



NEW TEXAS COVERAGE CASE ALERT – SEPTEMBER 8, 2010

© 2010 Schubert & Evans, P.C.

Two Recent Decisions Address Trigger and Horizontal v. Vertical Exhaustion When Multiple Coverage Years Are Involved

Two recent Texas pro-insured coverage decisions, one as to defense of construction defect cases, and the other as to indemnity/coverage allocation in the asbestos bodily scenario, give insureds greater leverage in selecting which year of coverage must respond to a claim where multiple years of coverage are potentially triggered. It remains to be seen whether these decisions may potentially impact other types of claims, as well.

In *Mid-Continent Casualty Co. v. Academy Dev.*, Cause No. H-08-21 (S.D.Tex. August 24, 2010) the federal district court in the Southern District, construing a fairly typical **construction defect** scenario (*i.e.*, the underlying construction suit pleading was silent on exactly when the property damage or construction occurred but contained other dates from which a range of potential dates of possible property damage could be inferred) held that multiple years of Mid-Continent CGL policies were triggered for defense. **The Court held that the insured was entitled to select the year of coverage that was most advantageous to it to provide a complete defense rather than, as Mid-Continent argued, defense being prorated among the several policy years involved.** This was important because in some years the insured had a big deductible that included defense costs whereas in other years, including the year selected by the insured, the insured had defense cost coverage outside of limits from first dollar. Finally, the Court noted that it was not deciding the different issue addressed in one of our other recent Case Alerts (9/3/10) as to whether the carrier tapped to defend the case may have recoupment recourse via contribution against other triggered years.

Then on September 2, 2010, a federal district court in the Eastern District of Texas in *LSG Technologies v. U.S. Fire Ins. Co.*, Cause No. 2:07-CV-399-DF (E.D. Tex. Sept. 2, 2010) held that, **at least in the asbestos bodily injury context**, all plaintiffs who sustained asbestos-related injury from the insured's gasket manufacturing process at any particular point in time from a particular location constituted a **single bodily injury "occurrence"** and triggered that particular year of coverage **vertically** for purposes of indemnity. The Court, noting that no prior Texas case had squarely addressed whether Texas followed the **"vertical" or "horizontal" exhaustion** rule, concluded that **Texas courts would follow a vertical exhaustion rule.** In so doing, it rejected the excess carrier's contention that, as a true excess carrier, all underlying years of primary coverage had to be exhausted horizontally before its excess coverage was triggered in any year. The Court made clear, however, **that the insured bore the burden of submitting evidence demonstrating when each claimant sustained injuries** in order to support a vertical exhaustion of coverage.

Mid-Continent, a construction defect case, is potentially important at least in that type of claim but also could easily be found applicable in other analogous contexts where broad, non-date-specific allegations can be reasonably construed to trigger defense by multiple carriers. This is potentially troublesome since the right of a defending carrier to seek reimbursement from other carriers who deny defense is now uncertain. (See Case Alert of 9/3/10.) A single carrier



SCHUBERT | EVANS

ATTORNEYS AND COUNSELORS

covering only one of several years involved in a construction defect claim could end up being forced to provide 100% of the defense funding with no recourse against other coverage years. The vertical exhaustion rule adopted in *LSG* was expressly for asbestos injury cases and only for purposes of indemnity, not defense; thus, it may or may not have any impact outside of that arena. If its rule is extended by later decisions into other areas, then this could further complicate resolution of large claims where more than one year of coverage is involved.

If you would like a copy of either decision or to discuss these issues further or as applied to a particular claim, feel free to contact Schubert & Evans, P.C. at 214-744-4400.

If you would like a copy of the opinion or wish to discuss any insurance-related issues or needs, please feel free to contact Schubert & Evans, P.C. at 214.744.4400 or visit our website at www.schubertevans.com.