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Asbestos Coverage Held Exhausted After Federal Court Applies De Facto Merger Doctrine

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In a recent decision involving coverage for asbestos claims, the U.S. District Court in Ohio ruled that an insured's acquisition of the assets of another company in 1966 amounted to a *de facto* merger of those companies, effectively providing the acquired company with "Named Insured" status under the policies issued to the acquiring company. As such, the underlying asbestos claims against the acquired company were found to be subject to the aggregate limits in the acquiring company's policies.

In *Bondex International, Inc. et.al. v. Hartford Accident and Indemnity Company, et. al.* (N.D. Ohio), Case No. 1:03-CV-1322, Republic Powdered Metals, purchased the assets of Reardon Company in 1966. In that transaction, Republic assumed liability for all products manufactured or sold by Reardon should those products cause bodily injury after the date of the purchase agreement.

Numerous underlying asbestos claims were filed against Republic, arising out of products manufactured by Reardon prior to the acquisition by Republic. This transaction gave rise to the issue of whether those claims were subject to the coverage limits in the policies issued to Republic. Those policies contained aggregate limits for claims arising out of products manufactured by the "Named Insured" or "Insured," but no aggregate limit for claims falling outside of the "products hazard" and "completed operations hazard." The definition of "Named Insured" in the policies at issue included new organizations acquired by the Named Insured through merger.

The parties cross-moved for summary judgment with respect to whether the transaction amounted to a merger, thereby bringing Reardon within the definition of "Named Insured" (and therefore bringing the underlying asbestos claims against Republic arising out of Reardon's products within the aggregate limits of the policies). Applying Ohio law, the court applied the *de facto* merger doctrine in determining whether such a merger took place. Focusing on the continuation of the predecessor's business and corporate personnel, the rapid dissolution of the predecessor corporation, and the assumption of all

liabilities and obligations of the predecessor ordinarily necessary to continue the predecessor's business operation, the court found the existence of a *de facto* merger. As such the court found that Reardon was a "Named Insured" or "Insured," and therefore, its claims were subject to the aggregate limits of the policies at issue.

The court also addressed an important issue regarding the tendering of liability limits by one of the insurers into an attorney trust account. The tendering insurer argued that it had no continuing duty to defend because it had paid out its limits of $39 million into an attorney trust account used to make disbursements to the underlying plaintiffs. The insured argued that it was still owed continuing defense costs amounting to $57 million, based on the proposition that a liability insurer cannot terminate its duty to defend by unilaterally tendering its policy limits absent a judgment or settlement.

In finding that the tendering carrier had no further duty to defend or indemnify, the court noted that the trust account deposits were made at the request of the insured, and that the insurer notified the insured that coverage was exhausted upon payment of the limits. Moreover, the insured sought coverage from excess carriers that it believed were liable for amounts above the exhausted limits.

The court's application of the *de facto* merger doctrine in *Bondex* emphasizes the need for insurers to look beyond the characterization of a corporate transaction in the transaction documents themselves to determine whether claims arising from a predecessor's products fall within aggregate limits. The potential for owing coverage for asbestos liabilities without aggregate limits mandates a close look at this issue and full exploration of the facts surrounding the corporate transaction at issue before decisions are made with respect to the existence and amount of such coverage that may be available in such situations.

Should you have any questions about the *Bondex International, Inc. et.al. v. Hartford Accident and Indemnity Company, et. al.* decision, or about insurance coverage under commercial liability policies in general, please feel free to contact your Plunkett Cooney attorney, or in the alternative, Charles Browning at (248) 594-6247, Ken Newa, at (313) 983-4848 or any other member of Plunkett Cooney's Insurance Practice Group. For a practice group directory, click here. To read the complete *Bondex* opinion, click the link below.