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Delaware Deals A Blow To Insurers' Delay Tactics

Law360, New York (October 5, 2016, 12:41 PM EDT) --


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It has been more than two decades since a New Jersey appellate court noted that insurers in the asbestos-coverage context live by the "unholy mantra" of "we collect premiums, we do not pay claims."[1] Warren Buffet's Berkshire Hathaway has since elevated that criticism into a business model, exploiting the unique source of ready capital provided by the "float" inherent in a business that collects premiums today and pays claims, if ever, years later. Since its 2007 assumption of the assets and liabilities of Equitas, Berkshire has sought to maximize that float not merely by avoiding coverage claims, but by delaying payment on them as long as possible.

In its Sept. 12, 2016 decision in Viking Pump,[2] the Supreme Court of Delaware rejected two delay and denial tactics that insurers have increasingly proffered in connection with asbestos coverage claims — claims which, not coincidentally, constitute a significant portion of the Equitas liabilities. First, it held that an insurance company may not use so-called "non-assignment" provisions to claim that the right to coverage for existing liabilities is forfeited when the policyholder assigns the rights to that coverage without the insurers' consent. Second, it rejected insurer attempts to alter the proof required to establish that a policy has been "triggered" by asbestos injury during the policy period, and thereby complicate and delay the resolution of asbestos coverage claims. Both holdings were major victories not only for the specific policyholders in Viking Pump, but for those throughout the country faced with the battle of attrition and delay being fought with respect to long-tail coverage claims in general, and asbestos claims in particular.

Viking Pump represents the prototype "anti-assignment" dispute. Policyholders Warren Pumps LLC and Viking Pumps Inc. sought coverage for thousands of asbestos claims under policies originally sold to Houdaille Industries. Houdaille had at one time owned and operated the pump businesses now operated by Warren and Viking. Various corporate transactions in the 1980s transferred the liabilities of those businesses — and the rights under the insurance policies that covered them — to Warren and Viking. The insurance defendants argued that because Houdaille, Warren and Viking had not sought the insurers' consent to the policy assignment, coverage was void under provisions in the policies stating that the policies could not be assigned without the consent of the insurer.[3] Warren and Viking argued that the insurers should not be able to evade coverage where the only effect of the assignment was to

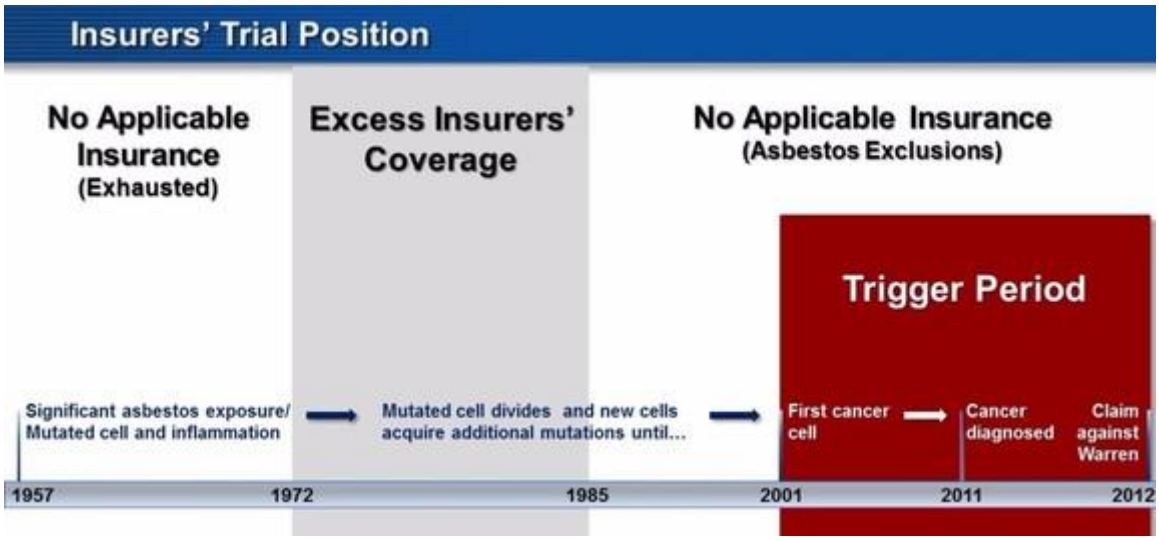
change the name of the payee on the coverage check.

Applying New York law, the court held that once an insured-against loss takes place, "an assignment is not a transfer of the policy itself, but rather of a claim for policy proceeds that previously vested in the insurer," and is not subject to the anti-assignment provision.[4] It also agreed with Warren and Viking that an assignment after the loss has occurred does not alter the risk originally undertaken by the insurer: "[the insurers'] interest is not impeded by the assignment of rights to claim for pre-assignment occurrences since, in such instances, the insurer is covering the risk it originally contracted to insure."[5] Finally, the court rejected the insurers' assertion that no "loss" could take place before the asbestos liabilities became "fixed" or "measurable:" "That the precise amount of liability was not identifiable at the time of assignment did not alter the [insurers'] obligation to insure the risks for which they contracted."[6]

That holding is critical in the case of "long-tail" claims such as those involving asbestos and environmental liabilities, where the injury or damage giving rise to the covered liability often takes place decades before any claim is brought — during which time responsibility for the liability frequently has changed hands through mergers, spin-offs, stock or asset acquisitions or other corporate transactions. The court's ruling not only prevents the loss of coverage by virtue of an assignment that does not prejudice the insurer, but avoids the need to spend time and resources on the assignment issue, aside from simple proof of when the liability arose and when the assignment took place.

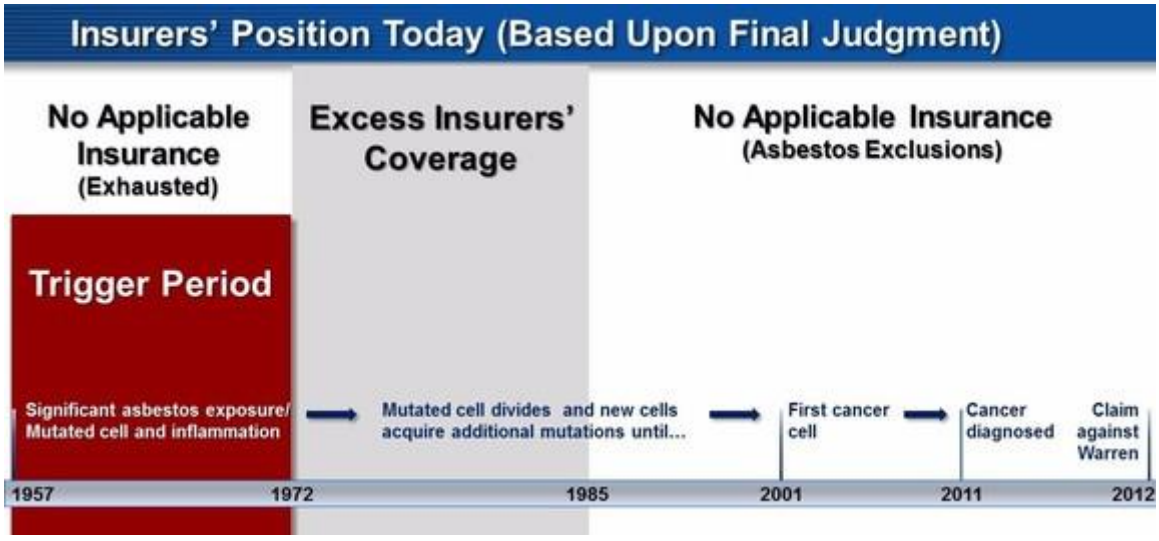
The court's decisive rejection of the insurers' trigger arguments similarly had the dual effect of protecting the policyholder's right to coverage and restricting the insurers' ability to engage in complication and delay. The Houdaille policies, like most occurrence-based insurance policies, covered liabilities arising from injury or damage during the policy period; New York law has long held that such policies are triggered if the underlying claimant suffered some "injury in fact" during the policy period.[7] Moreover, the broad strokes of how asbestos injuries progress in those people who ultimately develop an asbestos disease have long been understood: the inhalation of asbestos fibers causes inflammation and damage at the cellular and molecular level in the body, which begins a continuous process culminating, often decades later, in an asbestos-related disease.

Despite this, the insurers in Viking Pump argued that no "injury-in-fact" takes place in the asbestos context until cancer develops or the underlying claimant suffers actual "impairment of bodily function." Aside from the fact that nothing in the policy language supports such a narrow view of what constitutes an "injury," that standard would require the policyholder to offer proof, presumably on a claimant-by-claimant basis, of the precise policy period in which the molecular or cellular injury had advanced to the point where it was sufficient to interfere with some bodily function. As a practical matter, even where the available medical records would permit such proof, which they often would not, their production and evaluation would exponentially delay the resolution of the thousands of claims usually faced by a policyholder seeking asbestos coverage. More importantly, by tying the definition of "injury" to bodily impairment, which typically does not happen until decades after the first significant exposure to asbestos, the insurers greatly increased the likelihood that the claims would trigger only those policies in place after the industry began to adopt asbestos exclusions in 1986:

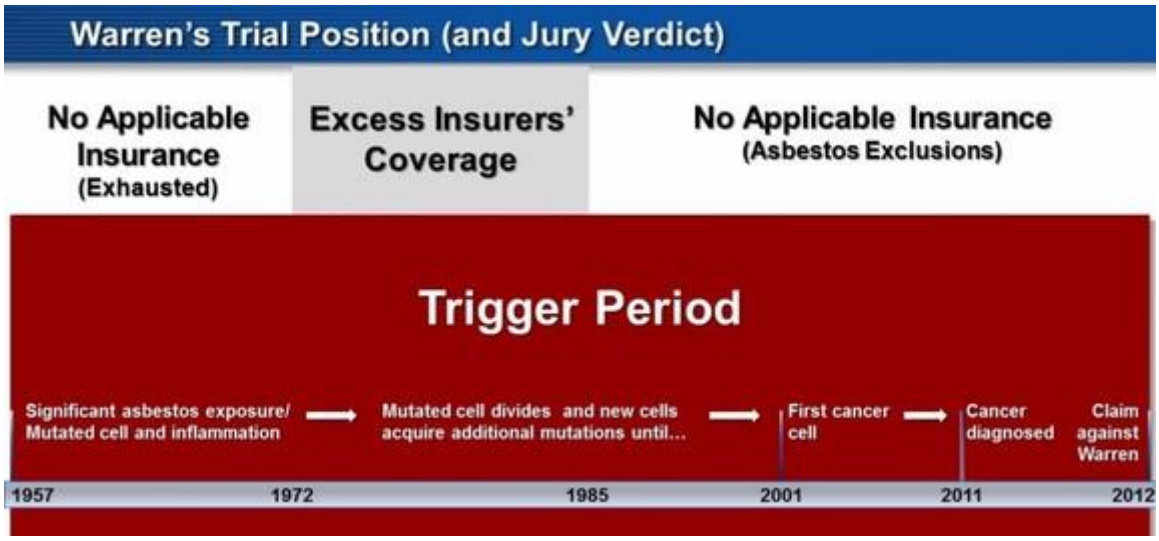


At trial, as the Supreme Court later noted, "although the opposing parties had different starting points as to when bodily injury first occurred, both agreed that, as to their respecting starting point, the injury continued thereafter."[8] The jury held for plaintiffs that people who ultimately develop an asbestos disease[9] suffered injury-in-fact beginning with the first molecular and cellular damage to the body, not merely upon the development of disease or other "bodily impairment."

In crafting its final judgment, however, the trial court altered the jury's finding that injury began at the first significant exposure, and entered judgment that injury took place only while the claimant was inhaling asbestos.[10] That limited "exposure" trigger had the effect of triggering policies only in policy periods prior to 1972, where the coverage was exhausted:



In reality, given the parties' agreement on the continuous nature of the injury-to-disease process, the jury's ruling that injury began at the first significant exposure should have resulted in all policy periods during or after the first significant exposure being triggered and having to respond to the claim:



Highlighting that their trigger position was dictated by the desire to avoid coverage rather than by their view of the policy obligations, on appeal the insurers abandoned their "impairment of function" trigger and embraced the "exposure" trigger employed in the trial court's final judgment. As the Supreme Court noted, the two positions were irreconcilably inconsistent, one assuming no injury took place until at least 2001, the other assuming that all injury took place prior to 1972.[11] The insurers also argued that Warren and Viking had failed to submit any "proof" of when injury-in-fact took place, and had, instead, simply applied a so-called "continuous trigger," which assumes that injury takes place from first exposure to manifestation.

The Supreme Court reversed the final judgment's exposure trigger as inconsistent with New York law.[12] More importantly, it also rejected the insurers' argument that Warren and Viking had failed to prove injury-in-fact, but had instead simply "assumed" that injury took place in each policy period after significant exposure:

> Plaintiffs did not rely on a presumption that asbestos-related injuries take place from exposure through manifestation. Rather, they presented to the jury expert medical testimony that the cellular and molecular damage that leads to asbestos-related disease is a continuous process that is triggered after there is an injury-in-fact, i.e., the claimant's first significant exposure to asbestos.[13]

Based on those proofs, the court amended the final judgment to provide that cellular and molecular damage triggering coverage "occurs during each and every period of an asbestos claimant's significant exposure to asbestos *and continues thereafter.*"[14]

In terms of fighting insurer delay, the ruling in Viking Pump may provide greater benefits to future policyholders than to Warren and Viking themselves, who had pursued their asbestos coverage claims for almost a decade before the Supreme Court issued its ruling. For those future policyholders, however, the decision provides a significant additional weapon in the fight against insurer efforts to add complexity, cost and, most importantly, time to the pursuit of long-tail claims.

—By Robin Cohen, Keith McKenna and Elizabeth A. Sherwin, McKool Smith LLC

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DISCLOSURE: McKool Smith LLC represented Warren Pumps LLC in the Viking Pump case.

[1] Owens-Illinois v. United Ins. Co., 625 A.2d 1, 17 (N.J. Super. Ct. App. Div. 1993).

[2] In re Viking Pump Inc. and Warren Pumps LLC Insurance Appeals, Nos. 581,2014; 523,2014; 525, 2014; 528, 2014 (Del. Sept. 12, 2016) ("Viking Pump").

[3] The insurers also challenged whether the insurance rights had actually been assigned. The Supreme Court affirmed the ruling below rejecting those arguments on the facts. Id. at 10-20.

[4] Id. at 21.

[5] Id. at 24.

[6] Id. at 24-25.

[7] See, e.g. Cont'l Cas. Co. v. Rapid-Am Corp., 177 A.D.2d 61, 65-66 (1st Dept. 1992).

[8] Viking Pump at 74.

[9] See id. at 82-83 ("The parties acknowledged at oral argument before this Court that every asbestos claim [paid by Warren or Viking] involves a claimant who ultimately developed an asbestos-related disease.")

[10] Id. at 79.

[11] Id. at 81.

[12] Id. at 82.

[13] Id. (footnote omitted).

[14] Id. at 83 (emphasis in original).
