

EDITORS:

- Meryl R. Lieberman
mlieberman@traublierman.com
- Copernicus T. Gaza
cgaza@traublierman.com
- Brian Margolies
bmargolies@traublierman.com

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New York Appellate Court Addresses Late Notice As Between Co-Insurers

by Brian Margolies

The decision by the New York Appellate Division, First Judicial Department, in *Continental Casualty Co. v. Employers Ins. Co. of Wausau*, 871 N.Y.S.2d 48 (N.Y. 1st Dep’t 2008), was a decision of particular note for its discussion of whether the insured’s underlying asbestos liabilities implicated its products/completed operations coverage, or its ongoing operations coverage. In a recently issued opinion, 2011 NY Slip Op 4594 (June 2, 2011), the same appellate court had occasion to revisit the matter in order to address

issues involving defense costs that had not been resolved in its earlier decision. Specifically, the court had issue to address an insurer’s obligation to provide timely notice to a co-insurer when seeking reimbursement of defense costs. The court’s decision provides a stark reminder of just how strictly New York courts enforce notice provisions, at least for policies governed by New York’s “no

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California Court Holds No Coverage For Proposition 65 Claim

by Meryl R. Lieberman

California’s Proposition 65 of the California Safe Drinking Water and Toxic Enforcement Act of 1965, §§ 25249.5 *et seq.*, is a “remedial statute” which, among other things, requires “businesses to warn individuals about carcinogens and reproductive toxins to which they may be exposed through commercial transactions, employment, and the environment.” *Consumer Cause, Inc. v. SmileCare*, 91 Cal.App.4th 454 (Cal.App. 2001). The statute allows private citizens to sue for violations, and to recover civil penalties, injunctive relief, and legal

fees. The past decade has seen an explosion in the number of suits brought under this statute, particularly against manufacturers of allegedly dangerous products.

In its recent decision *Ultra Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America*, 2011 Cal. App. Unpub. LEXIS 4388 (Cal. App. June 10, 2011), the Court of Appeal of

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Late Notice as Between Co-Insurers (cont.)



prejudice rule” (i.e., policies issued or delivered prior to January 17, 2009).

From the period 1970 through 1987, Keasbey, an asbestos insulation installer, was insured under a series of consecutive primary general liability policies issued by CNA. These policies had aggregate limits for products/completed operations, but no aggregate limits for ongoing operations. During portions of the CNA coverage period, Keasbey also qualified as an insured under two wrap-up policies issued by OneBeacon. Beginning in the 1970s, CNA began defending Keasbey in connection with numerous underlying asbestos-related suits. This defense was provided under the policies’ products/completed operations limit. CNA’s primary policies exhausted in 1992, after which time, Keasbey’s excess insurers assumed the defense of the underlying suits. Keasbey’s excess coverage exhausted sometime in 2002. In 2001, however, Keasbey took the position vis-à-vis CNA that the underlying matters should have been considered as ongoing operations claims, for which there was no aggregate limit and as such, the policies were not exhausted. CNA commenced a declaratory judgment action against Keasbey, but so as to prevent the default judgments in the remaining underlying suits, CNA assumed the defense of the matters under its primary policies.

Sometime after Keasbey demanded a defense pursuant to the policies’ ongoing operations limit, CNA reviewed its Keasbey files, many of which it had been in possession of since the 1980s. This review led to CNA’s February 2003 discovery of the OneBeacon policies. CNA gave notice almost immediately thereafter to OneBeacon of an underlying asbestos suit, and two months later, CNA commenced a second declaratory judgment action, this time naming OneBeacon as a defendant. CNA sought a declaration that: (a) the underlying matters were properly handled under its policies’ products/completed operations limit; (b) OneBeacon had an obligation to defend Keasbey in connection with present and future asbestos claims and (c)

OneBeacon was required to reimburse CNA for defense costs incurred from the time that CNA gave first notice to OneBeacon. The Appellate Division’s 2008 decision concluded that the underlying suits were correctly considered as products/completed operation claims and that the CNA policies, therefore, were properly exhausted in 1992. In its June 2, 2011 decision, the court addressed CNA’s right to reimbursement from OneBeacon for defense costs CNA incurred after February 2003.

In considering this issue, the court looked solely to whether CNA’s notice to OneBeacon complied with the policies’ requirements that notice of suit be given immediately. The court explained that under New York law, when “an insured gives only one of two insurers timely notice of claim, the insurer that received notice may obtain reimbursement from the other insurer only if it gives the other insurer notice of the claim that is reasonable under the circumstances.” Because Keasbey never put OneBeacon on notice of the underlying matters, the court was required to consider the timeliness of CNA’s notice. CNA pointed to the fact that it gave notice to OneBeacon, by letter, within weeks of having discovered the existence of the wrap-up policies in February 2003. The court noted that in the first instance, it was questionable as to whether CNA’s letter was sufficient, as it referenced only a single lawsuit rather than the thousands of suits for which CNA began to defend in 2001. More importantly, explained the court, CNA had not acted diligently in attempting to ascertain the identity of the OneBeacon policies. CNA, explained the court, had Keasbey’s records since the 1980s, and this, could have learned of the OneBeacon policies long before 2003. The court specifically rejected CNA’s argument that it had no reason to look for the OneBeacon policies until Keasbey raised the “ongoing operations” issue in 2001, stating that “[w]hile CNA’s sudden interest in finding an untapped primary insurer in response to this unexpected development may be understandable, it does not change the fact that the means to discover the OneBeacon policies had been available to CNA for more than a decade.”

District of Columbia Court Addresses Coverage by Estoppel

by Copernicus T. Gaza

In its recent decision in *Capitol Specialty Ins. Corp. v. Sanford Wittels & Heisler, LLP*, 2011 U.S. Dist. LEXIS 68171 (D.D.C. June 27, 2011), the United States District Court for the District of Columbia had occasion to consider whether the insurer, as a result of its actions, was estopped from denying coverage to its insured.

The policy at issue in *Capitol Specialty* was a lawyers' professional liability policy issued to a firm that was sued for malpractice in connection with its prosecution of a class action. The insurer, Capitol Specialty, agreed to provide a the firm with a defense in the malpractice suit under a reservation of rights. While the insured initially selected defense counsel of its own choice, Capitol Specialty subsequently exercised its right under the policy to pick counsel. In doing so, Capitol Specialty specifically advised that if the insured did not want to cede control of the defense, Capitol Specialty would "disengage counsel and close this matter." Capitol Specialty's letter regarding selection of counsel reiterated its earlier reservation of rights. Nearly seven months later, Capitol Specialty denied coverage for the matter based on the policy's prior knowledge exclusion.

In a subsequent declaratory judgment action, Capitol Specialty was successful in showing that the exclusion operated to preclude coverage. The insured, however, argued that Capitol Specialty was estopped from denying coverage after having controlled the defense. The court noted that while Capitol

Specialty did control the insured's defense, it did so under a proper reservation of rights. Under the circumstances, explained the court, estoppel will lie only where the insured can show that it was actually prejudiced as a result of the insurer's conduct. Such prejudice could be shown by demonstrating that the insurer's control of the defense harmed or hindered the insured by undermining its ability to defend itself.

The insured argued that Capitol Specialty was estopped from denying coverage because: (1) it initially advised that coverage was available for the underlying suit; (2) it assumed the defense of the underlying suit; (3) it waited too long before disclaiming coverage and (4) it prejudiced the insured's defense. The court easily rejected the first three points, explaining that these arguments were "not evidence of prejudice" in light of Capitol Specialty's proper reservation of rights. Turning to the fourth point, the court held that the insured failed to demonstrate that it had been actually prejudiced. While Capitol Specialty did cause the insured to terminate its initial counsel, the court explained that this would be prejudicial only if the insured could demonstrate that counsel selected by the insurer performed demonstrably worse than preferred counsel would have performed. Because the insured alleged no facts of "poor representation or malpractice" and because the insured never objected to Capitol Specialty's conditional defense, the court concluded that the insured failed to show that it had been prejudiced.



... estoppel will lie only where the insured can show that it was actually prejudiced as a result of the insurer's conduct.

Coverage for Proposition 65 Claim (cont.)

WARNING

This Area Contains
Chemicals Known To
The State Of California
To Cause Cancer And
Birth Defects Or Other
Reproductive Harm.

California for the Second Appellate District had occasion to consider whether an insured was entitled to coverage under a general liability policy for an underlying Proposition 65 lawsuit. The lawsuit alleged that numerous manufacturers, distributors and/or sellers of nail products, including Ulta Salon, Cosmetics & Fragrance, Inc. (“Ulta”), violated Proposition 65 because they failed to disclose that their products contained DBP, a chemical known to cause reproductive toxicity. The lawsuit sought civil penalties of \$2,500 per day for each individual exposed to the chemical, as well as injunctive relief preventing the continued sale of such products without proper warnings.

Ulta’s insurer, Travelers, denied coverage on the basis that the underlying suit did not allege bodily injury or property damage, but instead sought only civil penalties and injunctive relief, which are not covered damages under the policy. Ulta subsequently commenced a coverage action against Travelers, alleging breach of contract and bad faith. Among other things, it argued that the underlying litigation raised the potential for coverage, such that Travelers had a duty to defend. The basis for the Ulta’s assertion was that the underlying suit alleged that the plaintiff class had been exposed to DBP. This exposure, argued Ulta, could “potentially give rise to bodily injury claims,” which under California law, is sufficient to trigger a defense obligation.

While the court acknowledged a broad duty to defend under California law, which extends to a suit “which potentially makes claims within the coverage of the policy,” the court agreed that Travelers had no defense obligation with respect to the underlying Proposition 65 lawsuit. In reaching this determination, the court found it determinative that the lead plaintiff in the underlying suit did not allege that she had used or had even suffered any injury as a result of exposure to the insured’s product. Rather, the litigation was limited to a single cause of action based on defendants’ alleged failure to provide “clear and reasonable warnings” as required under Proposition 65. The penalty for such violation is statutory, explained the court, and does not arise out of any particular bodily injury or property damage. Accordingly, because the underlying complaint “neither alleged facts giving rise to a claim for damages for bodily injury nor did it allege any bodily injury (or property damage), Ulta did not become legally obligated to pay damages for bodily injury, and the policy was not triggered.” The court further rejected the insured’s argument that Travelers owed a defense because the “facts on the face of the complaint [could] give rise to potential bodily injury claims.” Such speculation as to how a third party claimant might amend its complaint at some future date, explained the court, is not sufficient to trigger a present duty to defend.

Coverage not triggered because claim was for failure to warn rather than for actual bodily injury.

Ninth Circuit Holds Failure of Product Is Not Property Damage

by Brian Margolies

It is hornbook insurance law that the failure of an insured's product, in and of itself, does not constitute "property damage" for the purpose of a standard liability policy. Rather, to trigger coverage under a liability policy, there must be damage to the property of a third-party. Determining whether there is "property damage" to third-party property often requires a very exacting factual analysis. This is evidenced by the recent decision by the United States Court of Appeals for the Ninth Circuit in *Silgan Containers Corp. v. National Union Ins. Co. of Pittsburgh, PA*, 2011 U.S. App. LEXIS 10861 (9th Cir. May 27, 2011).

The insured, Silgan, sought coverage under an umbrella policy for loss arising out of the failure of "pull tab" lid cans that had manufactured for Del Monte. Del Monte used these cans for various fruit products. These "pull tabs" proved to have a high failure rate, making it difficult for consumers to easily remove the lids. After receiving thousands of complaints, Del Monte removed the defective cans from the market, and subsequently asserted a claim against Silgan for an amount in excess of \$6 million. Del Monte's claim included costs associated with the value of the fruit, value of the packaging, and value of the cans. National Union, Silgan's umbrella insurer, denied coverage to Silgan for the claim based on a lack of

"property damage" as well as the application of various "business risk" exclusions.

The Ninth Circuit affirmed the lower court decision that Del Monte's claim was not one for "property damage," which was defined by the National Union policy as either "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." The court concluded that Del Monte did not allege physical injury to its property – the fruit – since there was no allegation that the defective lids caused harm to the fruit contained within the cans, i.e., "[t]here was no alteration in the appearance, shape, or color of the fruit and the fruit remained edible." The court also rejected Silgan's assertion that Del Monte experienced a loss of use of tangible property, again basing its decision on the fact that the fruit contained in the otherwise defective cans was not rendered inedible. As the court explained "[a]lthough Del Monte may have made a business decision not to sell the fruit cups, Silgan has not shown that the edible fruit was unsuitable for other purposes, such as sale on a secondary market."



**TRAUB LIEBERMAN
STRAUS &
SHREWSBERRY LLP**

7 SKYLINE DRIVE
HAWTHORNE, NY
(914) 347-2600

100 METROPLEX DRIVE
SUITE 203
EDISON, NJ
(732) 985-1000

303 WEST MADISON
SUITE 1200
CHICAGO, IL
(312) 332-3900

FIRST CENTRAL TOWER
360 CENTRAL AVE, 10th FL
ST. PETERSBURG, FL 33701
(727) 898-8100, FL

Website at:

www.traublieberman.com

Sixth Circuit Holds Coal Dust Is a Pollutant

by Robert P. Siegel

In its recent decision in *Certain Underwriters at Lloyd's of London v. NFC Mining, Inc.*, 2011 U.S. App. LEXIS 11924 (6th Cir. June 9, 2011) had occasion to consider the application of a pollution exclusion to coal dust discharged as a result of the insured's coal prep operations.

In appealing the lower court's ruling in favor of the insurer, the insured argued that it had a reasonable expectation of coverage for coal dust-related liability based on a certificate of liability insurance that Underwriters were required to file with the Kentucky Department of Surface Mining Reclamation and Enforcement so as to allow the insured to obtain an operating permit. The certificate represented and warranted, essentially, that the policy issued by Underwriters provided coverage for all personal injury and property damage as required by state law.

The court held that in the first instance, it was not reasonable for the insured to believe that the certificate of insurance, rather than the policy itself, would set forth the terms of coverage. The court found support for this conclusion based on the fact that the insured did not sign or approve the certificate, and that the certificate itself was silent as to coverage for pollution-related liabilities. More significantly, the court held that it is the language of the policy rather than the insured's expectations - even if reasonable - that control coverage issues. Thus, concluding that the policy's pollution exclusion unambiguously precluded coverage for damages caused by coal dust, the Sixth Circuit readily affirmed the lower court's holding. As the court explained, "[t]he clarity of the exclusion forecloses NFC's resort to expectations about what the contract did or did not cover."

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