SIMPSON
THACHER

Continental Casualty Company v. Employers Insurance Company of Wausau: New York Court Decides Significant Asbestos Coverage Issues Against Insurer

May 15, 2007

OVERVIEW

Following a 34-day bench trial, on May 8, 2007, Judge Richard Braun of the Supreme Court, New York County, issued a ruling that policyholders will claim expands the scope of insurance coverage available for long-tail asbestos-related personal injury claims arising out of policyholders' operations. See Continental Casualty Company v. Employers Insurance Company of Wausau, Index No. 601037/03 (N.Y. Sup. Ct. May 8, 2007) (the "Opinion").

The Opinion arose in the context of a reverse class action in which certain insurers sought declarations against a class of 20,000 asbestos claimants regarding coverage under policies issued to a defunct insulation contractor. In ruling on the requested declarations, the Court made a number of sweeping conclusions on issues important to insurers with little reasoned analysis of the law:

- Products/completed operations aggregate limits. The insurers sought a declaration that the asbestos claims fall within the products aggregates of the policies at issue. The Opinion noted that the insurers, as plaintiffs, bore the burden of proving their entitlement to this declaration. Without meaningful discussion of the applicable policy provisions, the timing and nature of the alleged injury, or the relevant case law, the Court found that the insurers had failed to meet their burden. Then, in an inexplicable leap, the Court held that it must issue a declaration against the insurers – a determination that is all the more puzzling in that the asbestos claimants had no outstanding requests for relief pending. The Opinion concluded that generally the 20,000 asbestos claims fall outside the aggregated products/completed operations coverage of the primary policies at issue in the case. The Court then shifted the burden to the insurers to prove in a later phase of trial that any individual asbestos claims fall within the products/operations aggregate.

- Late notice defense. It was undisputed in the case that the policyholder did not timely tender notice of any unaggregated operations claims. Nonetheless, the Opinion rejected the insurers' defense of lack of timely notice based, in part, on the erroneous premise that no notice of occurrence was required.

- Equitable defenses. The Court acknowledged that the insurers could successfully assert certain equitable defenses to coverage against the policyholder itself. However, without any consideration of prejudice to the insurers, the Court found that the insurers could not assert the defenses of laches, waiver, estoppel, or

ratification against the asbestos class in this case, because it would be "inequitable" to allow these defenses to be interposed against the claimants.

Because the case involves unaggregated operations coverage for asbestos claims, the stakes are high, and an appeal undoubtedly will follow. This memorandum briefly summarizes and assesses some of the Opinion's most notable rulings.[1]

THE OPINION

Background

Continental Casualty Company and American Casualty Company (together, "Continental") filed this lawsuit in 2003, seeking various declarations concerning the scope of coverage available for asbestos claims pending against the Keasbey Company, a defunct contractor that installed insulation at various sites in the New York area from the 1950s to the 1970s.

Continental sued both Keasbey and 20,000 asbestos claimants deemed a defendant class (the "Asbestos Claimants"). Because Keasbey is only a shell, the Asbestos Claimants are the principal defendants. Certain other insurers, including One Beacon, are also named as defendants.

Continental issued primary general and excess liability policies to Keasbey for the period from 1970 through 1987. OneBeacon issued certain wrap-up policies to Keasbey that covered two sites during the period from 1966-69 and 1967-72. The combined aggregate limit of the primary policies was indisputably exhausted by May 1992. Thereafter, Keasbey's excess carriers paid out over $100,000,000 in excess coverage.

The Court's Blanket Classification Of 20,000 Asbestos Claims As Operations Claims

The Opinion broadly ruled that 20,000 asbestos claims generally fall outside the aggregated products/completed operations coverage of the subject policies. Specifically, the Court held:

[1] In addition to the issues noted above and highlighted herein, the Court also issued rulings on number of occurrences and trigger of coverage. With respect to number of occurrences, the Court found that under the primary policies at issue, each individual claimant's exposure to harmful conditions constitutes a separate occurrence. However, the Court also found that all asbestos claims arising out of exposure at the Indian Point Nuclear Power Plant, which was covered by a wrap-up policy, constitutes a single occurrence. Slip Op. at 20, 34. On trigger, the Court concluded that the policy periods for asbestos suits "are triggered by exposure to asbestos during the policy periods." Slip Op. at 17-18.

> [T]he evidence has shown that the injuries happened while the installation operations of defendant Keasbey were ongoing, which were covered under the operations coverage provisions of the subject insurance policies. . . . Here, as the risks of injuries grew out of defendant Keasbey's work with asbestos during its operations away from its premises, then operations coverage is applicable.[2]

Notwithstanding the Court's reference to the "evidence," the Opinion is silent with respect to any evidentiary details relevant to its analysis, such as the timing of the Asbestos Claimants' alleged exposure in relation to the policies at issue and the date on which any particular operations terminated. Moreover, rather than focusing on whether the "bodily injury during the policy period" arose from an ongoing or completed operation, as the plain language of the policies requires, the Opinion focused on the fact that the "risks of injuries" grew out of Keasbey's work with asbestos during its operations. However, the timing of the risk of injuries is irrelevant to whether the party seeking coverage has met its burden of demonstrating that a claim is within the operations coverage of a policy. The correct rule, as stated in the landmark decision in *Wallace & Gale*, is that:

> [W]hatever injury – theoretical or real – is assumed to have occurred after operations were completed will always – by definition – be covered by the completed operations clause. . . .

Aetna Casualty & Surety Co. v. The Wallace & Gale Co., 275 B.R. 223, 238 (D. Md. 2002), *aff'd, In re: Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004).

The Court's failure to even mention the *Wallace & Gale* decision, which is directly on point, is inexplicable. As the plain language of the policies provide and the *Wallace & Gale* opinion holds, if, as in most cases, the "bodily injury" arose after the operation was complete, the completed operations aggregate limit should apply.[3]

In a further oversimplification of the issues and misconstruction of the law, the Court appeared constrained to find that if it could not rule in favor of Continental, it must rule broadly against it. The Court held:

> To the extent plaintiffs are not entitled to a declaration in their favor, the court must declare against them. Thus, the court will declare in its separate judgment that generally the underlying

---

[2] Slip Op. at 7-8 (emphasis added).

[3] In addition, it is also possible that some portion of the claims could have been subject to the applicable products hazard limits, depending on whether the claims could be said to have arisen from the insured's products and when physical possession of those products were relinquished to others. It is not clear from the opinion whether the parties were relying on the applicability of the products hazard limits.

> asbestos personal injuries actions do not fall within the products aggregates.[4]

The Court's unwillingness to issue a blanket ruling that virtually all claims fell within the products/completed operations aggregate limits may have driven the result. However, in making the foregoing leap to rule against the insurers, the Court failed to reconcile its ruling with the policy language, failed to consider the relevant case law most directly on point, and in the end provided no persuasive analysis in support of the ruling. On appeal or in the next phase of this proceeding, the Court will have another opportunity to apply the facts of individual cases to the actual policy language.[5]

The Court's Rejection Of Policy-Based Defenses

Moving to the insurers' defenses to coverage, the Court acknowledged that "neither defendant Keasbey nor the class defendants gave specific notice of their occurrences" to Continental. However, the Opinion rejected Continental's late notice defense. In a discussion that is difficult to reconcile with well-settled law, the Court found that "under the circumstances, defendant Keasbey and the members of the defendant class did not have to give plaintiffs notice of each occurrence."[6] The Court further found that Continental had failed to specifically disclaim coverage on the basis of late notice and similarly rejected Continental's defense based on Keasbey's failure to cooperate. These rulings appear vulnerable on appeal because the Court appears to have imposed on the insurers a higher standard than would have been applicable if the defenses were asserted against Keasbey itself, rather than the Asbestos Claimants.

The Court's Rejection Of Equitable Defenses

The Court also rejected Continental's equitable defenses, with no discussion at all regarding the prejudice to the insurers. Continental contended that because Keasbey failed to bring a declaratory judgment action to establish operations coverage after becoming aware that its claims were being treated as product/completed operations claims subject to an aggregate limit, the Asbestos Claimants should be barred by the doctrine of laches from pursuing operations coverage. The Court agreed that Keasbey had sat on its right to bring a declaratory judgment action and therefore would be subject to the laches defense, which would have precluded its claim for coverage. However, the Court found that it would be inequitable to allow Continental to interpose a laches defense on asbestos claimants themselves who had "no right to bring their own actions when defendant

---

[4] Slip Op. at 8 (emphasis added).

[5] In a vague series of remarks, the Opinion left open the possibility that some of the 20,000 asbestos claims may fall within the products/completed operations aggregates, suggesting that in further proceedings Continental will bear the burden of proving that any individual claim falls within these aggregates, without any indication of how analysis of the claims will proceed.

[6] Slip Op. at 22 (emphasis added).

Keasbey failed to do so."[7] On a similar basis, the Court rejected the equitable defenses of waiver, ratification, and estoppel.

The Court failed to consider the fact that the impact of this ruling, if upheld, would be to provide individual claimants with greater rights to coverage than the policyholder. The distinction drawn by the Court between defenses such as lack of notice or cooperation – which the Court observed would be binding on a direct action claimant – and defenses that were "personal" to the insured (such as laches), was supported by neither logic nor precedent. Whether the insured failed to provide proper notice or cooperation, or whether it delayed in seeking coverage, are equally valid defenses to coverage. In each of these circumstances, the loss of coverage can be said to arise from the policyholder's conduct rather than the conduct of an injured third party. Moreover, to prevail on a laches defense, as the Court recognized, required the insurers to prove that their ability to defend the claims against Keasbey was irreparably prejudiced by loss of evidence. In contrast, under New York law, late notice is a defense to coverage even in the absence of prejudice. *See* Argo v. Greater New York Mutual Insurance Company, 4 NY3d 322, 339 (2005). Under such circumstances, the finding that it would be inequitable to uphold Continental's defenses lacks any sound foundation.

CONCLUSION

In sum, the Opinion is marked by sweeping characterizations with scant analysis of the subject claims, the operative policy provisions, or the relevant case law. Taken as a whole, the Opinion could inspire renewed efforts by asbestos plaintiffs to pursue unaggregated operations coverage, particularly under policies that have been issued to policyholders which are defunct.

* * *

We will be monitoring these proceedings closely and will report on further developments. If you have any questions concerning the issues addressed in this memorandum, please contact Barry Ostrager (bostrager@stblaw.com / 212-455-2655), Mary Kay Vyskocil (mvyskocil / 212-455-3093), Mary Beth Forshaw (mforshaw@stblaw.com / 212-455-2846), Andy Frankel (afrankel@stblaw.com / 212-455-3073), Bryce Friedman (bfriedman@stblaw.com / 212-455-2235), or Elisa Alcabes (ealcabes@stblaw.com / 212-455-3133).

[7] Slip Op. at 14.