

23 April 2015

Practice Group:
Insurance Coverage

Ohio Federal Court Rules that Policyholder's Asbestos Liabilities Arose from Multiple Occurrences Under Ohio Law

By Joseph J. Porcello

On April 7, 2015, a federal judge in the Northern District of Ohio granted partial summary judgment in favor of plaintiffs Mahoning Valley Supply ("MVS") and Westfield Insurance Company ("Westfield") and against defendant Continental Insurance Company ("Continental"), ruling that MVS' asbestos liabilities arose out of multiple occurrences, not a single occurrence. Under the policy language and facts here, this ruling maximized coverage for the policyholder, MVS, which may now access \$4.5 million in aggregate limits under three Continental policies, in contrast to just \$1.5 million in per-occurrence limits.

This case serves as a prime example of how dramatically different the coverage picture may be depending on how a court resolves the issue of whether a policyholder's asbestos claims arise from just one occurrence or multiple occurrences. Policyholders should carefully consider the language of their policies and facts relating to the underlying claims in crafting a strategy on the number of occurrences issue that maximizes coverage, which may be achieved by a finding of either single or multiple occurrences, depending on the circumstances.

The Parties and the Policies

Plaintiff MVS previously distributed industrial products containing asbestos manufactured by other companies. Since 1990, MVS has been sued by numerous claimants alleging they have been injured by asbestos-containing products manufactured by third-parties but sold by MVS.

MVS purchased three separate three-year commercial general liability policies from Continental's predecessor by merger, The Buckeye Union Insurance Company ("Buckeye"), for the period of November 30, 1972 to November 30, 1981 (the "Continental policies"). Each of those policies contains per-occurrence limits of \$500,000, for what the parties argued was a total of \$1.5 million in per-occurrence limits across the three policies. Each policy also provides coverage of \$500,000 in the aggregate, on an annual basis, for a total of \$4.5 million in aggregate limits over the nine years of the policies. Note that although none of the parties addressed the argument that per-occurrence limits may be applied annually, such an argument may be available to policyholders depending on the policy language, the facts, and the law of the relevant jurisdiction, and should not be overlooked by policyholders.

After the final Continental policy expired in 1981, MVS obtained general liability coverage from co-plaintiff Westfield Insurance Company ("Westfield") from January 1, 1981 to January 1, 1989. For years, Buckeye/Continental and Westfield provided coverage for the MVS asbestos claims and shared defense and indemnity costs. In February 2013, however,

Ohio Federal Court Rules that Policyholder's Asbestos Liabilities Arose from Multiple Occurrences Under Ohio Law

Continental asserted that its policies were nearly exhausted, with just a few thousand dollars remaining of the \$1.5 million per-occurrence limits.

Westfield and MVS sued Continental in the U.S. District Court for the Northern District of Ohio, seeking a declaration that MVS was entitled to the \$4.5 million aggregate limits under the Continental policies for its asbestos claims.

The Parties' Cross-Motions for Partial Summary Judgment

Plaintiffs Westfield and MVS and defendant Continental filed cross-motions for partial summary judgment seeking a determination whether, under the language of the applicable policies, the MVS asbestos claims arise from a single occurrence or multiple occurrences. Continental argued that the claims arise from a single occurrence: MVS' decision to distribute asbestos-containing products. If correct, the per-occurrence limits would afford MVS just \$1.5 million in total coverage for its asbestos claims, which was nearly exhausted, and Westfield would be forced to shoulder the future defense and indemnity costs for the MVS asbestos claims alone. Conversely, Westfield and MVS asserted that the claims arise from multiple occurrences: each MVS claimant's exposure to harmful asbestos fibers contained in the products distributed by MVS. A finding of multiple occurrences would enable MVS to access \$4.5 million in aggregate limits and Westfield to continuing sharing the defense and indemnity burden with Continental.

The Court's Ruling

Applying Ohio law, the court held that the MVS asbestos claims arise from multiple occurrences, and therefore significant coverage remains available to MVS for those claims. The court's ruling was based on two grounds.

The first basis for the court's decision was the definition of the term "Occurrence" in the Continental policies.

"Occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

Finding that the plain language of the policies was clear that the "occurrence" must be an "accident," the court noted the lack of a definition of "accident" in the policies and looked to *Webster's* for a dictionary definition. Based on this definition, the court concluded that an "accident" requires an event that is (1) the result of chance; (2) unintended or unnecessary; or (3) unforeseen or unplanned. Because MVS' decision to distribute asbestos-containing products was an intentional act, the court determined that it could not be an "accident," and thus could not be an "occurrence" under the policies, as asserted by Continental. In contrast, the court stated that Westfield's and MVS' definition of "occurrence" as arising from each individual's exposure to harmful asbestos fibers was consistent with the policy language, which specifically included exposures to dangerous conditions leading to injury.

The second basis for the court's decision was the application of the "cause test," under which the number of occurrences is determined by reference to the cause or causes of the damage or injury, rather than by the number of individual claims. The court found that, while the MVS asbestos claims are related to its decision to distribute asbestos-containing products, those claims are proximately caused by claimants' exposure to asbestos fibers from different

Ohio Federal Court Rules that Policyholder's Asbestos Liabilities Arose from Multiple Occurrences Under Ohio Law

products with different distributions to different customers and sites at different times over many years.

Conclusion

The court's ruling in this case brings to the fore the need for a policyholder involved in a dispute with its carrier to pay close attention to the financial terms of its policies and how they operate in connection with the underlying claims.

Author:

Joseph J. Porcello

joseph.porcello@klgates.com

+1.412.355.6419

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates comprises more than 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

© 2015 K&L Gates LLP. All Rights Reserved.