

Continental's Limits Capped For BorgWarner Asbestos Claims

By **Jeff Sistrunk**

Law360, Los Angeles (October 13, 2015, 8:49 PM ET) -- An Illinois state judge has determined that Continental Casualty Co. has exhausted the limits for asbestos claims in four umbrella policies that it issued to Borg-Warner Corp., rejecting the efforts of BWC successors and excess insurers to tack on another \$70 million in limits to Continental's policies.

In a Thursday decision, Judge Peter Flynn of the Circuit Court of Cook County ruled that Continental exhausted the limits of the policies by paying \$94.3 million to cover asbestos claims against BWC-related entities, after finding that each of the policies had a single occurrence limit.

BWC successors York International and Flowserve Corp. and excess insurers including TIG Insurance Co. and Zurich International Ltd. had contended that the Continental policies covering multiple years had separate annual occurrence limits, but Judge Flynn said the policy language didn't support those arguments.

Continental filed suit in 2004 against BWC, York, Flowserve and a slew of insurers, seeking declarations regarding its obligations to cover asbestos claims against the BWC entities.

The trial court previously held that Continental had exhausted the single-occurrence limits of the two primary policies it issued to BWC by paying \$12.8 million for asbestos bodily injury claims. The insurer then paid its pro rata share of indemnity for the BWC entities' claims under four umbrella and two excess-level policies, according to court documents.

York, Flowserve and the excess insurers disputed when Continental's payments applied toward the exhaustion of the occurrence and aggregate limits of its policies. According to the excess insurers, Continental must prove that coverage was triggered on a claim-by-claim basis.

For the umbrella and excess policies that covered multiple years, Continental asserted that the occurrence limits of those policies applied to the entire policy periods. With respect to the umbrella policies, the total occurrence limit is \$90 million, which has already been exhausted, according to Continental.

York, Flowserve and the excess insurers countered that the occurrence limits for Continental's multiyear policies apply on an annual basis — a position that would have increased the umbrella policies' coverage limits to \$160 million.

One of Continental's umbrella policies covered a period spanning from October 1969 through September 1973. For each of the first two years, that policy had an occurrence limit of \$5 million, but an endorsement raised that limit to \$50 million for each of the final two years, according to court documents.

Judge Flynn pointed out that the occurrence limit in that policy applies to an occurrence, not to any particular period of time. The policy language indicates that the occurrence limit applies across a single period, according to the judge.

"Regardless of whether the event giving rise to an 'occurrence' took place during a period commencing with the policy's effective date or anniversary date, there would still be one occurrence," the judge wrote. "Thus, if an event giving rise to an 'occurrence' took place in 1970 and then again in 1971 (as it did here), it would still be the same occurrence, so one limit would apply."

Another of Continental's umbrella policies covered a period between January 1983 and January 1986. The occurrence limit of that policy was initially \$25 million but was reduced via endorsement to \$10 million and then to \$5 million in consecutive years, according to court documents.

According to Continental, payments allocated to that policy were made on a horizontal, continuous trigger basis and first "occurred" on Jan. 1, 1983, such that the \$25 million limit applies. York and TIG asserted that Continental's own records showed that Continental understood the policy to have three separate annual occurrence limits.

But Judge Flynn said that, because the intent of the endorsement was to reduce the policy's limits, it wouldn't be reasonable to find that the policy had three separate limits totaling \$40 million.

The judge held that Continental's \$94.3 million in payments under the umbrella policies were reasonable and can be counted toward the limits. The excess insurers can't second-guess Continental's settlement decisions, according to Judge Flynn's order.

"CNA made thousands of indemnity and defense payments under its umbrella policies," the judge wrote. "Allowing the excess insurers to challenge each payment claim-by-claim would require a huge amount of time and resources and would go against public policy favoring the finality of settlements."

The judge further held that Continental could count a \$4.3 million payment to BWC for claims arising out of a tank explosion at a subsidiary's plant toward the exhaustion of the policy with the \$25 million limit.

An attorney for Continental declined comment. Attorneys for Flowserve, York and the excess insurers did not immediately respond to requests for comment.

Continental is represented by David E. Schoenfeld, Irving C. Faber and Justin R. Donoho of Shook Hardy & Bacon LLP.

Flowserve is represented by Chris Bechhold of Thompson Hine and by Donohue Brown Mathewson & Smyth LLC. York is represented by Holland & Knight LLP.

TIG is represented by Clausen Miller PC. Zurich is represented by James Ruggeri of Shipman & Goodwin LLP.

The case is Continental Casualty Co. et al. v. BorgWarner Inc. et al., case number 04-CH-01708, in the Circuit Court of Cook County, Illinois, County Department, Chancery Division.

--Editing by John Quinn.

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