distinguish it from the IBNER reserve described above. An IBNR reserve may be held, for example, when asbestos related claims are expected to be notified at some point in the future, while the actual exposure to asbestos happened some years ago.

- The **Unallocated Loss Adjustment Expenses reserve** ("ULAE reserve") is the amount held to cover future claims handling expenses, in addition to those amounts already allocated to specific claims and therefore included in the OCR. For example, a ULAE reserve may be held to cover the expected cost of running the insurer's in-house claims department.

Overview of reserving process

From the time a policy is underwritten to the time when an insurer expects no further claims to be paid in respect of the policy, insurers establish and adjust the level of reserves they are holding. In its simplest form, the process which insurers follow is described below:

- At the time an insurer underwrites a policy, a UPR is established. This reserve is then reduced during the period of the policy such that at the end of this period it is zero.

- During the period of the policy a URR may also be established, should the insurer deem it necessary. Any URR established would be reduced to zero by the end of the period of the policy.

- Soon after an insurer has underwritten a policy, an IBNR reserve would also typically be established. The IBNR reserve would be established to cover the expected cost of future claims where this cost does not relate to the unexpired period of a policy (since this would be covered by the UPR and URR) or to a notified claim (since this would be covered by the OCR together with any IBNER reserve).

- If the insurer receives notification of a potential claim, or group of claims, under a policy an OCR for the claim is typically established. This could occur during the period of the policy or a significant number of years after the end of the policy period, depending on the type of claim involved. Once an OCR has been established, an IBNER reserve may also be established to recognise the expected deficiency or surplus in the OCR.

- Since the future cost of claims is not known with any certainty, the insurer will monitor and adjust the reserves they are holding over time in response to a number of internal and external influences, as discussed in the following section.

- When the insurer expects no further claims to be paid in respect of the policy all remaining reserves will be reduced to zero. This may happen, for example, following a legal judgement, although the speed at which insurers would adjust their reserves will vary.

Influences on reserves held

As part of the above process, insurers will adjust the reserves they are holding in response to a number of internal and external influences, since the future cost of claims is uncertain. The most common of these influences are described below:

- When additional information is received, or an interim payment is made, in respect of an individual claim, or group of claims, the OCR is typically reviewed. This could include receiving updated information regarding the claim which affects the future expected payments, such as the outcome of a court case or arbitration, or making a partial payment in respect of a claim.

- Insurers undertake routine reserving exercises, typically quarterly or annually. The analysis undertaken during this process usually considers all of the reserve types described and often results in the insurer adjusting the level of reserves it is holding.

- Insurers also undertake ad-hoc reserving exercises, the instigation of which can depend on a variety of factors. These reserving exercises can include consideration of all the business of the insurer, only a specific class (or classes) or a particular type of claim (such as all asbestos related claims).

- Legal decisions and changes to legislation can both affect the expected ultimate claim payments for a large number of similar claims and therefore result in insurers reviewing the reserves they are holding for the types of claim affected.

- Insurers sometimes rely on academic studies to assess the reserves they require, particularly in the case of long-tail business where the claims can take a number of years to arise and be settled. Hence, the publication of new or revised academic studies can result in insurers changing their view on the expected future cost of claims, and therefore adjusting their reserves accordingly.

- The emergence of a new type of claim can trigger the establishment of new reserves by insurers. As more information becomes known about this new claim type the reserves may be further adjusted to reflect the most up-to-date information.

- The approach and philosophy of each insurer also affects the level of reserves they hold, in particular the level of prudence they are looking to achieve. The future cost of claims is unknown and uncertain and, due to the subjective nature of the reserving process, two insurers could hold different levels of reserves for exactly the same claims, both of which would be acceptable but reflect a different level of prudence. An insurer's approach and philosophy may change over time, for example following changes in the senior management of the company.

- The approach of insurers may also be impacted by the position of the insurance cycle, which is the tendency for the insurance market to swing between profitable and unprofitable periods over time. For example, insurers may be more likely to set prudent reserves at times when insurance premiums are high and profitability is generally good.

Impact of changes in reserves

When the overall reserves for an insurer are increased, either as a result of initially establishing reserves or adjusting them subsequently, this results in a reduction in the current profits of the insurer.

The overall impact of a reduction in reserves needs to be assessed by considering both the change in the level of reserves together with the amount of any payments made:

- If a reserve is reduced with no payments being made then the result will be an increase in the current profits of the insurer.

- If a reserve is reduced with a payment being made which is less than the amount of the reserve reduction, this will also result in an increase in the current profits of the insurer.

- If a reserve is reduced with a payment being made which is greater than the amount of the reserve reduction, this will result in a reduction in the current profits of the insurer.

- If a reserve is reduced with a payment being made which is equal to the amount of the reserve reduction, this will have no impact on the current profits of the insurer.

The format of insurers' annual accounts mean that it is not usually possible to trace which individual claim types or classes of business have given rise to any reserve adjustments. Further details of reserve adjustments can be obtained by reviewing an insurer's returns to the Financial Services Authority (the "FSA returns"), which are publicly available. The FSA returns provide a greater breakdown of changes in the reserves of insurers, including by class of business.

Summary

Insurers establish reserves to cover the cost of future claim payments that are expected to arise. These reserves may be claim specific or more general reserves that cover a number of policies or a complete class of business.

The future claim payments are unknown and uncertain, and hence the reserving process itself includes a large element of subjectivity. Hence, different insurers may establish different levels of reserves for the same business.

From the time a policy is underwritten to the time when an insurer expects no further claims to be paid in respect of the policy, insurers establish and adjust the level of reserves they are holding. These changes in reserves arise due to the standard reserving process typically followed by insurers but also in response to a number of internal and external influences, since the future cost of claims is uncertain. These influences include legal decisions and changes to legislation, and as a result of routine reserving exercises.

When the level of reserves held by an insurer is adjusted any decrease in reserves will result in an increase in the current profits of the insurer. This, however, needs to be balanced against any claim payments which have been made which will reduce the current profits of the insurer.

If an insurer reduces the level of reserves held, for example in response to a legal decision, where no claim payments have been made, then the amount of the reserve reduction will directly increase the current profits of the insurer.

Yours faithfully

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