

Del. Supreme Court Disarms 'Exposure Trigger' in Asbestos Insurance Case

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Resolving an 11-year legal saga under New York law, the Delaware Supreme Court on Monday ruled that two manufacturers of industrial pumps may seek excess insurance coverage for any asbestos injuries that occurred during insurers' policy periods.

In so ruling, the high court rejected a Superior Court's ruling that limited Viking Pump Inc. and Warren Pumps to recover under insurance policies in effect when the underlying plaintiffs first encountered the dangerous mineral, a proposition that has come to be known as the so-called "exposure trigger."

Instead, the en banc panel of justices said, the cellular and molecular damage that leads to asbestos-related diseases, like mesothelioma and lung cancer, is a "continuous process" that is triggered after a claimant's first significant exposure to asbestos, which constitutes an injury-in-fact.

"We agree with Warren that the Superior Court's application of an 'exposure trigger' is inconsistent with New York law," Justice Karen Valihura wrote on behalf of the court in an 84-page opinion.

The case has been the subject of numerous rulings in Delaware and New York state courts since Viking filed suit in the Delaware Court of Chancery claiming that it was the successor to insurance policies Liberty Mutual Insurance had issued to Houdaille Industries Inc., a former owner of Viking and Warren.

Viking and Warren, which bought pump manufacturing businesses from Houdaille in the 1980s, have faced potential liability from personal injury claims by plaintiffs alleging damage from asbestos exposure dating back to the time Houdaille owned the businesses.

The companies settled the initial dispute, and then sought to fund liabilities from the Houdaille-era claims using a 14-year insurance tower that included \$427.5 million in excess coverage from 20 different carriers. The excess insurers responded that Viking and Warren were not entitled to the excess policies, and they disputed the extent of available coverage on multiple grounds.

The case was ultimately transferred to the Superior Court, whose denial of Warren's motion to amend a final post-trial judgment sparked an appeal to the state Supreme Court, which enlisted the aid of the New York Court of Appeals after oral arguments exposed unsettled questions of New York law.

Responding to two certified questions, the New York court made waves when it ruled for the first time that all-sums appropriation, and not pro rata, was the appropriate approach for distributing losses in long-term bodily injury or property damage cases.

With the "critical questions" squared away, the Delaware Supreme Court in June accepted five principal issues left to be resolved based on the rulings of the lower courts, and in Monday's opinion, Valihura addressed each. Viking and Warren were properly determined to have received valid assignments of insurance rights under the excess policies, and anti-assignment provisions in the relevant policies did not bar the transfer of post-loss claims, she said.

Liberty, Valihura also determined, had defense obligations under its umbrella policies to be paid in addition to its policy limits. And the justice clarified the duties of excess insurers to pay defense costs based on the terms of their policies.

As a final matter, Valihura turned to the Superior Court's ruling with respect to trigger coverage. Warren had argued that the lower court's final judgment suggested that excess policies are triggered only during the first instance of significant exposure—and not by injury during the policy period—a ruling, the company said "fundamentally alters and eviscerates" a jury verdict in favor of coverage for Warren's claims. The Superior Court, Warren added, had twice misstepped in denying its requests to find that bodily injury continued from the first significant exposure through diagnose.

Valihura, who also criticized the excess insurers for repeatedly changing their position on the issue, came down squarely on the side of Warren.

"We also reject the excess insurers' contention that Warren is essentially seeking a 'continuous trigger' as opposed to New York's operative injury-in-fact trigger," she said. "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."

Robin Cohen of McKool Smith argued the appeal on behalf of Warren and Michael P. Foradas of Kirkland & Ellis argued for Viking. Neither attorney was immediately available to comment on Tuesday. And attorneys for the excess insurers did not immediately return calls seeking comment.

Justices Randy J. Holland and James T. Vaughn Jr. joined Valihura, along with Judges William J. Walls Jr. and Paula Ryan, who sat on the court by designation. The case was captioned *In re Viking Pump*.