

## **Nonprofit Says Travelers Wrong On Asbestos Exclusion**

Law 360

A nonprofit consumer rights and insurance education organization has told the Third Circuit that General Refractories Co. was correctly awarded \$36 million in its suit accusing Travelers of improperly denying coverage for asbestos exposure claims, saying the insurer gets Pennsylvania insurance law wrong. United Policyholders, in a March 28 amici brief, said that under Pennsylvania law, insurance companies have the burden of proving that a policy's exclusion can be applied, especially when the exclusion is contained in a standard form policy drafted by the carrier and not negotiated by the policyholder. Travelers failed to carry that burden and only relied on its counsel's assertions that the exclusion wasn't ambiguous and self-serving extrinsic evidence, the non-profit said.

"In fact, it is settled law in Pennsylvania that when the interpretation of an exclusionary or coverage-limiting clause is at issue, courts must adopt the construction urged by the policyholder so long as that construction is not unreasonable," United Policyholders said.

General Refractories has engaged in a decadelong battle to win coverage from Travelers and its other insurance carriers for a wave of asbestos-related claims brought by plaintiffs who say they were injured after being exposed to the company's asbestos-containing products. The company previously settled with all the other insurers involved in the litigation.

Last March, U.S. District Judge L. Felipe Restrepo ruled that the asbestos exclusion in General Refractories's excess insurance policies was ambiguous and must be construed in the policyholder's favor.

The judge said the asbestos exclusion in the policies issued to General Refractories by Travelers predecessor Aetna Casualty & Surety Co. in 1985 is "not enforceable, and it is not effective to preclude insurance coverage for GRC against the claims made in the underlying asbestos-related lawsuits."

The exclusion at issue eliminates coverage for amounts for which General Refractories becomes legally obligated to pay for injuries or loss “arising out of asbestos,” according to court documents.

Travelers contended at trial that the exclusion is subject to only one reasonable interpretation — that claims for injuries related to asbestos in any form are excluded from coverage. General Refractories countered that the term “asbestos” plainly meant the physical substance in its raw form, which the company did not produce.

The only evidence that Travelers presented in support of its argument that General Refractories agreed to its interpretation of the asbestos exclusion was the company’s corporate records, its communications with the insurer and communications with brokers, United Policyholders said in its brief.

But the lower court correctly found that the extrinsic evidence was improper under Pennsylvania law, which holds that undisclosed communications and subjective understandings are not credible extrinsic evidence and can’t be used to determine the parties’ mutual intent, the nonprofit said.

“While the insurance industry may not like it, the ruling by Judge Restrepo was consistent with decades of law dictating how exclusions in insurance policies must be interpreted,” Michael Conley of Offit Kurman, counsel for General Refractories, told Law360 on Wednesday.

At trial, General Refractories 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.

From 1978 to 1985, Travelers itself used a different asbestos exclusion in policies sold to other insureds, according to court documents. That exclusion barred coverage for bodily injury arising out of asbestos, “whether or not the asbestos is airborne as a fiber or particle, contained in a product, carried on clothing or transmitted in any fashion whatsoever,” court papers said.

Judge Restrepo found that General Refractories had set forth a reasonable interpretation of the asbestos exclusion, without ruling on which party’s interpretation was more reasonable. As such, the exclusion is ambiguous and must be construed in General Refractories’ favor, the judge held.

After the judge issued his ruling, General Refractories and Travelers decided to forgo a trial over

damages and stipulated to cap the insurer's potential payout at \$21 million. Judge Restrepo tacked on an additional \$15.3 million to that sum in September, and Travelers appealed to the Third Circuit the following month.

In its opening appellate brief, Travelers contended that the lower court erred in finding that the asbestos exclusion only covered raw asbestos minerals and not products containing asbestos. That limitation doesn't appear in the exclusion, the insurer said.

Earlier this month, General Refractories argued that Travelers could have used more comprehensive language in its policies that would have unambiguously excluded loss arising from asbestos-containing products, but chose not to do so.

Representatives for the other parties didn't immediately respond to requests for comment on Wednesday.

United Policyholders is represented by John N. Ellison and Lisa A. Szymanski of Reed Smith LLP and in-house by Amy Bach.

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 J. Arena Jr., Daniel T. Fitch and William T. Mandia of Stradley Ronon Stevens & Young LLP and Theodore Boutrous Jr., Richard J. Doren, Blaine H. Evanson and Cameron O. 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 Emily Kokoll.