LEGAL UPDATES

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Barriers to Insurance Coverage for Personal Injury Claims Lowered in Illinois and Missouri

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Two recent state appellate court decisions, one applying Illinois law and the other applying Missouri law, have reduced barriers to insurance coverage for bodily injury and wrongful death claims faced by manufacturers, businesses and homeowners.

Illinois Appellate Court Holds Companies Liable

John Crane Inc. filed a declaratory judgment action against its many umbrella/excess insurance carriers for coverage of thousands of asbestos claims. Crane had manufactured gaskets containing asbestos, and, since 1979, the company had been named a defendant in more than 250,000 asbestos-related bodily injury claims. Crane had primary insurance coverage with one carrier, Kemper, from January 1944 through August 2001. The undisputed policy limits of the underlying coverage were $41,075,000.

Crane also had umbrella/excess coverage from CNA, Kemper, TIG and Allianz at various points from 1961-1982. In accordance with the terms of the primary policies, Kemper defended Crane in the lawsuits and agreed to adopt a “no settlement policy” based upon Crane’s position that its products had not caused the victim’s asbestosis-related illness.

In 2001, Kemper was facing financial difficulties, and Crane and Kemper negotiated an “agreement concerning coverage (ACC)” that allocated and altered policy limits in such a manner as to “exhaust” the Kemper coverage. In 2004, Crane filed a declaratory judgment action against its umbrella/excess carriers (not including Kemper) seeking a declaration that its primary coverage was exhausted and determination of the obligations owed by the umbrella and excess insurers.

In 2005, the trial court rejected Crane's motion for summary judgment in which it had argued that each umbrella/excess policy triggered by a claim must pay up to its policy limits – the so-called "all sums" allocation scheme (based upon policy language stating the insurer "will pay all sums which the insured becomes legally obligated to pay"). Instead, the court granted summary judgment to Allianz and CNA, which argued for a "pro-rata" allocation (liability only for the portion of time on the risk, spread out among the other responsible insurers/coverage).

Other motions followed, and Crane and Kemper entered into an agreement in 2006 that released the insurer from further obligations under the policies in exchange for a lump sum payment of $20 million and a provision in which Crane assumed Kemper's obligations under the primary policies. More motion practice ensued, and the trial court held that the doctrine of horizontal exhaustion applied, requiring Crane to have used up all triggered primary policies before pursuing coverage under the excess policies and holding that Crane and Kemper could not make the original limits of the primary insurance unavailable via their agreement, which had retroactively amended the policies' terms. The court, therefore, determined that Crane must prove that the original policy limits had been exhausted in order to trigger the umbrella/excess coverage. The trial court also rejected Crane's argument for a continuous trigger of coverage (from initial exposure to asbestos through diagnosis of disease) and instead applied the "triple trigger" declaring that the insured must prove that policies in place during years of exposure, the years of sickness *and* the years of manifestation were triggered.

There were multiple trials and additional rulings over several years and both sides appealed some facet of the underlying case. The Illinois Court of Appeals, First District, affirmed, in part, and reversed and remanded, in part. In light of Illinois Supreme Court precedent, the court agreed that a "triple trigger" rather than "continuous injury trigger" for coverage applied but declared that the insured only had to prove one, not all three triggers: exposure, sickness or disease. The court also reversed the trial court's application of a "pro rata" allocation scheme, holding instead that the "all sums" provision in the underlying policies meant each triggered policy (insurer) was *jointly and severally liable* for payment up to its policy limits for covered claims. In addition, the appellate court agreed that, according to the Illinois Supreme Court's horizontal exhaustion doctrine, the insured must prove that all primary policies' original limits as written before they entered into the ACC had been exhausted before the umbrella/excess policies were implicated.

The court, however, rejected the insurers' argument that Crane and Kemper had acted in bad faith in renegotiating terms and settling liability, declaring that the fact that the underlying claimant's demands greatly exceeded the limits of the primary policies meant that no plausible claim of bad faith could be made. (The case is *Crane v. Admiral Insurance Co., et. al.*, No. 1-09-3240, 2013 IL App 093240.)

Missouri Appellate Court Rules Coverage Claims Not Excluded

American National Property & Casualty Co. (ANPAC) sought a declaration that it was not liable under a renter's policy for two personal injury and wrongful death lawsuits seeking coverage for damages resulting from accidental carbon monoxide poisoning. The trial court granted summary judgment to the insurance company, finding that the pollution exclusion in the policy precluded coverage because carbon monoxide emissions from a vehicle were a "pollutant" and, therefore, damages caused by such pollutants were excluded from coverage under the unambiguous terms of the policy.

The Missouri Court of Appeals, Western District, reversed, agreeing with the claimants that the exclusionary language relating to "pollutants" was ambiguous and that an "ordinary" policy holder could reasonably read the pollution exclusion in a manner that would not exclude coverage for injuries caused by the accidental accumulation of carbon monoxide (which is not harmful unless, or until, it accumulates to certain levels) within a building or residence. The court's decision included a lengthy analysis of the history of the adoption and interpretation of pollution exclusions in comprehensive general liability policies, which concluded with recognition that its purpose "was to have a broad exclusion for traditional environmentally related damages."

The court also rejected the practice of many courts that applied dictionary definitions to terms such as "irritants' and discharge" because doing so could disregard the context in which the term is used in the policy – "a reasonable policy holder would not understand the policy to exclude coverage for anything that irritates or contaminates." Coupled with the fact that an insurance policy is a contract of adhesion, the court determined that application of the doctrine of reasonable expectations was warranted, finding in favor of the claimants. (The case is *American National Property & Casualty Co. v. Wyatt*, No WD 75226, 2013 WL 1197508.)

What This Means to You

The monetary and brand-name stakes are increasingly significant to manufacturers and other businesses facing personal and bodily injury claims, especially related to asbestos and chemical exposure. A thorough understanding of the availability of insurance coverage for such claims, oftentimes going back decades, is vital for manufacturers and other potential defendants in the evaluation and defense against such cases. These two recent decisions provide further support for interpreting policies in a manner that extends coverage to claims which, if not covered, could severely deplete companies' litigation reserves and damage market share.

Contact Information

For additional information, please contact your Husch Blackwell attorney.

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