Weekly Law Resume

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Edited by David Blinn and Mark Hazelwood

WEEKLY LAW RESUME™
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Coverage - Duty to Defend - Excess Carriers

Kaiser Cement and Gypsum Corporation v. Insurance Company of the State of Pennsylvania
Court of Appeal, Second District (June 3, 2011)

Under the principles of horizontal exhaustion, all primary policies available to cover a continuous loss must be exhausted before an excess policy has any exposure. This case considered the same in a case where one carrier had multiple years' policies, but a "per occurrence" limit regardless of the same.

Kaiser Cement and Gypsum Corporation manufactured a variety of asbestos-containing products from 1944 through the 1970's. Truck Insurance provided primary insurance to Kaiser from 1964 to 1983. The policy in effect from 1974 to 1981 contained a $500,000 "per occurrence" liability limit. There were three other carriers who provided primary policies during this time, including Fireman's Fund, Home Indemnity and National Union Fire Insurance Company of Pittsburg. In 1993, Truck and Kaiser and the other three primary carriers entered into an agreement to share defense and indemnity costs until the aggregate limits of each primary policy were exhausted. By 2004, over 24,000 asbestos claims had been filed against Kaiser. According to Truck, by April of 2004, the three other primary carriers had each given notice that their limits had been exhausted. Insurance Company of Pennsylvania ("ICSOP") had issued a first layer excess policy to Kaiser from 1974 to 1977, providing coverage for its "ultimate net loss" in excess of its retained limit up to the policy limit of $5,000,000 per occurrence. "Retained limit" was defined as the scheduled primary policy plus "the limits of any other underlying insurance collectible by the insured."

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Truck filed suit against Kaiser seeking a declaration that its primary policies had been exhausted and it owed no further obligation to defend or indemnify Kaiser. Kaiser cross-complained against its excess carriers, including ICSOP, seeking a declaration that they were obligated to defend and indemnify once a primary policy (such as Truck's) was exhausted. The trial court ruled that the claim of each asbestos bodily injury claimant was a separate and distinct occurrence under Truck's policies, and each was a continuous loss.

Kaiser selected the 1974 Truck policy to defend it, and under that policy, Truck paid out the "per occurrence" limits of $500,000 on numerous claims. Kaiser then brought a motion for summary adjudication against ICSOP, based on the fact that Truck had paid its 1974 policy limits on particular claims, and that ICSOP, the 1974 excess carrier, owed a duty to pay all amounts for the claim in excess of Truck's $500,000 occurrence limits. The trial court granted the motion, noting that Truck's primary policy stated that the "per occurrence" limit was "the limit of the company's liability for each such occurrence." Hence, once this was exhausted, the excess carrier had to participate in defense and indemnification of the case.

ICSOP appealed, and contended that because there was continuous loss of each of the "occurrences," all 19 of Truck's policies had to be exhausted before its duties as excess carrier required it to defend or indemnify Kaiser. The Court of Appeal disagreed. It held that ICSOP's own policy language held that it was excess to "collectible" insurance. In turn, Truck's policy language setting "the limit of the company's liability" at the "per occurrence" limit of $500,000 meant that no matter how many years of coverage "the company" (i.e., Truck) had written, there could be no "stacking" of Truck's annual "per occurrence" limits to require payment on any claim above the $500,000 limits. Once Truck paid $500,000 on a single claim, there was thus no further "collectible" insurance from Truck, no matter how many policies there were. Thus, for purposes of horizontal exhaustion, once Truck paid $500,000, all Truck's "collectible" insurance was "exhausted" for purposes of ICSOP's exposure.

The Court of Appeal held that the trial court had erred in granting summary adjudication of ICSOP's current duty to defend. The Court of Appeal pointed out that all parties acknowledged existence of the policies of the three other primary carriers. Although Truck contended they were exhausted, there was

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no evidence before the Court of Appeal to support a finding of the same. Without it, there could be no trigger of the excess carrier's responsibilities under its policies.

On a second issue, although it would not stack the limits of the Truck policies, the Court of Appeal stated that it did not recognize any generalized "anti-stacking" rule to be applied to the limits of all available policies, including the three carriers whose policies had not been put before the Court. These would have to be reviewed before it could be determined if they would stack above the $500,000 "per occurrence" limit from the Truck policies. (The issue of stacking policy limits on continuous loss cases is currently before the Supreme Court: State of California v. Continental Insurance Co.; see WEEKLY LAW RESUME FEBRUARY 5, 2009).

Without evidence of exhaustion of the other carriers' primary policies, the summary judgment in favor of Kaiser on ICSOP's duty to defend was reversed.

COMMENT

This case illustrates an exception to rule of horizontal exhaustion. When one carrier has successive policies but has a "per occurrence," rather than simply a "per occurrence per year" limit, not all of its policies need to be exhausted prior to the excess carrier having a duty to defend.

For a copy of the complete decision see:

HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/B222310.PDF

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