Insurance Layering: Is an insured and/or insurer entitled to choose which claims to meet out of each layer of a programme of insurance so as to maximise their recovery?

The allocation of claims across policies can often give rise to disputes between insureds, insurers and/or reinsurers. In what is a welcome clarification, the Supreme Court has recently passed judgment on the order in which losses made by an insured exhaust layers of insurance cover under a programme of professional liability insurance. The case has more general application.

The Court upheld the view that an insured/insurer is not entitled to choose the order in which it presents claims so as to maximise recovery. Liabilities must be met from the "bottom up" and in the order in which they are ascertained.

The claim

The appeal of *Teal Assurance Company Limited (Appellant) v WR Berkely Insurance (Europe) Limited and others (Respondents) [2013] UKSC 57*, concerned claims by a US engineering firm Black and Veatch Corp (B), on a programme of professional liability insurance containing various layers. The programme provided for a deductible and a self-insured retention.

Above this was the primary layer underwritten by the insurer Lexington (L), which required BV to have paid the amount of the deductible and self-insured retention prior to L indemnifying BV under the terms of the policy.

Above the primary layer was an insurance "tower", being three successive layers insured by the Appellant Teal Assurance (T) the captive insurer, which reinsured its risks with various insurers.

The top layer was a "top and drop" policy also with T. This top layer (unlike the underlying layers, which were worldwide) excluded claims from the USA and Canada. This top and drop policy was reinsured with the respondents in the case.

All of the layers were subject to the same terms as the primary layer with L which stated that liability to pay shall not attach unless and until the insurers of the underlying policy(ies) have paid, admitted liability, or have been held liable to pay, the full amount of their indemnity.

T argued, however, that BV and T could chose the order in which insurance claims were paid by the lower layers of insurance cover to ensure that the remaining claims to be met by the top and drop policy were not claims from the USA and Canada. They also asserted that cover under a policy was only actually exhausted on payment by the insurer.

The Supreme Court unanimously upheld the ruling of the Court of Appeal and held that the claims should be met from the "bottom up" in the order in which BV's third party liabilities and expenses were ascertained. The term "paid" in the policies did not literally require a monetary disbursement to have been made, but rather was better interpreted as a measure of liability incurred.

Comment

- The decision indicates that express and clear wording will be necessary if the orthodox interpretation is to be departed from and liability is to be dealt with in any order other than that in which it is ascertained.
- It was noted by the Court that an insured can choose not to notify, withdraw or abandon a claim under a policy. The next claim would then be recoverable in the ordinary course. However, this was different to continuing claims whilst adjusting their priority, as BV and T were proposing.
- The court declined to address T's challenge to the long established principle of when the insurer's obligation to indemnify arises. This issue is subject to current law reform proposals.

continued overleaf

Contact

Burges Salmon's core insurance group brings together insurance sector expertise in Financial Services Regulation, Corporate, Commercial and Dispute Resolution.

Kari McCormick
Partner
+44(0)117 902 6620
kari.mccormick@burges-salmon.com

Kari has a wealth of experience in insurance law and regulation, acting for insurance companies, banks and corporates in many different jurisdictions on both contentious and non-contentious matters.

Hannah Miller
Solicitor
+44 (0) 117 307 6291
hannah.braye@burges-salmon.com

Hannah is a member of Burges Salmon's Insurance group.

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

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