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Insurers, Policyholders Both See Silver Lining In Olin Ruling

By **Jeff Sistrunk**

Law360, Los Angeles (July 19, 2017, 9:20 PM EDT) -- The Second Circuit's decision Tuesday in Olin Corp.'s bid for environmental cleanup coverage reaffirmed a ruling from the New York Court of Appeals that policyholders can seek coverage for an entire loss under any triggered policy they hold, but it also opened the door for insurers to reduce their liability by deducting past payments by other carriers.

In a mixed decision in the decades-old coverage dispute, a panel of the Second Circuit agreed with Olin that its payments toward remediating contamination at five manufacturing sites implicated a series of excess policies issued by Lamorak Insurance Co., formerly OneBeacon American Insurance Co. The panel refused to hold that all of Olin's primary policies had to be assigned a prorated share of the chemical maker's liability and then depleted before Lamorak's excess layers could be tapped.

The ruling adopted the principles articulated by New York's highest court, the Court of Appeals, in last year's landmark Viking Pump decision.

The state high court ruled in Viking Pump that, where insurance policies contain so-called "prior insurance" or "noncumulation" clauses, allocation is governed by the "all sums" method, which allows a policyholder to hold the policies in any triggered year liable for an entire loss up to their limits. The New York justices rejected the application of a "pro rata" allocation approach, which spreads out liability proportionally among all triggered policies.

According to Anderson Kill PC managing shareholder Robert M. Horkovich, who represents policyholders, the Second Circuit's decision in the Olin matter marks another significant victory for the policyholder-friendly all sums approach.

"This decision reflects the appellate courts' continued movement toward all sums joint and several liability of the insurance companies — based on language in the policies — and away from pro rata allocation, an invention of some courts," Horkovich said.

However, the appellate panel threw a rope to Lamorak, agreeing that the insurance company may be entitled to reduce the limits of its liability by the sum of payments made under any prior, same-level

excess policies issued to Olin by different insurers. Attorneys say that this broad reading of the noncumulation language in Lamorak's policy will be influential in similar disputes among insurers over coverage for environmental contamination and other long-term losses.

"This decision is helpful in confirming what other courts have ruled," said Morrison Mahoney LLP partner Michael Aylward, who represents insurers. "There are different noncumulation clauses, and some have limited language indicating they only apply to policies issued by the same insurer. Absent that language, the Second Circuit is saying the plain meaning is that any similar policy, whether or not issued by the same carrier, is deemed to be prior insurance."

Since the 1980s, Olin has been entwined in legal battles with its insurers over its costs to clean up a slew of manufacturing sites across the country. The wide-ranging litigation has resulted in scores of lower court decisions and three prior rulings by the Second Circuit.

Lamorak's predecessor had issued Olin a set of excess umbrella policies for the 1970 policy year, providing up to $20 million in coverage beyond a $300,000 primary policy issued by INA. A prior-insurance provision in the excess policies states that, where a loss is "also covered in whole or in part under any other excess policy" previously issued to the insured, the policies' liability limit "shall be reduced by any amounts due to the insured on account of such loss under such prior insurance," court papers show.

In 2015, a New York federal judge issued a pair of orders directing Lamorak to reimburse Olin for $44.5 million in costs and another $42.7 million in interest, finding the insurer liable for much of the cost of cleaning up five sites in New Jersey, Georgia, New York, Ohio and Alabama. Both Lamorak and Olin appealed various rulings by the trial court.

For one, Lamorak argued in favor of a "hybrid" approach to policy allocation and exhaustion, where liability for Olin's cleanup costs would be prorated among all its triggered primary policies, which would all have to be exhausted before Lamorak's excess layer would be implicated. Only then would all sums allocation apply and allow Olin to access the excess policies one after the other, in what is known as "vertical exhaustion," Lamorak contended.

According to the insurer, if the hybrid approach were to be applied, its excess policies were never reached because Olin hasn't exhausted all of its triggered primary policies. But the Second Circuit panel rejected that suggestion, finding that under the New York Court of Appeals' holding in Viking Pump, only the primary policy directly below the Lamorak's policies had to be exhausted for the excess coverage to kick in, which indisputably happened.

"Because OneBeacon’s policies call for all sums allocation, and the New York Court of Appeals’ decision in Viking Pump dictates vertical exhaustion where the all sums approach is the proper method for allocation, we conclude that Olin’s underlying policies have been exhausted and OneBeacon’s policies have attached," Judge Peter Hall wrote for the panel.

Attorneys say the appellate panel's ruling provided an answer to a key question left unanswered by Viking Pump: how allocation and exhaustion should be handled if an excess policy contains a noncumulation clause but the underlying primary insurance does not.

"This decision doesn't announce a new rule, but puts an exclamation point on Viking Pump's finding that, where a policy contains a noncumulation clause, all sums allocation is the law of New York," said Pillsbury Winthrop Shaw Pittman LLP partner David Klein.

Hunton & Williams LLP partner Syed Ahmad noted that the ruling appeared to be based on specific language in Lamorak's policies, but said the appellate panel's extensive discussion of Viking Pump indicates that insurers whose policies contain different language will have a tough time fighting the all sums regime in future cases.

"[T]he court relied on much broader principles and cited extensively to the reasoning in Viking Pump, which calls into question if similar efforts to avoid all sums will be accepted even in cases with different policy language," Ahmad said.

The Second Circuit panel did, however, provide Lamorak an opportunity to lessen its liability, agreeing that the noncumulation provision in the insurer's policies requires that its limits be reduced by any amounts that different excess insurers previously paid to Olin for cleanup of the five sites. The trial court had concluded that the provision only referred to payments under past policies issued by Lamorak, not different insurers.

"To conclude otherwise would be to strip the prior insurance provision of its bargained-for effect, as evinced by its plain language, and permit Olin to recover multiple times for a single loss by pursuing multiple insurers within the same layer of coverage," Judge Hall wrote.

According to attorneys, the panel's decision on this point comports with the plain language and purpose of the noncumulation provision and will afford Lamorak and other similarly situated insurers the opportunity to share costs for multiyear losses with other carriers.

In a twist, however, the panel found that Lamorak must shoulder the burden to prove on remand to the trial court that Olin's past excess insurers from Lloyd's of London made payments specifically for the chemical company's cleanup endeavors at the five sites as part of a sweeping settlement. Hinshaw & Culbertson LLP partner Scott Seaman said that it is unusual for an insurer to bear the burden of proof under these sorts of circumstances.

"A strong argument can be made that the policyholder should have the burden of proof because the noncumulation clause is a policy condition, not an exclusion, and the burden should rest on the policyholder because it was a party to the prior settlement and has better access to the information," Seaman said.

As it stands, attorneys say Lamorak could have a difficult time meeting its burden. Wide-ranging "global"

settlements for long-term losses such as the one between Olin and its excess carriers at Lloyd's of London are almost always confidential and rarely parse out coverage for specific risks or sites.

"That will be a tough burden to bear because insurance companies refuse to allocate settlement payments to specific sites and instead simply pay for releases generally as broad as they can get," said Anderson Kill's Horkovich. "So the discovery insurance companies will begin seeking from one another will be fascinating."

According to Pillsbury's Klein, a ruling by the trial court that Olin must fork over details of its deal with the Lloyd's of London insurers, while unlikely, could deter policyholders from entering into settlements with their carriers in the future by removing the cloak of confidentiality.

"It would actually chill insurers and policyholders from entering into these settlement agreements if the trial court allowed discovery into the settlement terms," Klein said.

--Editing by Philip Shea and Pamela Wilkinson.