Complex Insurance Coverage Reporter

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White and Williams is pleased to present this new publication by its Insurance Coverage and Bad Faith Practice Group. The Complex Insurance Coverage Reporter will highlight significant legal developments for complex insurance claims and coverage litigation. We hope you enjoy this inaugural issue and welcome your feedback.

Spotlight: OLIN CORPORATION V. ONEBEACON AMERICA INSURANCE COMPANY, ET AL., 864 F.3D 130 (2D CIR. 2017)

Last year, the New York Court of Appeals ruled in *Matter of Viking Pump*, 52 N.E.3d 1144 (N.Y. 2016), that "all sums" allocation, instead of pro rata allocation, would be applied to asbestos claims under excess policies containing certain "non-cumulation" language. *Viking Pump* left unanswered a host of legal and practical questions concerning when and how all sums allocation should be applied to long-tail claims under policies containing such language. In *Olin Corporation v. OneBeacon America Insurance Company, et al.*, 864 F.3d 130 (2d Cir. 2017), the Second Circuit Court of Appeals addressed, for the first time, several of the myriad issues raised by *Viking Pump*. Unless and until these issues are addressed by New York state courts, the *Olin* decision could have a significant impact on how long-tail claims are allocated under New York law where policies contain non-cumulation clauses.

Based upon the decision in *Consolidated Edison Company of New York v. Allstate Insurance Company*, 774 N.E.2d 687 (N.Y. 2002), New York courts generally follow a pro rata allocation of indemnity costs in the context of long-tail claims (e.g., involving exposure to asbestos and pollutants). In *Con Ed*, the New York Court of Appeals agreed with insurers that the standard policy language limiting coverage to liability for injury that occurs "during the policy period" mandates pro rata allocation. By the same reasoning, the *Con Ed* court rejected all sums (or "joint and several") allocation because it would result in a particular policy covering liability for injury or damage that occurred both during and outside the policy period.

In *Viking Pump*, which came to the Court of Appeals on certified questions from the Delaware Supreme Court, the policyholder argued that all sums – not pro rata – allocation should be applied to asbestos claims under excess policies containing certain "non-cumulation" provisions. Some of the excess policies at issue in *Viking Pump* contained the following commonly used non-cumulation language (which often appears as "Condition C"):

> C. Prior Insurance and Non-Cumulation of Liability
>
>> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof, the limit of liability hereon . . . shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.
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>> Subject to the foregoing paragraph and to all other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, [the insurer] will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.

It has generally been recognized that the purpose of such non-cumulation language is to prevent the policyholder from "stacking" policy limits for the same loss by reducing the limits of later policies by the amounts due under prior policies.

The Court of Appeals in *Viking Pump* agreed with the policyholder's argument that all sums allocation should apply to the excess policies at issue in that case because, unlike policies that limit coverage exclusively to injury that occurs during the policy period, the language in the policies in question expressly contemplated that they may cover injury that occurs outside the policy period. The court focused on language in the non-cumulation clause that referred to loss covered under the policy that was also covered "in whole or in part under any other excess policy" and the second paragraph of the clause, which the court referred to as a "continuing coverage" provision. But the court's ruling essentially stopped there. The *Viking Pump* court did not address how all sums allocation should apply under the facts of the case or any of the legal and factual issues that may arise in applying non-cumulation clauses.

The Second Circuit tackled several of these issues in *Olin Corporation v. OneBeacon America Insurance Company* 864 F.3d 130 (2d Cir. 2017). In *Olin*, the policyholder sought coverage for costs incurred in connection with five underlying environmental claims under various primary and excess policies. The Second Circuit was asked to address the proper allocation of those costs to the excess policies at issue on an all sums basis because the excess policies contained the "Condition C" non-cumulation clause quoted above. The Second Circuit made the following key rulings concerning the application of *Viking Pump* and all sums allocation:

First, the court addressed the defendant OneBeacon Insurance Company's argument that Olin's damages should be allocated initially on a pro rata basis to the primary policies, which did not contain non-cumulation clauses, before the remaining damages were allocated to the excess policies on an all sums basis. This approach, OneBeacon argued, was required under New York law because pro rata allocation is generally applied to policies that do not contain non-cumulation clauses. If the Second Circuit had adopted this approach, it would have resulted in Olin's damages being confined to the primary layer. If this approach were adopted as a general rule, it would have the effect in all cases of reducing the damages eligible to be allocated on an all sums basis to excess policies containing non-cumulation clauses. *Olin*, slip op. at 21-22.

The Second Circuit, however, rejected what it characterized as a "hybrid" approach to allocation. The court noted that *Viking Pump* held that the excess policies at issue in that case were triggered upon the exhaustion of the immediately underlying primary policy (*i.e.* "vertical exhaustion") and not only after all primary policies were exhausted ("horizontal exhaustion"). The Second Circuit found that, under the vertical exhaustion approach, the relevant consideration is whether the insured's damages exceed the primary insurance in any one policy year. If so, the excess policy in that year is triggered, and the damages may be allocated to the excess insurance in that year on an all sums basis, minus the amount of the applicable primary limit. *Id.* at 22-23.

Second, the Second Circuit addressed the language in the non-cumulation clause providing that the limits of the policy will be reduced by amounts due for the same loss under "any other excess policy" issued to the policyholder prior to the policy in question. OneBeacon argued that "any other excess policy" is unambiguous and means that, if there is any prior insurance available for the claim in the same layer of coverage, the limits of the OneBeacon policy will be reduced by the amounts due under the prior insurance. This gives full effect to the "anti-stacking" purpose of the non-cumulation language. *Id.* at 28. In response, Olin argued that "any other excess policy" means only policies issued by the same insurer and that OneBeacon was not entitled to have its limits reduced due to the existence of prior insurance issued by another insurer.

The court agreed with OneBeacon and held that the plain language of Condition C requires reduction of the policy limit "by amounts due under any prior excess policy on account of a loss covered by a prior insurance policy in the same layer." On the other hand, the court disagreed with OneBeacon's argument that Olin was entirely precluded from recovering under the OneBeacon policies due to the fact that Olin had prior insurance in the same layer sufficient to cover its entire damages. *Id.* at 34. The court held that OneBeacon would be entitled to reduce its policy limits only by amounts actually paid by prior insurers for the same loss in the same layer. According to the court, "[t]he prior insurance provision works in conjunction with the overarching approach dictated by Condition C to prevent the insured from stacking policies once it has *already* obtained indemnification for that specific loss from another policy in the relevant coverage layer." *Id.* (emphasis in original).

Finally, the court addressed the practical effect of its rulings. Although the court had held that OneBeacon's limits "should be reduced by amounts paid to settle claims with respect to the five manufacturing sites at issue here," it found no basis in the record to calculate the reduction. *Id.* at 35. Therefore, the court remanded the case to the district court for further findings on the issue. The Second Circuit held that, in order to obtain a reduction of its limits, it would be the insurer's burden to prove on remand that the claims were covered under the prior settled policies and also the specific portion of the settlement payment attributable to the settled claims. The court noted in passing that, because the prior settlements were purportedly "global settlements," it could mean there "is no easy way" to determine the settlement amounts that were properly associated with the contaminated sites at issue. *Id.*

The *Olin* decision is only the first of what is likely to be a long line of cases that interpret and attempt to give effect to the ruling in *Viking Pump* and it is, at best, a mixed bag. The *Olin* court recognized that the purpose of the non-cumulation language was to prevent the insured from "stacking" policy limits for the same loss and so it correctly enforced the plain language of the clause by allowing insurers to reduce their limits by amounts paid for the same claims by any prior insurer in the same layer. However, other aspects of the decision appear to be at odds with the policy language and the law, in particular (1) the court's holding that a reduction in limits is allowed only for payments actually made under prior policies (instead of amounts "due" under prior policies); (2) the court's rejection of the argument that the damages should have been allocated initially on a pro rata basis to the primary coverage, which did not contain non-cumulation provisions; and (3) the court's decision to place the burden on the insurer to prove the portion of prior settlements attributable to the claims in question, which arguably imposes an unreasonable burden on insurers seeking to enforce the "anti-stacking" purpose of the clause. The *Olin* decision is not binding on a New York state court and insurers should be prepared to challenge the unfavorable aspects of the ruling in New York state courts or other courts applying New York law when appropriate.

OTHER TOP DEVELOPMENTS

ALLOCATION

Travelers Indemnity Company, et al. v. Thomas & Betts Corporation, No. 13-6187, 2017 U.S. Dist. LEXIS 117135 (D.N.J. July 26, 2017)
District Court finds that umbrella and excess coverage should be included in *Owens-Illinois/Carter-Wallace* allocation regardless of the likelihood those policies will be implicated by underlying asbestos claims. Policyholder's insurance purchasing decisions, rather than the probability that higher-level coverage would be reached, is said to more appropriately reflect risk transfer and retention considerations articulated by New Jersey courts.

Nooter Corporation v. Allianz Underwriters Insurance Company, et al., No. ED103835, 2017 Mo. App. LEXIS 977 (Mo. Ct. App. Oct. 3, 2017)
Missouri Court of Appeals *inter alia* upholds application of "all sums" allocation and vertical exhaustion in asbestos "bodily injury" claim coverage dispute between Nooter and several excess insurers. Relies on its 2013 decision in *Doe Run v. Lloyds* (400 S.W.3d 463) that "found the 'all sums' language was not limited by the 'during the policy' language." On exhaustion, the court finds that while the parties' respective interpretations are reasonable, policies containing other insurance provisions are ambiguous as to whether they address concurrent or successive coverage. Also issues some favorable limiting rulings relating to defense under excess policies.

Missouri Law

New Missouri legislation addresses "bad faith" set-ups through time-limited settlement demands and Section 537.065 agreements not to execute. Among other things, the legislation, which took effect August 28, 2017, establishes requirements for these demands to be admissible in an action seeking extra-contractual damages, including that the demand be in writing and remain open for not less than 90 days from receipt by an insurer (requirements do not apply to demands within 90 days of a jury trial). Insurers also now have 30 days from notice of a Section 537.065 agreement by an insured to intervene in the underlying lawsuit as of right.

Rancosky v. Washington National Insurance Company, No. 28 WAP 2016, 2017 Pa. LEXIS 2286 (Pa. Sept. 28, 2017)

Pennsylvania Supreme Court adopts two-part test from *Terletsky v. Prudential,* 649 A.2d 680 (Pa. Super. 1994) for proving a statutory "bad faith" claim under 42 Pa. C.S.A. § 8371, which requires that a plaintiff present "clear and convincing evidence (1) that the insurer did not have a reasonable basis for denying benefits under the policy and (2) that the insurer knew of or recklessly disregarded its lack of a reasonable basis." Rules that proof of an insurer's "subjective motive of self-interest or ill-will," while potentially probative of the second prong of the test, is not a requirement to prevail under § 8371. Evidence of an insurer's "knowledge or reckless disregard for its lack of a reasonable basis" for denying a claim alone, according to the court, is sufficient even in cases seeking punitive damages. John Anooshian and Sean Mahoney recently covered the *Rancosky* decision in an article available here.

DUTY TO DEFEND - AFFIRMATIVE CLAIMS

Mount Vernon Fire Insurance Company v. VisionAid, Inc., 477 Mass. 343 (Mass. 2017)

Massachusetts Supreme Judicial Court rules that the contractual duty to defend does not require insurers to prosecute an insured's affirmative counterclaim under policy language at issue or common-law "in for one, in for all" doctrine. The "essence of what it means to defend," the court said, is to "work to defeat a claim that could create liability against the individual being defended." Here, the insurer agreed to "'defend' Visionaid in any claim 'first made against [it] during the Policy Period,' and no more." Since it is coextensive with the duty to defend in Massachusetts, the duty to pay defense costs likewise does not require an insurer to fund an insured's affirmative claims.

EXHAUSTION

Montrose Chemical Corporation of California v. Superior Court, No. B272387, 2017 Cal. App. LEXIS 759 (Cal. Ct. App. Aug. 31, 2017)

Second District rejects policyholder's blanket "elective stacking" approach to vertically exhaust excess policies in environmental coverage action: The California Supreme Court in "[*State of California v. Continental Ins. Co.,* 281 P.3d 1000 (2012)] did *not,* as Montrose asserts, announce a general principle that insureds covered by multiple policies are entitled to 'select which policy(ies) to access for indemnification in the manner they deem most efficient and advantageous.'" Finds that the sequence in which coverage may be accessed must be evaluated on a policy-by-policy basis in light of potentially relevant provisions including "other insurance" clauses.

POLLUTION EXCLUSION

Longhorn Gasket & Supply Company, et al. v. United States Fire Insurance Company, No. 15-41625, 2017 U.S. App. LEXIS 15706 (5th Cir. Aug. 18, 2017)

Fifth Circuit concludes that asbestos is a "pollutant and an irritant" and that pollution exclusion applies to alleged bodily injury claims at issue involving exposure to asbestos-containing products. Denies certification to Texas Supreme Court and remands for determination

on applicability of "sudden and accidental" exception.

Zhaoyun Xia, et al. v. ProBuilders Specialty Insurance Company, et al., 393 P.3d 748 (Wash. 2017)
Washington Supreme Court refuses to reconsider pro-policyholder ruling in closely watched case that absolute pollution exclusion did not preclude liability coverage for injury claim from exposure to carbon monoxide fumes where the "efficient proximate cause" of loss (here, a negligently-installed water heater) was a covered occurrence. Finds insurer wrongfully declined to defend in "bad faith" even though (1) the court recognized that the insurer had "correctly identified the existence of an excluded polluting occurrence under the unambiguous language of its policy" and that it is "clear that the [pollution] exclusion covers the release of carbon monoxide in this case"; (2) the efficient proximate cause rule had not been applied in the third-party context before; and (3) there was a lower court ruling in favor of the insurer. The dissent (Justice Madsen) focused in part on the seemingly unjust imposition of "bad faith" liability under the circumstances: "[I]t is unfair for us to say that [the insurer] was trying to circumvent a rule that we have never before applied to this type of case. We cannot fairly hold insurers to a standard that requires them to anticipate whether and how the law might change to determine their duties to defend."

RESERVATION OF RIGHTS

Harleysville Group Insurance v. Heritage Communities, Inc., et al., 803 S.E.2d 288 (S.C. 2017)
South Carolina Supreme Court files substituted opinion in important construction defect coverage case addressing method of reserving rights and punitive damages. Recognizes that "generally a third party will have no basis to assert any perceived inadequacies" in an insurer's reservation of rights, but that it was not an error under the "specific circumstances" and "unique facts" of this case to permit condo owners association claimants with final judgments to stand in the shoes of the defunct insured. The court explains that reservation of rights must be specific and unambiguous and that, among other things, "generic denials of coverage coupled with furnishing the insured with a copy of all or most of the policy provisions (through a cut-and-paste method)" are insufficient to reserve the right to contest coverage (*i.e.,* the insured "must be provided sufficient information to understand the reasons the insurer believes the policy may not provide coverage"). Separately and without creating a categorical or bright-line rule, finds that where there was no record evidence that the conduct at issue occurred outside the relevant policy periods, punitive damages which were not excluded were not subject to *Crossmann*-type time on the risk allocation.

STATUTE OF LIMITATIONS

Estate of Harold L. Adams, et al. v. Continental Insurance Company, et al., 161 A.3d (Md. Ct. Spec. App. 2017)
For the second time, Maryland appeals court rejects claims by asbestos plaintiffs against insulation company's liability insurers as time-barred. Finds that plaintiffs were on inquiry notice of their alleged misrepresentation claims regarding the availability of additional "non-products" coverage under an old insurance settlement as early as 1997 with the publication of the Maryland Court of Special Appeals decision in *Commercial Union v. Porter Hayden* (698 A.2d 1167) addressing installation theory of liability.

If you have questions or would like additional information, please contact John Anooshian (anooshianj@whiteandwilliams.com; 215.864.7005), Robert Walsh (walshr@whiteandwilliams.com; 215.864.7045) or another member of our Insurance Coverage and Bad Faith Group.

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