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Alerts

New York Appellate Court Rules Insurer Accepting Service and Assigning Counsel to Defend Defunct Insured Retains Coverage Defenses and is Only Liable for Settlements on a Pro Rata Basis

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Insights for Insurers

On March 22, 2022, the Supreme Court of New York Appellate Division, First Department reversed a trial court order which had held an insurer—ordered to accept service on behalf of a defunct policyholder—was liable for the entire amount of settlements later reached with asbestos claimants. *Liberty Mut. Ins. Co. v. Jenkins Bros*., 2022 NY Slip Op 01968, 2022 N.Y. App. Div. LEXIS 1846 (App. Div. 1st Dept. Mar. 22, 2022).

Case Summary

The trial court, on cross-motions for summary judgment, had held the insurer was responsible for the full amount of settlements negotiated on behalf of its insured—a defunct valve manufacturer called Jenkins Bros—which dissolved in 2004 after a prior bankruptcy. The trial court held the insurer was the real party in interest after accepting service and appointing counsel to defend its insured. The trial court further found that the insurer "stood in the shoes" of the insured and was required to pay the entire amount of the settlements. The insurer argued that it was only responsible for a *pro rata* amount of the settlements and not for sums attributed to periods after 1980, at which time it ceased insuring the insured (and the insured went uninsured). The trial court rejected the insurer's argument and held it was responsible for the entire amount of the settlements.

In the brief but pointed opinion, the First Department began by determining that the individual defendants (the asbestos claimants) "failed to fulfill a condition precedent to filing a claim directly against [the insurer], *i.e*., they did not obtain judgments against plaintiff's insured, defendant Jenkins Bros." *Id*. ¶¶ 1-2. The First Department stated the trial court's order directing substitute service on the insurer did not constitute a determination that the insurer was required to fund the entire amount of any potential settlement between the insured and the individual claimants. *Id*. Nor did it make the insurer a party to those settlement agreements. *Id*.

The First Department also found the doctrine of equitable estoppel did not bar the insurer from asserting that it is not responsible for the full amount of the settlements, despite the fact that it appointed defense counsel for the insured.

Id. The First Department noted that the insured and the claimants were the parties to the settlement agreements, the insured's counsel disclosed the insurer's position to the individual claimants, and the individual claimants did not establish that they adopted a prejudicial change in position in reliance on the insurer's conduct. *Id*.

Next, the First Department determined that, even if the asbestos claimants obtained judgments against the insured (which they did not), the claimants would only be entitled to the same relief from the insurer that would have been due to the insured. *Id*. ¶ 3.

Finally, citing *Keyspan Gas E. Corp. v Munich Reins. Am., Inc.*, 73 N.Y.3d 113, 117-18, 96 N.E.3d 209 (2018), the First Department held that, as between the insurer and the insured, the insurance policy language supported a *pro rata* allocation. *Liberty Mut. Ins. Co. v. Jenkins Bros*., 2022 NY Slip Op 01968, ¶ 3. Thus, the insured bore the risk for those years where it did not have coverage. *Id*.

Significance of Decision

The decision is important for insurers on several levels. First, it recognizes that insurers should be able to accept service and appoint counsel on behalf of insolvent or defunct insureds without forfeiting their coverage or policy defenses. Second, it reaffirms that absent policy language to the contrary, New York law requires *pro rata* allocation. Third, it reinforces the principle that the insured is responsible for injuries or damages attributed to uninsured periods (or periods in which insurance was unavailable).