

# *New York Court Issues Landmark Decision in Non-Products Insurance Coverage Case*

## EXECUTIVE SUMMARY

On May 8, 2007, the Supreme Court for New York County upheld the claims of 20,000 individuals seeking insurance coverage from Continental Casualty Company for asbestos-related personal injuries. The decision confirmed that aggregate limits in general commercial liability (“CGL”) policies do not apply to all claims that arise during the course of business operations. Although the case dealt specifically with asbestos claims, the impact of the decision will likely be much broader in scope, as it may apply to any policyholder seeking insurance coverage for third-party claims.

## CASE BACKGROUND

The Robert A. Keasbey Company (“Keasbey”) installed asbestos-containing insulation materials at industrial sites in the greater New York area. Beginning in the 1980s, the company faced thousands of asbestos-related tort claims filed by workers at the various installation sites. The company closed its doors in the 1990s and settled, with its insurers, most of the existing claims. After it went out of business, claims continued to be filed against Keasbey, eventually numbering in the thousands.

In 2001, Keasbey’s primary insurers, Continental Casualty Company and American Casualty Company of Reading, PA (“CNA”), filed suit in New York seeking a declaration that all of the pending and future claims against Keasbey were subject to the policies’ aggregate

limits, which by that time had already been exhausted. Accordingly, CNA argued, it owed no coverage obligations to any of the thousands of claimants who had claims against Keasbey.

In the lawsuit, CNA named as defendants Keasbey and many of the claimants with pending claims against Keasbey. CNA also named Wausau, which had insured Keasbey prior to 1970, and One Beacon, which had provided coverage for certain locations where Keasbey operated, as defendants. The parties then stipulated, and the Court agreed, that the individual claimants would be certified as a class of all persons with asbestos tort claims then pending against Keasbey.

## PRODUCTS VS. OPERATIONS HAZARDS

The insurance policies in dispute contained aggregate limits for claims that came within the “products hazard” (i.e., products claims) but no aggregate limits for claims falling under the “operations hazard” (i.e., non-products claims). At the heart of the dispute was whether the asbestos tort claims against Keasbey constituted products claims or non-products claims.

CNA asserted that the asbestos tort claims were products claims, because the asbestos-containing insulation to which the workers were exposed constituted a product. CNA further asserted that, because the aggregate limits for products coverage had been exhausted, it owed

no coverage for any pending or future tort claims.

The defense, in turn, argued that because the bodily injuries occurred while Keasbey's insulation installation operations were ongoing, the claims were non-products claims. Accordingly, the defense argued, the claims were not subject to the aggregate limits in the CGL policies and CNA was responsible for covering the costs related to the claimants' injury claims.

#### **LACK OF AGGREGATE LIMITS PROVIDES FOR VIRTUALLY UNRESTRICTED INSURANCE COVERAGE**

In his decision, Justice Richard Braun of the New York County Supreme Court wrote that the "'products hazard' includes bodily injury . . . arising out of the named insured's products . . . but only if the bodily injury . . . occurs away from the premises owned and rented to the named insured and after physical possession of such products has been relinquished to others." Continental Casualty Co. v. Employers Insurance Co. of Wausau, No. 601037/03, N.Y. Sup., N.Y. Co.; 2007 N.Y. Misc. LEXIS 3336, slip op. at 5. On these grounds, Justice Braun found that the asbestos tort claims against Keasbey failed to satisfy the products hazard requirements because "the injuries happened while the installation operations of defendant Keasbey were ongoing." *Id* at 7. In other words, the bodily injuries did not occur "after physical possession" of the products had been relinquished to others. Instead, the

claims fell within the policies' operations hazard, thereby constituting non-products claims that were not subject to aggregate limits.

In this particular case, the distinction between products and non-products claims meant that the associated insurance coverage policies provided coverage for all the remaining asbestos-related injury claims against Keasbey. More broadly, Justice Braun's ruling restricts insurers' ability to impose aggregate limits on claims that derive from business operations. Consequently, commercial policyholders facing third-party claims arising from business operations may have available insurance coverage even if the aggregate limits have been exhausted. Such policyholders should consult with insurance coverage counsel to learn more regarding the implications of the Keasbey decision for their company.

#### **FOR MORE INFORMATION**

Kelley Dye & Warren's Insurance Recovery Group has extensive experience representing commercial policyholders engaged in non-products coverage disputes with their insurers. The group is led by John Heintz, a 30-year veteran of insurance recovery law who has secured coverage on behalf of clients for, among other things, asbestos, lead, environmental, and other mass tort claims; class-action claims; first and third-party property damage claims; directors' and officers' liabilities; and residual value losses. Members of the group include trial counsel for the defendant class in the Keasbey case.

For additional information about Keasbey,  
non-products claims, or any other insurance  
coverage topic, please contact:

John E. Heintz  
(202) 342-8412  
[jheintz@kelleydrye.com](mailto:jheintz@kelleydrye.com)

Marla H. Kanemitsu  
(202) 342-8879  
[mkanemitsu@kelleydrye.com](mailto:mkanemitsu@kelleydrye.com)