Insurance Recovery Law

Horizontal Exhaustion Not Required for Excess Policies in New York

Why it matters
A Delaware superior court recently predicted that New York’s highest court would not require policyholders to horizontally exhaust excess policies in long-tail coverage cases. The court concluded that the horizontal exhaustion method applies to primary and umbrella policies, but not to excess policies. Recognizing that this was an issue of first impression in New York, the Delaware court concluded that New York courts would require all of the primary and umbrella policies to be exhausted before any of the first-layer excess policies could be triggered. After that, the court predicted, insureds would not be required to exhaust all of the first-layer excess policies across all years before being able to access second-layer excess policies. As long as a lower-level excess policy in a given year is exhausted, the excess policy above that policy can be triggered. Although this decision represents a victory for policyholders, time will tell whether New York courts ultimately agree that this decision accurately reflects New York law.

Detailed Discussion
Viking Pump and Warren Pump sought coverage from primary, umbrella, and excess insurers for asbestos claims filed against them. Eight years of litigation ensued, culminating in a three-week trial in Delaware Superior court. The trial court, applying New York law, held that “all sums” allocation applied, but that horizontal exhaustion was required. The excess insurers filed a motion seeking clarification of how horizontal exhaustion would apply to their policies.

They argued that horizontal exhaustion applies to all layers of coverage so that all first-layer excess policies must be exhausted before any second-layer excess policy is triggered. The insured, on the other hand, argued that horizontal exhaustion applies only to the primary and umbrella policies. Once those have been exhausted, then all excess policies are triggered.

Although horizontal exhaustion is the settled rule in New York, the Delaware court held, its courts have not addressed the problem of whether horizontal exhaustion applies to every layer or only the primary and umbrella layers. In deciding that issue, the court rejected the cases proffered by the insurers and instead looked to the California Superior Court decision in *Kaiser Aluminum and Chem. Corp. v. Certain Underwriters at Lloyds, London*. In that case, which the court believed squarely addressed this issue, the court applied horizontal exhaustion to the primary layer but vertical exhaustion to the excess layers.

"[T]he New York high court would hold horizontal exhaustion governs only the primary and umbrella policies here, not the excess coverage," the Delaware court concluded. “New York emphasizes the policies’ purposes as evidenced by their language, premium amounts, and other indicators. New York has also unequivocally held that only policies insuring the same risk should respond simultaneously and that ‘other insurance’ clauses are not relevant in allocating damages to policies over different periods. Accordingly, neither New York law nor the policy language urges, let alone requires, horizontal exhaustion of the excess layers.”

Like *Kaiser Aluminum*, the Delaware court believed that the excess insurers had not demonstrated a legal or policy-based requirement for
horizontally exhausting the excess policies. “It is unassailable that horizontal exhaustion is a limitation tending to deny coverage,” the court said. “While that makes sense at a primary/umbrella level where the policies specifically contemplate responding first, this limitation ought not apply to excess. . . . [The excess insurers] have not shown why, having bought insurance, [insureds] should find [themselves] with less coverage. It is a general tenet of New York law that policies are ‘construed in favor of finding coverage.’”

To read the decision in Viking Pump Inc. v. Century Indemnity Co., click here.

Connecticut Court: 19 Leaky Pools Means 19 Occurrences Under Insurance Policy

Why it matters
A Connecticut federal court expanded the amount of insurance potentially available to an insured in a case involving coverage for 19 defective swimming pools. The insured in the underlying action was held liable for using defective concrete in 19 swimming pools. Its insurer argued that coverage was capped at the policy’s $1 million-per-occurrence limit because only one defective product was used to build the pools. The court disagreed, holding that there were 19 separate occurrences because “[a]ll of [the insured’s] prior mistakes – its bad formula, reckless management and disregard for industry standards – were just steps in a chain of events that ended in the company’s defective product destroying pools.” In so holding, this court joined a long list of courts nationwide that have construed arguably ambiguous “occurrence” language in favor of maximizing available coverage.

Detailed Discussion
R.I. Pools sued Paramount Concrete, alleging Paramount manufactured a defective concrete product (“shotcrete”) that caused damage in newly constructed pools. A jury awarded R.I. Pools $2.75 million in compensatory damages plus attorneys’ fees. Paramount then sought coverage from its insurer, Harleysville Worcester Insurance. Harleysville asserted that if the underlying litigation was covered under its policy, all of the damage stemmed from one occurrence – the production of faulty shotcrete. The policy provided limits of $1 million per occurrence and $2 million in the aggregate.

The court rejected Harleysville’s one-occurrence argument, ruling instead that there were 19 separate occurrences. According to the court, the case law is clear that “the ‘occurrence’ is the ‘unfortunate event’ that causes injury and not the cause of that event.” The court reasoned that “Paramount habitually manufactured defective shotcrete, but that shotcrete caused discrete harm each time its use in a pool caused the pool to crack and leak, thereby ruining the finished product it helped to hold together,” the court said. “All of Paramount’s prior mistakes its bad formula, reckless management, and disregard for industry standards, were just steps in a chain of events that ended in the company’s defective product destroying pools. There were 19 separate occurrences here and, to the extent that these occurrences caused ‘property damage’ and were otherwise covered under the scope and temporal limits of the CGL policy, Harleysville must cover the costs of each separate injury to each individual pool.”

To read the order in Harleysville Worcester Ins. Co. v. Paramount Concrete, click here.

Pollution Exclusions Ambiguous as Applied to Asbestos Claims, Connecticut Court Rules

Why it matters
A Connecticut superior court recently ruled that numerous pollution exclusions extending as far back as the 1950s were ambiguous as to the underlying asbestos bodily injury claims and therefore did not preclude coverage for an insured’s massive asbestos liabilities incurred from the sale of industrial talc. The court held that, despite the policy exclusions purporting to eliminate coverage for injuries resulting from the discharge, dispersal, release or escape of pollutants, there was coverage because it was unclear whether they referred to traditional environmental contaminants (as the insured argued) or could be read to include asbestos exposure resulting from mined talc (the insurer’s contention).

In so holding, this court joined the vast majority of courts nationwide that have rejected application of pollution exclusions to asbestos bodily injury claims.

Detailed Discussion
Vanderbilt Minerals, LLC, sought coverage from more than 30 of its
The insurers took the position that both types of pollution exclusions encompassed claims for asbestos exposure from talc. The insured, on the other hand, argued that the exclusions referred only to traditional environmental pollution and therefore were inapplicable.

The court ruled that both interpretations were viable, stating that “It cannot be said with a high degree of certainty that the policy language clearly and unambiguously excludes the claim.” However, the court noted that specific asbestos exclusions began appearing in policies starting in 1986. Because asbestos exclusions would be largely superfluous if asbestos claims were covered by the pollution exclusion, the court was persuaded that the insured’s interpretation was better.

“[T]he very adoption of separate asbestos exclusions in policies beginning in 1986 is in itself evidence that the industry did not consider the pollution exclusion language to be clear enough to exclude such claims,” the court said. “To argue the pollution exclusion was unambiguous and therefore excluded asbestos claims would render the asbestos exclusion redundant and unnecessary.”

Because the insurers failed to meet their burden of demonstrating the applicability of the exclusions, the court found they did not preclude coverage.

To read the decision in RT Vanderbilt Co. Inc. v. Hartford Accident & Indemnity Co., click here.
million and did so without the defendant's consent."

Under Georgia law, an agreement to settle a claim is a "voluntary payment [that] does not constitute a legal obligation," the court wrote. "In the case here, plaintiff's insurance contract with the defendant provides for the payment of claims and defense costs only if the plaintiff is 'legally obligated' to pay a securities claim. The defendant is not obligated to pay any claims or costs arising out of a securities claim if the plaintiff did not have a legal obligation to pay the settlement amount, and the defendant did not consent to pay the settlement amount. The plaintiff's complaint is required to be dismissed on this basis alone."

Judge Duffey was unmoved by Piedmont's argument that it became "legally obligated" to pay the settlement once the district court approved the deal.

"That 'voluntary act' was completed before the district court approved the settlement agreement," the court said, granting XL's motion to dismiss the complaint. "The district court's approval of the settlement does not convert an uncovered amount into a covered amount under the insurance agreement."

To read the decision in Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co., click here. 

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