BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
White and Williams LLP
Randy J. Maniloff
maniloffr@whiteandwilliams.com

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Editor's Note: Please allow me to reiterate my thanks to *Binding Authority* readers for their continuing support of "General Liability Insurance Coverage: Key Issues In Every State." The book is currently Sold Out on the Oxford University Press website and, after just six weeks, is going into a third printing. Books can still be ordered at the Oxford site and they'll be back in stock shortly (Amazon currently has a few copies left). Thank you everyone for this great support and the feedback that you've provided. -- Randy

New York's Highest Court Perplexcess Insurers

Asbestos – But More

If the decision can make it here, it can make it anywhere

Come on, isn't it annoying that New York's highest court is called the Court of Appeals of New York and not the New York Supreme Court. Because it's not, you constantly have to characterize the Court of Appeals of New York as "New York's highest court," because you think that the reader might think that you are referring to a mid-level appellate court, which is what the name sounds like. But you're not. If you were referring to a mid-level appellate court in New York, as well as a trial court, amazingly so, you would have said supreme court. And, in doing that, you would have then undoubtedly pointed out that the supreme court is not New York's highest court, despite being called the supreme court. And the irony of all this -- the reader probably knows perfectly well that the Court of Appeals of New York is, in fact, New York's highest court, since everyone has forever been making this point when saying New York Court of Appeals. But you do all of this anyway – just in case they don't. It's an Abbott and Costello routine. Not to mention from a place that loves to brag about how much of a rush it's in.

In any event, yesterday the Court of Appeals of New York, New York's highest court, issued a decision in a classic asbestos coverage case. *Binding Authority* doesn't usually do much with asbestos coverage cases – even when they are from courts as respected and influential as New York's highest. But yesterday's decision is an exception. While unquestionably a significant one in the asbestos (and hazardous waste) coverage world (*e.g.*, *see* section addressing "stub periods"), it may be farther reaching than the environmental context. Yesterday's New York high court decision in *Union Carbide*

Corp. v. Affiliated FM Insurance Co. raises an issue relevant to the overall primary – excess relationship, regardless of the nature of the claim.

Union Carbide, a company facing significant asbestos liabilities, sought coverage from its fifth-layer excess insurers. The fifth layer policy was a "brief 'subscription form policy' prepared by UCC's insurance broker." *Union Carbide at 2.* We've all seen these couple-of-page follow-form excess policies that, despite being about the size of a shopping list, provide multi-millions in coverage.

The fifth-layer excess policy followed form to an underlying primary policy. The primary policy was a three-year policy, with a $5 million limit of liability, and nobody disputed that, for purposes of the claims at issue, the limit was annualized. In other words, the policy's $5 million limit applied separately to each of the three years. Specifically, the policy provided: "The limit of liability . . . set forth as 'aggregate' shall be the total limit of the company's liability under this
policy for ultimate net loss . . . during each consecutive 12 months of the policy period." *Union Carbide* at 2 (alteration in original).

Now turn to the fifth-layer excess policy, also on the risk for three years (at least initially), that followed form to the primary policy. It provided a limit of liability of $30 million "each occurrence and in the aggregate." [The fifth layer policy's $30 million limit was shared by six insurers, with each having a $5 million piece.]

At issue was whether the fifth-layer excess policy, which followed form to the primary policy, was, like the primary policy, also subject to annualized limits. The competing arguments went like this:

[The fifth-layer excess insurers] argue in substance that the words of the declarations in the subscription form policy, "$30,000,000 . . . in the aggregate," can mean only that $30 million is the maximum that may be paid under the policy, and thus that the maximum share for each of the six signatories, including [themselves], is $5 million. They stress that the follow-the-form clause, which incorporates the [primary] policy by reference, is expressly made "subject to the declarations set forth below" and that those declarations, unlike the [primary] policy, speak of an "aggregate," not an "annual aggregate," limit of liability. UCC [Union Carbide] argues that, under the follow-the-form clause, the conditions in the primary policy are part of the subscription form policy, and that one of those conditions is that the "aggregate" limit shall be annualized.

Union Carbide at 4-5.

The court (unanimously) disposed of the issue quickly:

UCC has the better of the argument. While the reading [the fifth-level excess insurers] give to the word "aggregate" might be plausible in many contexts, here the follow-the-form clause should prevail. Such clauses serve the important purpose of allowing an insured, like UCC, that deals with many insurers for the same risk to obtain uniform

coverage, and to know, without a minute policy-by-policy analysis, the nature and extent of that coverage. It is implausible that an insured with as large and complicated an insurance program as UCC would have bargained for policies that differed, as between primary and excess layers, in the time over which policy limits were spread.

Union Carbide at 5-6.

There is some more to the decision than just this and no doubt the parties' files in this protracted case would make a Redwood jealous. But the take-away is simple. On one hand, the court justified its decision based on the policy language, not to mention that it would have done so based on extrinsic evidence had it needed to. Further, the follow-form language at issue did not specifically address limits, as some follow-form provisions do. But New York's highest court also made clear that, when determining coverage owed under an excess follow-form policy, the spirit of the follow-form concept is not to be ignored.

Lastly, the *Union Carbide* court addressed whether a two-month stub period, added to a three-year policy, provided a separate limit of liability. That's an interesting issue and one that arises with some frequency, especially in the long-tail coverage arena.

Here is a link to the Court of Appeals of New York's February 22nd decision in *Union Carbide Corp. v. Affiliated FM Insurance Co.*:

http://www.nycourts.gov/ctapps/Decisions/2011/Feb11/16opn11.pdf

If you have any questions, please let me know.

Randy

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Randy
Randy J. Maniloff
White and Williams LLP
1800 One Liberty Place | Philadelphia, PA 19103-7395
Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608
maniloffr@whiteandwilliams.com