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Del. Justices Say 1st Asbestos Exposure Not Coverage Trigger

By **Jeff Sistrunk**

Law360, Wilmington (September 12, 2016, 7:31 PM ET) -- Delaware's highest court Monday reversed a trial court's ruling that a pair of industrial pump makers may seek only excess insurance coverage for asbestos injuries under policies that were in place when underlying plaintiffs first inhaled the toxic mineral, finding instead that coverage was triggered if any bodily injury occurred during the insurers' policy periods.

In a multipronged, 84-page decision, the Delaware Supreme Court found that the lower court had erred in holding that Viking Pump Inc. and Warren Pumps LLC can pursue coverage only under excess policies that were in effect when the plaintiffs in underlying asbestos personal injury cases first had "significant exposure" to asbestos, in what is known as the "exposure trigger" of coverage.

The justices agreed with Warren that the policies would be triggered if injury occurred during the relevant policy periods, acknowledging that asbestos-related injuries occur gradually after an individual's initial exposure..

"We agree with Warren that the [Delaware] Superior Court's application of an 'exposure' trigger is inconsistent with New York law," Justice Karen L. Valihura wrote for the court.

The dispute has been kicking around the Delaware and New York courts since 2005, when Viking and Warren sued more than 20 excess insurers in Delaware Chancery Court after reaching a settlement with Liberty Mutual Insurance Co., which had issued primary and umbrella policies to Houdaille, the pump companies' onetime parent.

Following a consolidated appeal to the Delaware Supreme Court on a litany of coverage issues, the case took a detour to New York's highest court, which **concluded in May** that each of the pump companies' excess policies can held liable for the entire loss resulting from asbestos claims against the manufacturers.

The Delaware high court's Monday decision, which addresses the proper trigger for excess coverage, whether the insurers had a duty to defend the pump companies and whether Houdaille properly transferred its insurance rights to Viking and Warren, follows another **round of oral arguments** held in July.

As a preliminary matter, the Delaware justices determined that Viking and Warren had received a valid assignment of Houdaille's rights to the excess policies by virtue of a series of corporate transactions in the 1980s.

The insurers had argued that "anti-assignment" clauses in their policies precluded Houdaille from transferring the insurance rights to the pump companies, but the Delaware

Supreme Court disagreed, saying that the assignment was valid because the asbestos injuries at issue had already occurred. Therefore, the carriers did not take on a greater risk of loss when the policies were assigned to Viking and Warren, the high court found.

"As they pertain to the preassignment, insured-against losses, therefore, the anti-assignment provisions are ineffective," Justice Valihura wrote.

With respect to the excess insurers' duty to defend, the state high court upheld several of the lower court's rulings while upending others. Among other holdings, the justices affirmed that excess policies following the terms of the Liberty policies had to cover the pump companies' defense costs within policy limits, but found that contrary to the lower court's decision, another category of policies unambiguously excluded coverage for defense costs.

Finally, the Delaware Supreme Court agreed with Warren that the lower court improperly held in a post-trial final judgment that, for the purposes of insurance coverage, bodily injury occurs when a claimant experiences a "significant exposure to asbestos."

Based on the language of the judgment, the excess carriers had argued on appeal that only policies that were in place when underlying plaintiffs first inhaled asbestos were triggered. During July's oral arguments, though, Warren's attorney contended that the lower court's decision was at odds with the jury's findings and eviscerated the pump companies' access to coverage for the asbestos injury claims.

The state high court said Monday that the trial court's adoption of an exposure trigger for coverage was out of line with New York law, accepting Warren's suggestion to revise the final judgment to indicate that bodily injury occurs upon a plaintiff's initial exposure to asbestos and continues thereafter.

Warren's attorney, Robin Cohen of McKool Smith LLP, praised the Delaware Supreme Court's decision, saying that the court's findings will have a significant impact on asbestos coverage cases across the country.

"Here, you have the Delaware Supreme Court applying New York law on these critical issues of trigger and assignment, in a way that will affect the insurance industry's arguments nationwide," Cohen said.

Cohen and McKool Smith's Keith McKenna said that Monday's decision, coupled with the New York high court's May ruling, give the pump companies broad access to their excess coverage.

"What the two rulings together say is that if John Smith is exposed to asbestos in 1950, every policy in place during that year and thereafter is triggered, and we can select any given policy period to pay that claim and go straight up the coverage tower," McKenna said.

Attorneys for the excess insurers did not immediately respond to requests for comment.

Warren is represented by Robin L. Cohen and Keith McKenna of McKool Smith and Jennifer C. Wasson of Potter Anderson & Corroon LLP. Viking is represented by Lisa A. Schmidt and Travis S. Hunter of Richards Layton & Finger PA and Michael P. Foradas, Lisa G. Esayan and William T. Pruitt of Kirkland & Ellis LLP.

The carriers are represented by Garrett B. Moritz and Nicholas D. Mozal of Ross Aronstam & Moritz LLP, John D. Balaguer of White & Williams LLP, Brian G. Fox and Lawrence A. Nathanson of Siegel & Park, Paul Cottrell of Tighe & Cottrell PA, Laura McKay of Hinkhouse Williams Walsh LLP, Anthony G. Flynn, Timothy J. Houseal and Jennifer M. Kinkus of Young

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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.

--Editing by Edrienne Su.