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Viking Pump Tops Biggest Insurance Decisions Of 2016

By **Jeff Sistrunk**

Law360, Los Angeles (December 13, 2016, 3:31 PM EST) -- New York's highest court sent shockwaves through the insurance industry this year when it ruled that Viking Pump and Warren Pumps could hold policies in a single year liable for their entire loss from scores of asbestos claims while other courts issued key guidance on coverage for faulty workmanship and property damage with multiple causes.

Here, Law360 looks back at the five biggest insurance rulings of the year.

In re: Viking Pump and Warren Pumps Insurance Appeals

The New York Court of Appeals seized the insurance industry's attention in early May when it unanimously held that the "all-sums" allocation method, under which each of an insured's policies can be held liable for an entire loss, should apply in Viking Pump and Warren Pumps' asbestos injury coverage dispute with a slew of excess insurers.

Ruling on certified questions from the Delaware Supreme Court, the New York high court rejected the excess carriers' arguments in favor of the "pro rata" allocation method, which spreads out liability proportionally among all triggered policies. The carriers had contended that the Court of Appeals' 2002 decision in a case called Consolidated Edison v. Allstate Insurance required a pro rata approach to allocating coverage for multiyear claims.

"The decision suggests that the Court of Appeals may no longer adhere to the idea that losses triggering coverage have to be spread among all policies that are potentially triggered," said Pillsbury Winthrop Shaw Pittman LLP partner David Klein. "The historical rule in New York was that a policy can only cover the portion of a loss contemplated within the term of the policy period. At least in this circumstance, the court said this is not true. That may portend a bigger opening."

The Court of Appeals' decision in favor of all-sums allocation was based on the presence of "noncumulation" and "prior insurance" provisions in the industrial pump companies' policies. A noncumulation clause provides that only a single policy limit is available for a loss covered under multiple policy periods while a prior insurance provision reduces policy limits by the amount of coverage available to a policyholder under other, earlier insurance policies. Those provisions are incompatible with a pro rata allocation scheme, the court found.

The court further determined that the vertical, not horizontal, exhaustion method was appropriate in the case. With vertical exhaustion, Viking Pump and Warren Pumps can reach excess coverage for

certain years even if their primary policies for other years haven't been drained. Horizontal exhaustion requires insureds to deplete all triggered primary policies before reaching any excess policy.

Taken together, the two prongs of the Court of Appeals' ruling will offer a more straightforward path for policyholders to obtain coverage for costly multiyear losses, as they can select a single triggered policy year and go up vertically to tap each level of coverage in their insurance program, or "tower," according to attorneys.

"If the policyholder had to chase each insurer throughout that extensive period, which would be required under the 'pro rata' allocation, that would involve more risk because some of the insurers may no longer be solvent or may dispute coverage," said Hunton & Williams LLP partner Syed S. Ahmad. "In contrast, under 'all sums,' the policyholder can pick a subset of the policies and pursue its claims only in that tower. That would allow the policyholder to control the risk and to potentially recover a higher amount while minimizing the cost for insurance recovery."

Cypress Point Condominium Association v. Adria Towers

In August, the New Jersey Supreme Court held that damages resulting from a subcontractor's defective work on a condominium complex triggered an insurer's duty to defend the general contractor, joining the majority of state high courts that have ruled on the issue.

The New Jersey justices upheld a state appeals court's July 2015 ruling that consequential damages to the common areas of a Hoboken condo complex and unit owners' property caused by subcontractors' defective work constitute "property damage" and an accidental "occurrence" under the general contractor's commercial general liability policies.

With the decision, the New Jersey Supreme Court joined the ranks of two dozen other state high courts that have previously ruled that consequential damages from a subcontractor’s faulty workmanship can be covered by the general contractor’s CGL policy. By contrast, only five state supreme courts have ruled that CGL policies don't cover such damages.

According to attorneys, the decision provided clarity for general contractors and real estate developers in the Garden State, which had long faced uncertainty over whether they could pursue CGL coverage for property damage tied to subcontractors' shoddy work.

"Certainly, when it comes to very large projects, you're dealing with scores of subcontractors," Klein said. "This decision provides a pathway to coverage in these types of cases."

Sebo v. American Home Assurance Co.

The Florida Supreme Court resolved a conflict among two midlevel state appeals courts by ruling earlier this month that policyholders may obtain coverage for an entire property insurance claim where there are multiple concurrent causes of loss and at least one is covered under a policy.

With a 6-1 opinion in a closely watched case involving homeowner John Sebo's insurance dispute with American Home Assurance Co., the Florida justices found that the so-called concurrent cause doctrine is the proper standard for evaluating insurance coverage when an insured suffers a loss simultaneously from both covered and excluded risks. The ruling reinstated Sebo's $8 million jury award for the loss of his home, which was attributed to the excluded risk of construction defects, as well as the covered

causes of rain and wind.

In adopting the concurrent cause doctrine, the Florida high court approved of the rationale set forth by the Third District Court of Appeal in its 1988 decision in Wallach v. Rosenberg. The justices quashed a ruling by the Second District Court of Appeal in Sebo's case that adopted the opposing "efficient proximate cause" doctrine, under which a loss is covered under a policy only if the primary cause of the loss is a covered peril.

However, the state high court left the door open for the efficient proximate cause doctrine to still be applied if an insurer can point to a single excluded cause that set in motion the events causing a loss. Whether insurers in Florida challenge property claims going forward will likely depend on the size of the loss, attorneys say.

"Following this decision, I would think carriers will be more likely to accept a claim in situations where there is concurrent causation," said Kilpatrick Townsend & Stockton LLP counsel William Um. "Where there is a major loss, however, carriers will probably still try to fight coverage."

Attorneys further noted that the Florida Supreme Court's decision did not grapple with the anti-concurrent causation language found in some property policies. The presence of such language may change the outcome of property insurance disputes, lawyers say.

"We will have to see how specific anti-concurrent causation language will impact the analysis," Ahmad said.

Stresscon Corp. v. Travelers

Colorado's highest court concluded in April that policyholders that settle presuit claims without an insurance carrier's permission can't win coverage, rejecting an expansion of the state's notice-prejudice rule, which requires liability insurers to show that they suffered prejudice from late notice of a claim before they can deny coverage on that basis.

In a 4-3 opinion, the Colorado Supreme Court overturned an intermediate appeals court's September 2013 decision in concrete company Stresscon Corp.'s insurance coverage battle with Travelers Property Casualty Co. of America stemming from a construction accident near Colorado Springs that killed one worker and seriously injured another. The suit focused on coverage for Stresscon's settlement with a general contractor over project delays caused by the accident, a deal that was struck before the contractor filed suit.

The appeals court had found that Colorado's notice-prejudice rule should be extended to cases where policyholders violate a clause in liability policies barring them from voluntarily settling claims or making payments without the insurer on board, but the Colorado Supreme Court majority rejected that finding.

The majority held that the notice-prejudice rule does not apply to "no-voluntary-payments" policy provisions such as the one at issue in this case, and Stresscon is not entitled to coverage for its deal with the contractor. It said an insurer's denial of coverage due to a policyholder's failure to comply with a no-voluntary-payment provision is not just a technicality.

"This decision enforcing the voluntary payment clause reinforces the idea that insurance isn't a bank," said Wiley Rein LLP partner Laura Foggan. "The policyholder can't just tap into its policy at any time.

Here, without gaining the insurer’s agreement, the policyholder made the voluntary decision to pay."

For insurers, enforcing voluntary payment clauses provides an "orderly way" to determine when they will pay a settlement, as opposed to going to trial on claims, Foggan added.

Arceneaux v. Amstar Corp.

The Louisiana Supreme Court in September adopted a pro rata allocation method in a CNA Financial Corp. unit's dispute with American Sugar Refining Inc. over defense coverage for claims brought by employees who allegedly suffered hearing loss at one of the sugar company's refineries.

In a unanimous opinion, the Louisiana justices reversed a lower court's determination that CNA Financial subsidiary Continental Casualty Co. was on the hook for 100 percent of American Sugar's defense costs for underlying suits brought by two sets of plaintiffs.

The state high court said that a finding that Continental can be held liable for the entirety of American Sugar's defense expenses was contrary to the language of the relevant policies, which state that the insurer is required to cover bodily injury occurring during the policy period. Continental only had policies without exclusions for employment-related claims in effect for 26 months out of the 65-year period cited by the underlying plaintiffs, the court noted.

"Based on the policy language, neither party could reasonably expect that the insurer was liable for losses that occurred outside the policy coverage periods," Justice Jefferson D. Hughes III wrote for the court. "While the duty to defend is broader than the duty to indemnify, neither obligation is broader than the policy's coverage period in the context of long-latency disease cases that trigger occurrence-based policies."

According to attorneys, the decision illustrates the importance of courts relying first and foremost on insurance policy language to determine the scope of carriers' obligations.

"Arceneaux was very significant because a state high court recognized a basic proposition about allocation of defense, as well as indemnity costs," Foggan said.

--Editing by Christine Chun and Catherine Sum.
