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Supreme Court Allows Insurer to Object to Insured's Bankruptcy Asbestos Claims Trust

Truck Insurance Exchange was the primary insurer for asbestos manufacturers. Two insureds, Kaiser Gypsum Co. and Hanson Permanente Cement, filed for Chapter 11 bankruptcy after facing thousands of asbestos-related lawsuits. As part of the bankruptcy process, Kaiser filed a proposed reorganization plan. The Plan created an Asbestos Personal Injury Trust under U.S. bankruptcy code provisions which allow Chapter 11 debtors with substantial asbestos liabilities to fund a trust and channel present and future asbestos claims into that trust.

Truck objected to the Plan. Truck argued that the (1) the Plan was collusive between the debtors and claimants representatives because it had fewer fraud-preventing disclosure requirements for insured claims than for uninsured claims; and (2) the Plan altered Truck's policy rights by relieving the debtors of their assistance-and-cooperation obligations and barring Truck from raising their conduct in the bankruptcy proceedings as a defense in coverage disputes.

Even so, the Bankruptcy Court confirmed the Plan, reasoning that Truck had limited standing to object to the plan. Because the Plan didn't alter Truck's "quantum of liability," the Bankruptcy Court concluded that the Plan was "insurance neutral." The Fourth Circuit affirmed. The Supreme Court granted certiorari to decide the extent to which an insurer has standing to assert objections in an insured's Chapter 11 bankruptcy proceedings.

The Supreme Court, in an 8-0 opinion by Justice Sotomayor, ruled for the insurer. The key statutory provision was whether a debtor's insurer was a "party in interest" under 11 U.S.C. §1109(b) who could raise and be heard on any issue in an insured's Chapter 11 bankruptcy. The Court emphasized that "party in

interest" was a broad phrase that includes any entity potentially concerned with, or affected, by the bankruptcy proceeding. In this case, Truck faced exposure of up to $50K per claims for thousands of asbestos-injury claims and thus it could certainly be affected by the bankruptcy proceedings.

The Court added that it was immaterial, for a standing analysis, whether the Plan was "insurance neutral" or whether Truck would have been entitled to fraud prevention disclosure requirements under its policies absent the bankruptcy trust. Those arguments conflated the merits of the insurer's objections with its standing to raise objections in the first instance. The Court emphasized that when an insurer like Truck has a financial interest in the proceedings, 11 U.S.C. § 1109(b) grants the insurer neither a vote nor veto, but a voice in the proceedings.

The Court reversed the judgment below and remanded for further proceedings consistent with its opinion.

The case is *Truck Ins. Exch. v. Kaiser Gypsum Co.*, No. 22-1079 (U.S. June 6, 2024).

Comment: *Truck* upends decades of Chapter 11 bankruptcy jurisprudence that often gave a debtor's insurer no right to be heard. Our bankruptcy colleagues here at Rivkin Radler – Stuart Gordon, Benjamin Wisher, and Alexandria Tomanelli Vath – tell us that this legal about-face will have immediate and lasting impacts. Both pending Chapter 11 proceedings and future proceedings will have to consider *Truck*. The most important shift will involve mass tort claims, where insurers can now have a voice in setting up trusts that pay out injured claimants. You can read Gordon's and Tomanelli Vath's analysis **here.** Additionally, you can read Gordon's and Wisher's analysis **here.**

California Supreme Court Holds that First-Level Excess Insurers Cannot Invoke Horizontal Exhaustion to Block Contribution Claim by Primary Insurers but Can Still Raise Equitable Defenses

From 1944 through the 1970s, Kaiser Gypsum Co. manufactured asbestos-containing products at different facilities. By 2004, more than 24,000 claimants had filed product liability suits against Kaiser alleging bodily injury from exposure to Kaiser's asbestos products. Kaiser tendered these claims to Truck,

one of several primary insurers that had issued commercial general liability policies to Kaiser during the relevant period.

All the primary insurance policies had been exhausted except Truck's 1974 policy. Truck initiated an insurance coverage action in California state court to determine its indemnity and defense obligations to Kaiser. Truck added a contribution claim against several of Kaiser's excess insurers that had issued first-level excess policies where the directly underlying primary policy had been exhausted.

Whether Truck, a primary insurer, could assert a contribution claim against a first-level excess insurer depended on whether they shared the "same level of liability on the same risk" as any of the primary insurers. And whether they shared the "same level of liability on the same risk," in turn, depended on whether the first-level excess policies attached only after exhaustion of all primary insurance issued during the continuous period of injury (horizontal exhaustion) or whether they attached on exhaustion of the directly underlying primary insurance issued during the same policy year (vertical exhaustion).

Truck argued for vertical exhaustion based on *Montrose Chem. Corp. of California v. Superior Court*, 9 Cal. 5th 215 (2020) ("*Montrose III*"). In that case, the California Supreme Court had held that standard "other insurance" provisions in higher-level excess policies refer to insurance purchased for the same policy period and thus an insured need only exhaust the lower excess insurance policies in the same tower before higher-level excess policies are triggered. The excess insurers countered that *Montrose III* didn't apply to first-level excess insurers and, as here, when there is unexhausted primary insurance in other policy periods.

The Court of Appeal sided with the first-level excess insurers. That court held that Truck had to exhaust all its primary insurance in each policy period before the first-level excess insurers' policies could be attached. Truck appealed.

The California Supreme Court reversed. The court held that *Montrose III*'s vertical exhaustion rule for higher-level excess insurers applied with equal force to first-level excess policies sitting over primary

insurance. As the court observed, the "other insurance" provisions in the first-level excess policies at issue were essentially identical to the higher-level excess policies in *Montrose III*.

The Supreme Court disagreed that the "qualitative distinctions" between primary and excess insurance justified a different outcome from *Montrose III*. For example, the first-level excess insurers argued for horizontal exhaustion given that, unlike excess insurers, primary policies attach immediately upon an occurrence and primary insurers generally have the right to control defense and settlement without input from excess insurers. The court held that horizontal exhaustion wouldn't alter these well-settled features of the excess policies.

The court added that the reasoning of *Montrose III* applied just as much to first-level excess insurers as it did to higher-level excess insurers. Just as *Montrose III*, a rule of horizontal exhaustion makes the attachment point for excess insurers unpredictable and unascertainable when the policy is issued. The court also reasoned that given that these excess policies were written long before California adopted the all-sums-with-stacking approach to continuous injuries, it was doubtful that excess insurers priced their premiums on the assumption that their policies wouldn't attach until the insured had exhausted the directly underlying primary policies along with any other primary insurance the insured might acquire in later years. The court also expressed doubt that even after California's adoption of the all-sums-with-stacking approach, excess insurers would choose to price premiums, or that the insured would agree to pay premiums, based on a horizontal exhaustion approach that carries the inherent uncertainty of what other primary insurance the insured might acquire in later years. In the court's view, horizontal exhaustion effectively penalizes insured for obtaining more insurance in later years.

That said, the court held that, even though an insured was authorized to access its first-level excess insurance upon vertical exhaustion as a matter of contract interpretation, the excess insurers could still make equitable arguments for why they shouldn't have to contribute to a claim that is covered by primary insurance given the distinct types of insurance at issue. Because the Court of Appeal denied contribution based solely on its interpretation of the first-level excess policies, it didn't consider these alternative

arguments related to contribution. The court remanded the matter to the lower court to reevaluate contribution in light of these equitable principles.

The case is *Truck Ins. Exch. v. Kaiser Cement & Gypsum Corp*., S273179 (Cal. Sup. Ct. June 17, 2024).

Eleventh Circuit Interprets Meaning of "Owned or Occupied" in Pollution Exclusion

Two residents sued a condominium association for allowing exhaust fumes from a backup diesel generator to enter their units. The generator was housed in a utility closet in the basement and was used as a backup power source during power failures. The condo association managed all of the common and shared property in the building, including the generator and the closet.

The condo association sought a defense from its insurer. But the insurer asserted the pollution exclusion. There was no dispute that the toxins emitted by the generator qualified as "pollutants." The issue was whether the pollutants escaped from a "premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured."

The insurance policy did not define "owned or occupied," so the court looked to Georgia law for the plain and ordinary meaning of these terms. It found that the term "occupy" meant "to take possession of or inhabit," "to dwell or reside in," and to "have, hold, or take as a separate space, possess, or reside in." Based on these definitions, the court concluded that the condo association "occupied" the utility closet and generator.

The court explained that the utility closet and generator are part of the common elements of the condominium, which the association is responsible for.

For its part, the condo association argued that the residents jointly owned all common elements of the building, and that the term "occupied" was ambiguous when applied to someone who manages space owned by others.

But the Eleventh Circuit disagreed, finding that the legal ownership of the closet and generator did not affect the interpretation of the word "occupied" in the pollution exclusion for three reasons.

First, the policy listed “owned” as a separate way to qualify for the exclusion. This meant that “occupied” must reach situations not encompassed by ownership. Second, the Geogia Supreme Court has ruled that a tenant, who did not own a room, “occupied” it. And third, other federal circuit courts interpreting the same language have found that a space is occupied by its principal user even if that entity is not the legal owner.

The court found that the pollution exclusion applied, and that the insurer had no duty to defend the condo association.

The case is *Auto-owners Ins. Co. v. Ovation Condo. Ass’n, Inc.*, Nos. 23-13111 and 23-13112 (11th Cir. May 28, 2024).

Illinois Appellate Court Finds Professional Services Exclusion Bars Coverage for Carbon Monoxide Poisoning Claim against Architect

A school district hired an architect to build an addition to a middle school. The addition housed hot water heaters and a venting system. The exhaust vent pipe for the water heater separated, causing carbon monoxide to escape. Personal injury suits followed.

The architect sought a defense under its businessowners and umbrella policies. Both policies had a professional services exclusion. The insurers asserted the exclusion and the architect sued.

One count in the complaints alleged that the architect negligently performed a health/life survey for public schools. According to the architect, allegations in this count – failure to warn, maintain, repair, and follow the manufacturer's directions – fell outside the professional services exclusion. Both the trial and appellate courts disagreed.

The appellate court explained that the term “professional service” is not limited to services by persons who must be licensed to practice. It includes “any business activity conducted by the insured which involves specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual in nature.”

None of the architect's work was alleged to be independent of its professional services. Any failure to warn, or repair the hot water heaters, or follow the manufacturer's instructions, flowed from the health/life survey, which the architect conceded was a professional service. And the failure to adequately remedy the unsafe and dangerous conditions of the mechanical systems required specialized knowledge and would be predominantly mental or intellectual in nature.

Policyholders often like to read allegations in isolation. But the court refused to do that. It read the complaints as a whole to assess their true nature. And in doing so, it found that the three allegations on which the architect relied were all tied to the performance of the survey, and thus the architect's professional services. The insurers had no duty to defend.

The case is *Allied Design Consultants, Inc. v. Pekin Ins. Co.*, No. 4-23-0738 (Ill. App. Ct. June 18, 2024).

Federal District Court in Texas Applies Anti-Assignment Clause and Finds Company Asserting Rights Lacked Standing to Make a Claim

Nalco Champion performed certain pipeline services for Highwood. It inspected one of Highwood's pipelines and reported that there was a low probability of corrosion. The pipeline leaked five months later because of internal corrosion. Highwood sued Nalco and its related companies for the costs to clean up the spill.

Nalco was a subsidiary of Ecolab, who held an insurance policy with the Insurance Company of the State of Pennsylvania (ICSOP). Ecolab tendered the claim to ICSOP, but it refused to defend.

Champion X Corporation, who was not named in the Highwood suit, then sued ICSOP in federal court in Texas to recover the defense costs it spent in defending Nalco and others in Highwood's suit. Through a series of corporate transactions and name changes, Champion X argued that it was the parent of Champion X Canada ULC, who was a defendant in the Highwood suit. ICSOP countered with three arguments.

First, that Champion X lacked standing because it was not a named insured under the policy issued to Ecolab.

Second, even if Ecolab transferred policy rights to Champion X, that transfer was void under the policy's anti-assignment clause.

Third, Champion X is not a defendant in the underlying suit and cannot enforce the rights of the named defendants.

The issue came down to the policy's anti-assignment clause. That clause stated: "[Ecolab Inc.'s] rights and duties under this policy may not be transferred without [ICSOP's] written consent except in the case of death of an individual Named Insured." The court found that Texas courts routinely enforce anti-assignment clauses like this one.

Champion X argued that ICSOP waived this clause by sending a denial letter that did not mention the anti-assignment clause. The court rejected this argument because ICSOP's denial letter addressed coverage for Ecolab, not Champion X. ICSOP did not know then that Champion X would be asserting a claim under the Ecolab policy, and thus ICSOP could not have intentionally relinquished a known right, nor be estopped from asserting the anti-assignment clause.

The court held that there was no waiver and that any purported assignment of policy rights by Ecolab to Champion X was void.

The case is *Champion X Corp. v. AIG Ins. Co.*, No. 4:23-CV-3190 (S.D. Tex. June 26, 2024).