Commentary

Continental Casualty Co. v. Employers Insurance Co. Of Wausau

New York Court Finds That Aggregate Limits Do Not Apply To Asbestos Installation Claims

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Introduction

One of the most hotly contested questions in the asbestos insurance coverage area is whether certain asbestos-related bodily injury claims fall outside of the products hazard and completed operations hazard in standard form comprehensive general liability ("CGL") policies. Insurers view this as a "bet the company" dispute because third-party claims that fall outside of those hazards — so-called non-products claims — are not subject to aggregate limits in most CGL policies.

Insurers generally take the extreme position that all asbestos claims come within the products and/or completed operations hazards, and are therefore subject to aggregate limits. Policyholders, on the other hand, argue that claims that arise out of the operations of a business, such as claims brought against an insulation contractor arising from the installation process, fall outside of the products and completed operations hazards.

Although this non-products dispute arises with some frequency in settlement discussions and confidential arbitrations, very few courts have spoken on the issue. But on May 8, 2007, Justice Richard F. Braun of the New York Supreme Court, New York County, addressed precisely this issue after a 34-day trial. In *Continental Casualty Co. v. Employers Insurance Co. of Wausau*, No. 601037/03, N.Y. Sup., N.Y. Co.; 2007 N.Y. Misc. LEXIS 3336 ("*Keasbey*"), the Court held unequivocally that the asbestos-related claims at issue, which were brought against an insulation contractor by claimants who were exposed to asbestos during the installation process, were non-products claims that were not subject to aggregate limits.

This decision already has been described as "very important" by policyholder lawyers because it is a well-reasoned publicly available opinion that was issued after a full trial not only on the non-products issue, but also on the full spectrum of coverage defenses raised by the insurers. This fully litigated case, which is described briefly below, can serve as a useful roadmap for policyholders and insurers involved in non-products disputes.

Case Background

The *Keasbey* matter arose in an unusual procedural posture because the policyholder, the Robert A. Keasbey Company ("RAK"), is a defunct corporation. RAK was an insulation contractor that installed asbestos-containing insulation materials in powerhouses and other facilities in and around New York and the tri-state area. Founded in 1897, RAK stopped doing business in the 1990s and was dissolved by New York's Secretary of State in 2001. Starting in the 1980s, thousands of individuals who suffered from asbestos-related injuries brought tort claims against Keasbey, mostly in New York state courts. Although some of those tort cases were tried before juries, RAK's insurers and RAK settled most claims.

In 2001, RAK's primary insurers, Continental Casualty Company and American Casualty Company of Reading, PA ("CNA"), brought a declaratory judgment action in New York Supreme Court, Westchester County, against RAK and over 100 individuals with tort claims pending against RAK. CNA alleged in its complaint that all of the pending asbestos-related claims were subject to the aggregate policy limits, which were exhausted, and any suggestion of non-products coverage to the contrary was a newly minted and meritless theory.

The individual defendants answered the complaint, and they subsequently prevailed on a motion to transfer venue to New York County, where most of the tort claims were pending. The parties stipulated to dismiss the complaint in Westchester County, and CNA filed a new complaint in New York County. In the new complaint, which was assigned to Justice Braun, CNA also named Wausau and One Beacon as defendants. CNA issued primary CGL policies to RAK from 1970 to 1987, as well as certain excess policies. Wausau issued primary policies to RAK from 1968 to 1970, and One Beacon issued certain site-specific "wrap-up" policies that provided coverage for locations where RAK performed operations. The parties stipulated that the individual claimants who were named as defendants would represent a class of all persons who had asbestos tort claims pending against RAK. The Court approved this class stipulation and the case proceeded to trial as a defendant class action.

The Parties' Positions At Trial

CNA pushed for a full trial on the merits with the opportunity to present extrinsic evidence because it believed that *Keasbey* was an important test case for the non-products issue. At trial, CNA tried to demonstrate that all past, present, and future asbestos claims were products hazard claims, and, therefore, subject to the aggregate limits in the policies. CNA further attempted to show that because it had paid out its aggregate limits for products and completed operations hazard claims, it owed no additional coverage. CNA also presented evidence in connection with all of the "kitchen sink" defenses that are typically asserted by insurers to deny coverage. For example, CNA argued that even if premises/operations coverage were available, the class was time-barred from asserting coverage by the statute of limitations, waiver, estoppel, ratification and/or laches. CNA also argued that no coverage remained because all asbestos claims constituted a single occurrence, and the per-occurrence limits in the policies were exhausted. Finally, CNA tried to prove that coverage was barred by the pollution exclusion and the notice and cooperation clauses in the policies.

The defendant class argued that the plain language of the policies provided unaggregated premises/operations coverage for the claims at issue and demonstrated at trial that the extrinsic evidence supported the class' reading of the language in the policies. Next, the class argued that because each asbestos claim was a separate occurrence, coverage remained for such claims. Finally, the class argued that all of CNA's remaining defenses were meritless.

After four months of trial and extensive briefing, Justice Braun denied CNA's requests for declaratory relief, addressing each claim in turn, and ruled in the defendant class' favor on nearly all of them. Below is a brief summary of the Court's most significant findings.

The Court's Findings

1. Aggregate Limits Do Not Apply To The Claims

The Court found that CNA failed to carry its burden of proving that every underlying asbestos tort claim fell within the products or completed operations hazards. The Court explained 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." *Keasbey*, slip op. at 5.

CNA presented two primary arguments as to why the Court should find that the products hazard applies to all of the claims against RAK. First, CNA argued that all products liability tort claims that involve a policyholder's product come within the products hazard. Second, CNA argued at trial that the asbestos products were in fact "relinquished," because they were "drop-shipped" to worksites before RAK installers retook possession of the products to install. The Court rejected both arguments. Citing and quoting the New York Court of Appeals decision in *Frontier Insulation Contractors v. Merchants Mutual Insurance Co.*, (91 NY2d 169 [1997]), the Court found that not all claims involving products come within the products hazard. Rather, the location of the accident and the possession of the product are determinative. As to "drop-shipping," the Court expressly rejected the theory and found that CNA failed to "demonstrate[ ] that the injuries occurred after relinquishment of the asbestos products" because even if RAK temporarily relinquished the products to others, "the injuries happened while the installation operations of defendant Keasbey were ongoing." *Keasbey,* slip op. at 6-7.

The Court added that other extrinsic evidence also supported this reading of the policies. For example, CNA had already classified certain claims against RAK as operations claims, which was consistent with the plain meaning of the policies. *Id.,* slip op. at 7.

The Court also refused to apply the completed operations hazard to any of the claims. *See id.,* slip op. at 7-8.

Accordingly, the Court held "that generally the underlying asbestos personal injuries actions do not fall within the products aggregates." *Id.*, slip op. at 8.

2. The Defendant Class Was Not Time-Barred

CNA asserted virtually every timeliness doctrine as defenses to coverage, such as waiver, laches, ratification, estoppel, and judicial estoppel. The Court rejected all of CNA's timeliness defenses and found that the claimants could seek premises/operations coverage for their claims.

3. The Pollution Exclusion Does Not Apply

CNA's policies from 1972 through 1987 exclude coverage for "bodily injury . . . arising out of the discharge dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge is sudden and accidental."

The Court stated that the insurer has a "heavy burden" to demonstrate that this exclusion applies, and that this same provision in CNA's policies was interpreted to be ambiguous by the Court of Appeals in *Continental Casualty Co. v. Rapid-American Corp.*, (80 NY2d 640 [1993]). Moreover, the Court found that CNA's "custom and practice" for many years was to defend and pay out under the policies without invoking the exclusion. Accordingly, the Court found that CNA's interpretation of its own ambiguous policy language demonstrated that the pollution exclusion did not bar coverage under the policies.

4. Each Asbestos Claim Constitutes A Separate Occurrence

CNA's policies define an occurrence as "an accident including injurious exposure to conditions, which results during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The Court found that the injuries to the members of the defendant class took place at various work sites over the course of many years. Accordingly, the Court held that each class members' injury constituted a separate occurrence.

5. CNA Was Untimely In Disclaiming Coverage For Lack Of Notice And Cooperation

CNA predictably tried to demonstrate that coverage was barred due to breaches of the notice and cooperation clauses in the policies.

The Court found that the defendant class provided sufficient notice by serving their complaints in the underlying action on RAK's defense counsel. The Court also found that CNA was barred from asserting the untimely notice and lack of cooperation defenses because CNA was untimely in disclaiming coverage on those grounds.

Conclusion

Justice Braun confirmed what the Court of Appeals established in *Frontier Insulation Contractors*: latent injury claims based on exposure during contracting operations generally are not subject to the products or completed operations hazards in CGL policies. Such claims are not subject to aggregate limits, and even if the insurance companies assert that their aggregate limits for products or completed operations hazard claims were exhausted by past claims handling and settlements, premises/operations coverage remains available. ■