State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, March 29, 2016

No. 59 Matter of Viking Pump, Inc. and Warren Pumps, LLC, Insurance Appeals

This insurance dispute, a consolidated appeal from rulings by the Court of Chancery and the Superior Court in Delaware, arises from efforts by Viking Pump, Inc. and Warren Pumps, LLC to recover under insurance policies issued between 1972 and 1985 to Houdaille Industries, now defunct, which previously owned both pump manufacturers. Viking and Warren face tens of thousands of asbestos-related personal injury suits, most of them alleging exposures to asbestos and progressive injuries that occurred over a period of years. The manufacturers' entitlement to coverage under primary and umbrella policies issued by Liberty Mutual Insurance Company was resolved in prior litigation. Viking and Warren then brought these actions in the Court of Chancery against more than 20 other insurers that issued excess insurance policies, a third layer of coverage, to Houdaille. The policies are governed by New York law.

The parties cross-moved for summary judgment on how losses should be allocated among the policies where the underlying asbestos claims potentially trigger coverage in multiple policy periods. Viking and Warren argued allocation should be made by an "all sums" or "joint and several" rule, which would permit them to recover in full up to the policy limit under a single triggered policy, leaving that insurer to seek contribution from other insurers whose policies were also triggered by the asbestos claims. The excess insurers argued the losses should be allocated among all of the triggered policies on a pro rata basis, requiring each insurer to bear its proportionate share of the cost. The Court of Chancery ruled for Viking and Warren, finding that, in the language of the policies and particularly in their "Non-Cumulation" and "Prior Insurance" provisions, the parties had agreed to all sums allocation.

The case was transferred to the Superior Court to determine, among other things, whether the excess policies were subject to vertical or horizontal exhaustion. Viking and Warren argued for vertical exhaustion, which permits an insured to obtain benefits under an excess policy once the primary and umbrella insurance for the same policy year are exhausted. The excess insurers sought horizontal exhaustion, requiring an insured to exhaust all triggered primary and umbrella policies before obtaining any excess coverage. The court ruled for the insurers, holding as a matter of New York law that Viking and Warren are required to horizontally exhaust all triggered "primary and umbrella insurance layers before tapping" any of Houdaille's excess coverage.

The Delaware Supreme Court, concluding that "a resolution of this appeal depends on significant and unsettled questions of New York law," is asking this Court to decide the key issues in a pair of certified questions: "1. Under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions? 2. Given the Court's answer to Question #1, under New York law and based on the policy language at issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?"

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For resp. Underwriters at Lloyd's, London: Kathleen M. Sullivan, Manhattan (212) 849-7000
For respondents Century Indemnity et al: Jonathan D. Hacker, Washington, DC (202) 383-5300

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To be argued Tuesday, March 29, 2016

No. 38 Millennium Holdings LLC v The Glidden Company

Insurance companies are appealing a decision that applied the antisubrogation rule to bar their claims against Akzo Nobel Paints LLC (ANP), formerly known as The Glidden Company, to recover as much as $15 million they paid to their insured, Millennium Holdings LLC, for defense and settlement of lead paint lawsuits under policies issued from 1962 to 1970. The appellants -- Certain Underwriters of Lloyd's, London and Certain London Market Insurance Companies (the London Insurers) and Northern Assurance Company of America -- issued primary and excess policies insuring Glidden until 1967, when Glidden merged with SCM Corp. and the Insurers began issuing policies to the Glidden-Durkee Division of SCM. SCM went into liquidation in 1986 and transferred the former Glidden paints business and pigments business to separate subsidiaries. After further corporate transactions and name changes, ANP became the owner of the paints business and Millennium the owner of the pigment business.

ANP and Millennium inherited from their predecessors an indemnification agreement over which they disagreed, and Millennium brought this action in 2008 to compel ANP to indemnify it for its defense costs in lead paint litigation. While the action was pending, in 2011, Millennium settled a lead paint suit by the City of Santa Clara, California, for $8.5 million. The London Insurers and Northern Assurance contributed $3.2 million to Millennium's satisfaction of the settlement subject to a reservation of rights, contending the Santa Clara settlement was not covered by their policies. Two months later, Millennium and ANP settled their claims in this case, with ANP agreeing to pay Millennium $3 million to terminate any obligations under the indemnification agreement. Supreme Court subsequently granted the London Insurers' motion to intervene in this action and Northern Assurance joined as a plaintiff in 2012, all of them seeking a declaration that they were entitled to subrogate to Millennium's indemnification rights against ANP and thereby recover their payments for lead litigation defense and the Santa Clara settlement. In 2013, in related litigation in Ohio, the Court of Common Pleas ruled the Insurers' contribution to the Santa Clara settlement was not required by their policies and was therefore a "voluntary payment" for which they could not seek reimbursement from Millennium.

Supreme Court granted ANP's motion for summary judgment dismissing the Insurers' subrogation claims. It found ANP was contractually obligated to indemnify Millennium in the lead paint cases, but said the antisubrogation rule, which prohibits an insurer from recovering against its own insured for damages arising from a risk covered by its policy, barred the Insurers' claims. Although it was bound by a 2006 Ohio Supreme Court ruling that ANP's predecessor was not an insured under the policies after it was spun-off from SCM in 1986, the trial court said ANP's "lack of coverage is irrelevant" because "ANP's liability arose between 1962 and 1970, when the lead in SCM's products caused property damage. That liability was expressly covered by the subject policies and is the exact liability that the [Insurers] do not want to pay for." The court also noted that it could have precluded the Insurers from recovering their payments for the Santa Clara settlement under the voluntary payment doctrine, based on the 2013 Ohio trial court ruling. The Appellate Division, First Department affirmed without opinion.

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For respondent ANP (f/k/a Glidden): Maura Monaghan, Manhattan (212) 909-6000

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To be argued Tuesday, March 29, 2016

No. 60 People v Andre Harrison
No. 61 People v Marino Serrano

These appeals, filed by defendants who were deported by federal authorities based on their guilty pleas while their appeals were still pending, address the scope of People v Ventura (17 NY3d 675 [2011], which held the Appellate Division abused its discretion in dismissing direct appeals by two defendants on the ground they had been involuntarily deported and were no longer subject to the court's mandate. This Court said the defendants "had an absolute right to seek appellate review of their convictions" under CPL 450.10. It also observed that disposition of the issues raised "would result in either an affirmance or outright dismissal of the convictions" and "neither outcome would require the continued legal participation of defendants." The current cases concern whether Ventura is limited to direct appeals or to cases that would not result in a remittal for further proceedings.

Andre Harrison, a native of Jamaica, was charged with weapon possession in April 2008 for discarding a loaded pistol as he fled from an officer who was trying to ticket him for riding his bicycle on a sidewalk in Queens. He pled guilty to second-degree attempted criminal possession of a weapon and was sentenced to two years in prison. He filed a CPL 440.10 motion to vacate the conviction due to ineffective assistance of counsel, arguing his attorney, since disbarred, misadvised him that his plea would not result in deportation. Supreme Court denied his motion and the Appellate Division, Second Department granted him leave to appeal.

After Harrison was deported, the Appellate Division dismissed his appeal. Distinguishing Ventura, it said Harrison "is not directly appealing from his judgment of conviction as of right pursuant to CPL 450.10(1) but, rather, is appealing, by permission, from an order denying his motion to vacate his conviction.... Further, if the order were to be reversed ... and his plea of guilty vacated, the defendant's continued participation in the proceedings would be required." Harrison argues that "the logic and fundamental fairness concerns that underlie Ventura apply equally to appeals from 440 denials raising ineffective assistance of counsel claims," since such a claim "impacts the essential validity" of a plea, and appeal of a section 440 motion denial "may be, as a practical matter, the only opportunity a defendant has" for appellate review.

Marino Serrano, a native of Mexico, was charged with driving while intoxicated in July 2009 after he sideswiped a parked vehicle in Brooklyn. He pled guilty and was sentenced to 30 days in jail. On direct appeal, he argued his plea was involuntary because neither his attorney nor the court explained the rights he was waiving, but he was deported before it was decided.

The Appellate Term, Second Department agreed with him on the merits that his plea was invalid because neither the court nor defense counsel discussed "in any manner or form" the rights he was waiving, but it dismissed his appeal because, unlike Ventura, "reversal would be required and ... a penological purpose would be served by remitting the matter to the Criminal Court for all further proceedings.... The crime with which defendant was charged is ... a serious one, which could potentially serve as a predicate for an enhanced charge.... Thus, defendant's continued legal participation would be necessary, which is not possible because he has been deported." Serrano argues that, as in Ventura, his "direct appeal was his first and only opportunity for appellate review of the critical claim in his case." The dismissal "gave the prosecution the windfall of keeping 'on the books' a conviction which the Appellate Term recognized as in violation of due process.... Such treatment of an involuntarily deported person is inconsistent with Ventura and indeed, with due process."

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