

## Travelers' 3rd Circ. Win Curbs Insurers' Asbestos Exposure

By **Jeff Sistrunk**

*Law360, New York (April 21, 2017, 10:20 PM EDT)* -- The Third Circuit ruled Friday that a common exclusion found in a Travelers policy bars coverage for claims arising out of asbestos in any form, limiting insurers' potential exposure to asbestos injury claims by precluding policyholders from arguing that the exclusionary language is ambiguous and doesn't extend to products containing the carcinogen.

In a published opinion, a panel of the appellate court reversed a Pennsylvania district court's decision that Travelers Surety & Casualty Co. cannot enforce a policy exclusion for claims "arising out of asbestos" to deny coverage to General Refractories Co. for scores of lawsuits brought by plaintiffs who allege they were injured by exposure to asbestos contained in the company's fire-resistant industrial products.

The panel disagreed with GRC's position that the asbestos exclusion is ambiguous and could reasonably be read to encompass only claims tied to exposure to asbestos in its raw mineral form.

Pursuant to Pennsylvania law, the phrase "arising out of" is governed by the broad "but for" causation standard, which doesn't require a showing that a product proximately caused an injury, according to the opinion. When the but-for standard is applied, the losses in the underlying suits against GRC fall within Travelers' asbestos exclusion, regardless of whether the exclusion is interpreted to apply to asbestos in any form or solely the raw mineral, the panel said.

According to the panel, a decision applying a broad interpretation of the "arising out of" language was necessary to promote consistency among insurance contracts in Pennsylvania, noting the prevalence of the exclusionary language at issue.

"Were we to ignore the consistent and explicit meaning assigned to the phrase ['arising out of'] in Pennsylvania insurance exclusions, we would cast doubt on a tradition of interpretation that many parties have relied upon in defining their contractual obligations," U.S. Circuit Judge Michael I. Vanaskie wrote for the panel. "Parties to an insurance contract must be able to place faith in consistent interpretations of common language when drafting their policies if they are to properly allocate the risks involved."

Crowell & Moring LLP partner Laura Foggan, who represented the insurance industry groups American Insurance Association and Complex Insurance Claims Litigation Association as amici in support of Travelers, said the decision marks a significant victory for insurers and prevents upheaval in the insurance market by endorsing Pennsylvania courts' traditionally expansive interpretation of the "arising out of" language.

"From a broader perspective, this is an important ruling because of the court's recognition of the fact that contract language needs to be applied in a consistent fashion so parties can rely on traditional interpretation and enforcement of policies in a reliable way," Foggan said.

Meanwhile, Amy Bach, executive director of the policyholder advocacy group United Policyholders, which filed an amicus brief in support of GRC, called the appellate panel's rejection of GRC's ambiguity argument "very disappointing."

"Decisions like the Third Circuit's don't give the proper weight to reasonable expectations of the policyholder," Bach said.

The asbestos exclusion in the Travelers policies eliminates coverage for amounts that GRC becomes legally obligated to pay for injuries or losses arising out of asbestos.

Over the course of long-running litigation over coverage for thousands of asbestos claims against GRC, Travelers has contended that the exclusion is subject to only one reasonable interpretation — that claims for injuries related to asbestos in any form are excluded from coverage. GRC countered that the term "asbestos" plainly connotes the physical substance in its raw form, which the company did not produce.

During a November 2014 bench trial before U.S. District Judge L. Felipe Restrepo, GRC presented evidence indicating that it was standard practice in the insurance industry between the late 1970s and 1985 to distinguish between claims stemming from direct exposure to asbestos fibers and exposure to asbestos-containing products.

In March 2015, Judge Restrepo found GRC had set forth a reasonable interpretation of the asbestos exclusion, without ruling on which party's interpretation was more reasonable. As such, the judge determined that the exclusion is ambiguous and must be construed in GRC's favor.

After the district judge issued his ruling, GRC and Travelers decided to forgo a trial over damages and stipulated to cap the insurer's potential payout at \$21 million. Judge Restrepo tacked an additional \$15.3 million onto that sum in September 2015, and Travelers appealed to the Third Circuit the following month.

In Friday's opinion, the Third Circuit panel said Judge Restrepo erroneously focused his analysis on the proper meaning of the term "asbestos" in Travelers' exclusion.

Instead, the district judge should have concentrated on the correct meaning of the antecedent “arising out of” language, the appellate panel said. And Pennsylvania law dictates that all of the claims against GRC arose out of asbestos under the but-for causation standard, according to the panel.

“The provision plainly encompasses losses that would not have occurred but for asbestos or which are causally connected to asbestos,” Judge Vanaskie wrote. “Pennsylvania law permits no other interpretation.”

According to some attorneys, the appellate panel's adoption of a broad reading of the phrase “arising out of” averted what could have been a costly expansion of insurers' exposure to asbestos-related claims against their policyholders.

“Even in the context of a policy exclusion, that language has been interpreted broadly by Pennsylvania courts,” said Clark & Fox partner Michael S. Savett, who represents insurers. “The ‘but for’ nexus that triggers an exclusion with ‘arising out of’ phrasing is much broader than the narrow interpretation that policyholders would have judges believe.”

United Policyholders' Bach, however, said Friday's opinion was troubling because insurance companies already have the upper hand in drafting the terms of even the most generic policies. As such, she said, any potential ambiguity in policy provisions or exclusions should be interpreted in the policyholder's favor.

“I think the biggest concern I have as an advocate for policyholders throughout the country is the way the court looked at the policy language and didn't find the ambiguity we felt is there,” Bach said. “At the end of the day, policyholders pay very substantial sums of money for financial protection, and we need the courts to apply a balanced approach not in favor of insurers.”

According to Savett, the Third Circuit's decision could have a wide-ranging impact on a variety of policy exclusions containing the “arising out of” language, not just those dealing with asbestos.

“Many exclusions in general liability policies include ‘arising out of’ language, whether it be an asbestos exclusion, an assault and battery exclusion, an intentional injury exclusion, or a mold exclusion,” Savett said. “The impact of this decision goes well beyond the immediate facts of this case.”

Gregory D. Podolak, managing partner of Saxe Doernberger & Vita PC's Southeast office, said the ruling is a cautionary tale that should galvanize policyholders and their insurance brokers to take a closer look at policies to delete or curtail broad “arising out of” language in exclusions. Otherwise, insureds could find themselves without any coverage for claims even remotely related to a certain product, he said.

“It is incumbent on policyholders and their brokers or insurance advisers to be thinking strategically, and to the extent an exclusion contains this type of broad language, they should have a dialogue with their carriers and push back to try to limit its use,” Podolak said.

Still, despite the Third Circuit panel's emphatic pronouncements about the meaning of the phrase "arising out of" in insurance policies governed by Pennsylvania law, it left open the possibility of future challenges in cases involving different policy language and circumstances, noted Blank Rome LLP partner John Gibbons. The panel indicated that "future parties may present evidence demonstrating a meaning of 'arising out of' that is unique to their contract."

"The decision leaves the door open to a different result based on future evidence of the meaning of phrase ['arising out of'] as a whole, as opposed to evidence solely about the meaning of the word asbestos," Gibbon said.

General Refractories is represented by Michael Conley and Meghan Finnerty of Offit Kurman and Howard J. Bashman of Law Offices of Howard J. Bashman.

Travelers is represented by Samuel Arena Jr., Daniel Fitch and William Mandia of Stradley Ronon Stevens & Young LLP and Theodore Boutrous Jr., Richard Doren, Blaine Evanson and Cameron Kistler of Gibson Dunn.

The case is General Refractories Co. v. First State Insurance Co., case number 15-3409, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Mark Lebetkin and Philip Shea.

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