

Insurance Coverage Alert: Cohen Ziffer Lawyers Secure Another Landmark Decision On Trigger of Coverage, Assignment and Defense Cost Issues In Viking Pump

The lawyers at Cohen Ziffer have secured another landmark decision for their client Warren Pumps LLC, this time from the Supreme Court of the State of Delaware, in *Viking Pump*, applying New York law on critical insurance issues including policy assignments, the trigger of coverage, and the obligation of excess carriers to pay defense costs. The Delaware decision comes on the heels of a ruling that Cohen Ziffer lawyers obtained for Warren Pumps in May from New York's highest court, holding that policyholders who purchased policies like those at issue can seek full payment under any triggered policy for certain types of claims, greatly increasing the coverage available for damage that happens over many years, such as asbestos or environmental injuries.

A key holding in the September 12 decision (available [here](#)) rejected efforts by insurance companies to walk away from otherwise covered claims simply because the right to collect that coverage has been assigned to someone other than the original policyholder. That is an especially important issue in connection with claims involving damage that develops over time, like an asbestos or environmental claim. Years or decades often pass between the time the damage giving rise to such a claim takes

place, triggering the policy coverage, and the time it ultimately results in a lawsuit by an injured plaintiff. In the meantime, the original policyholder may have merged with another company, or spun-off part of its business, or engaged in some other form of corporate transaction that has the effect of transferring the responsibility for the liability to a new entity. Typically, companies also want to transfer the insurance protection for the liability, and so they assign the rights under the applicable insurance policies to the new entity. However, most insurance policies contain so-called “anti-assignment” clauses stating the policy may not be assigned without the consent of the insurer. To the extent that companies in the midst of complicated corporate transactions fail to seek or obtain such consent, the insurance industry has claimed that the coverage is void.

The Delaware Supreme Court rejected that effort. It noted that once the event that triggers the policy coverage has taken place, a policy assignment does not require the insurance company to pay anything other than what it originally agreed to pay – it only changes the name on the check the insurance company must write to pay the claim. The Court refused to allow insurance companies to walk away from their coverage obligations based on that technicality. Accordingly, it held that the insurance company may not rely on anti-assignment clauses to avoid coverage for events that took place prior to the policy assignment.

The Court reached an equally important – and equally pro-policyholder – result on the trigger of coverage issue. The trial court had held that only those policies in effect during time periods when the underlying plaintiff inhaled asbestos are “triggered” and available to respond to the resulting asbestos claims. In the meantime, the insurers, had argued that *no* policy was triggered until the person exposed suffered some bodily impairment, such as the development of a cancerous tumor. The Delaware Supreme Court rejected both positions, and agreed with Warren that under New York law, asbestos liabilities “trigger” not only those policies in place during the years of exposure, but those in place throughout the period that the underlying plaintiff suffered actual bodily injury, including undiagnosable injury at the cellular level. It also held that by introducing expert testimony of the nature and progression of asbestos disease, Warren had met its burden of proving that injury began at the first

significant exposure and continued to develop thereafter. That holding is a significant blow to insurance industry efforts in recent years to significantly limit coverage for asbestos bodily injury claims by retraining coverage to years well after exposure, and particularly to years after the industry began to adopt asbestos exclusions in the mid-1980s.

Finally, the Delaware Supreme Court rejected insurers' contentions that various excess policy provisions, including standard definitions of "ultimate net loss" or "assistance and cooperation" provisions, serve to relieve excess insurers of their obligation to pay for the costs of defense once their coverage layers are reached. That ruling is especially critical in the mass-tort context, including asbestos and product liability claims, where the costs of mounting an effective defense can far exceed any eventual judgment in the case.

The appeals are *In re: Viking Pump Inc. and Warren Pump LLC Insurance Appeals*, case numbers 518,2014; 523,2014; 525,2014; and 528, 2014, the Supreme Court of the State of Delaware.

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