

OHIO CASE SUMMARIES

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Ohio case summaries will be provided on a continuing basis every Wednesday and Friday of each week (excluding holidays). Summaries include brief descriptions of cases decided in the past week by the Ohio Supreme Court and lower appellate courts on issues related to insurance law. To discontinue receiving this service, please call Travis Vieux at 937-224-3333 or email Travis at tjvieux@green-law.com.

Court of Appeals: First District Court of Appeals, Hamilton County

Case Name: Cincinnati Ins. Co. v. ACE INA Holdings, Inc.
(2007-Ohio-4948)

Decided: October 19, 2007 (Posted October 19, 2007)

Issue: Primary and excess coverage, policy ambiguity, bad faith

Summary of Opinion: The First District ruled that where the records, certificates and policies for multi-year policies were incomplete, it was appropriate to examine extrinsic evidence to resolve an ambiguity as to a policy definition of "aggregate." Further, the court found rejected "the cause test" to determine a single occurrence and found the deemer clause did not limit coverage under the facts of this case. The bad faith allegation against ACE was found to be insufficient.

ACE wrote three primary insurance policies for insured Flexco, Policy 1 covering 1963 to 1966, Policy 2 from 1966 to 1969, and Policy 3 from 1969 to 1972. CIC issued excess coverage policies from 1967 to 1986. Each policy provided for an aggregate amount of \$300,000. Flexco was sued for defective manufacture of protective masks purported to protect against asbestos and silica. In 2004, ACE notified CIC that the primary coverage was exhausted. CIC brought a declaratory judgement action alleging that ACE owed an additional \$1,800,000 in primary coverage.

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The dispute turned on the language of the ACE policy as to whether “aggregate” meant an annual aggregate or an aggregate for the term of the multi-year policy, ie, \$300,000 for each policy year (\$2,700,000) or an aggregate for each policy term (\$900,000). ACE could not produce complete policies for any of the policies disputed and “aggregate” was not defined in any of the available materials. The trial court determined that because the complete contents of the multi-year policies were not available, (1) the term “aggregate” was ambiguous; (2) extrinsic evidence was admissible; (3) the extrinsic evidence supported the interpretation of an annual aggregate; (4) the underlying asbestos claims constituted multiple occurrences; and (5) that ACE did not lack good faith in denying coverage. Both parties appealed.

The First Circuit found that where an insurance policy is lost or destroyed by no act of bad faith, coverage may be proved by evidence other than the policy itself. Further, where the contract provisions are reasonably susceptible to more than one interpretation, the policy will be construed against the insurer and liberally in favor of the insured.

Looking at the policies, the court found four factors that permit extrinsic evidence in this case: (1) these were multi-year policies; (2) the policies were incomplete; (3) “aggregate” was not defined; and (4) the available materials were ambiguous and unclear as to whether “aggregate” was contemplated to mean annually or by term.

ACE was a successor in liability from AETNA and CIGNA and is judged to stand in their shoes. Looking at the prior performance of AETNA and CIGNA, extrinsic evidence showed that both AETNA and CIGNA had treated the aggregates as annual aggregates. Further, ACE’s records showed nine separate entries in its computer system, one for each coverage year. ACE claimed these entries reflecting annual aggregates were mistakes.

The court then looked at industry standards for the Insurance Ratings Board, which AETNA had been a member of in 1967. ACE’s own expert testified that ACE’s predecessors followed the IRB and that the IRB applied aggregate limits on an annual, rather than on a term, basis where multi-year policies were involved.

The court then compared the policy premiums to other similar coverage from other providers for the policy periods. The premiums paid mirrored the premiums paid for other annual aggregate coverage policies. The court found that common sense would dictate that Flexco would not have paid for an ACE policy that provided one-third of the coverage.

Finding that the annual aggregate coverage applied to the policy, the court then turned

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to the issue of whether the claims constituted a single or multiple occurrences under the policy. ACE proposed that the court should follow the “cause test” that the number of occurrences is determined by reference to the cause or causes of the damage or injury, rather than by the number of individual claims. ACE asserted that, under the “cause test,” Flexco’s manufacture and sale of the defective masks constituted a single occurrence under the terms of the policy.

The court rejected the cause test as applied to these facts, finding that the cause test was inapplicable to comprehensive general policies that covered claims spanning many years, over a broad geographic area, under a multitude of unrelated circumstances and where the injuries were caused by different asbestos-related exposures.

ACE also relied on a “deemer clause” that stated “[A]ll bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence. The court held the deemer clause was inapplicable to the facts of this case.

Lastly, the court turned to the claim of bad faith against ACE. Citing the standard in *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552 (1994), an insurer “fails to act in good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated on circumstances that furnish reasonable justification therefore.” Though the court found ACE’s position “bordering on feckless,” it did not rise to the level of bad faith.

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