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2nd Circ.'s Olin Ruling Could Prove Costly For Insurers

By **Bibeka Shrestha**

Law360, New York (December 21, 2012, 6:09 PM ET) -- The Second Circuit's Wednesday ruling that Olin Corp.'s excess insurance policy could be triggered by environmental damage occurring outside the policy period shows that insureds in New York can use contract language to counteract the pro rata allocation method for long-tail claims and put carriers on the hook for more losses, experts say.

The decision makes clear that while the pro rata allocation rule — which holds insurers responsible for only the damage that occurs within their policy period — is the default rule in New York, policy language will be the deciding factor.

That's not the tack that New Jersey and other states have taken, according to to Michael Aylward, a Morrison Mahoney LLP partner who represents insurers. These states considered public policy when opting for the pro rata method over all-sums allocation, which lets the insured pick carriers to cover long-term property damage or product liability claims up to their policy limits, even if some of the damage occurred before or after their policy period.

"They would ignore the language in the contract," Aylward said. "New York obviously is taking a different approach."

Rene Siemens, a Pillsbury Winthrop Shaw Pittman LLP partner who represents policyholders, said the decision will be helpful to policyholders even if the language in Olin's excess policy isn't standard — though it isn't uncommon, either.

"It opens up the possibility that you can look at any insurance policy to determine whether its individual terms basically contract around the pro rata approach," Siemens said. "It opens an avenue of argument for policyholders in, I think, a lot of cases."

Policyholders in New York who are worried about coverage for long-tail claims could try to negotiate similar terms, Siemens said.

The Olin case headed to the Second Circuit after American Home Assurance Co. persuaded a lower court to rule that its two three-year excess policies hadn't kicked in.

Olin sought insurance coverage for part of the $102 million in damage that occurred at its Morgan Hill, Calif., manufacturing site from 1957-87, a figure that was divided equally among the years under the pro rata approach, coming out to $3.3 million of damage per year.

The trial court ruled that American Home's excess policies weren't triggered because the perchlorate spilled during each policy period caused only $9.9 million of damage, far below the $30 million attachment point required.

But Olin successfully argued that a provision in its policies, called Condition C, promised to cover personal injury and property damage that continues after the policy period ends, a theory that would easily allow American Home's $30 million attachment point to be reached.

Olin contended that American Home would be exposed to 22 years of damage at the Morgan Hill site under its 1966-69 policy — totaling $72.6 million — and 19 years of damage under its 1969-72 policy — totaling $62.7 million.

The Second Circuit accepted that argument despite American Home's claim that applying Condition C as Olin wanted would contradict the pro rata rule the court outlined in two prior decisions involving that company.

"Those decisions simply provide that when insurance contracts do not adequately define how progressive environmental damage is to be apportioned across multiple triggered policies, and the evidence cannot make that distinction, New York law requires damage to be allocated pro rata," the Second Circuit ruling said. "New York law does not preclude parties from contracting to indemnify the insured for damage allocated to years after the termination of the policy."

According to the court, Condition C simply adds additional years of exposure, using the same pro rata allocation method for determining the amount of damage attributed to each year.

John Nevius, Anderson Kill & Olick PC shareholder, said the Second Circuit took the time to properly evaluate the case, in a jurisdiction not perceived as policyholder-friendly.

"It's a good thing for policyholders as far as its broad application," Nevius said. "The application isn't so much in the specific policy language, but the idea that you need to look at the language of the policy. ... This decision should encourage policyholders to pursue their coverage rights, especially when it comes to higher level policies."

The Second Circuit's ruling does make it more likely that excess insurers will have to step in and pay their limits, but it probably won't create a major shift from New York's usual allocation rules, according to Aylward.

It doesn't represent a departure from how New York typically handles insurance cases, Aylward said.

"New York has always taken the approach that what's important is the wording and the intent of the parties," Aylward said. "That's consistent with the general philosophy that New York courts have followed."

However, Aylward points out, the decision could pose a problem if multiple policies are triggered for the same period. The Second Circuit ruling doesn't address how to reconcile two parties' respective coverage obligations.

U.S. Circuit Judges Denny Chin, Raymond J. Lohier Jr. and Christopher F. Droney sat on the panel for the Second Circuit.

Olin is represented by Craig C. Martin, Peter J. Brennan and Matthew E. Price of Jenner & Block LLP.

American Home is represented by Michael Herbert Cohen and David Farkouh of Saiber LLC and Michael J. Fleming of the Law Offices of Beth Zaro Green.

The case is Olin Corp. v. American Home Insurance Co., case number 11-4055, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Sarah Golin and Richard McVay.