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Pilkington Bests Insurers In Epic Coverage Spat

By **Samuel Howard**

Law360, New York (July 28, 2009) -- Dealing a resounding blow to Liberty Mutual Insurance Co. and One Beacon Insurance Co., a federal judge has determined that Pilkington North America Inc. bears its predecessor-in-interest's right to sue the carriers for the cost of cleaning up sites contaminated decades ago and for defense against any related asbestos claims.

Weighing in on a dispute that has gone up to the state's high court and back, Judge James G. Carr of the U.S. District Court for the Northern District of Ohio granted summary judgment to Pilkington on Monday. He held that the choses in action — the right to sue or receive insurance money — relating to coverage for pre-existing environmental liabilities transferred to the glass manufacturer along with original policyholder's assets in 1986.

The insurance companies contended in vain that Pilkington could not sue for coverage of the cleanup costs or make any claim on the insurance money because the choses in action to insurance benefits were not included in the transfer and assumption agreement, or TAA, that Pilkington entered when it acquired Libbey Owens Ford Co.

"Under Ohio law, choses in action are personal property," Judge Carr said. "Choses in action arising under an insurance policy are transferable as assets even if the insurance policy contains an anti-assignment clause. Thus, in accordance with the TAA's plain and unambiguous language, TAA transferred assets ... to LOF Glass/Pilkington, including the choses in action at issue in this case."

The insurers argued that Pilkington's coverage is limited to a \$25 million indemnification provision intended to cover Libbey Owens' potential environmental liabilities at the time of Pilkington's acquisition, according to the order.

The \$25 million indemnity fund has long been exhausted, and the court's decision now clears the way for Pilkington to assert claims in connection with the massive cleanup of Libbey Owens' contaminated sand ponds, which contain a slurry of arsenic and ground glass.

Seth Tucker, counsel for Pilkington and a partner at Covington & Burling LLP, applauded the court's confirmation of the plaintiff's rights and looked forward to pressing ahead with the suit, he said.

"The ruling vindicates Pilkington's long-standing position that it has rights to coverage under policies that insured the Libbey Owens Ford glass business," Tucker said. "Pilkington is eager to bring the case to trial quickly in order to help fund its environmental cleanup obligations stemming from those historic manufacturing operations."

Judge Carr also determined that the insurers were obligated to provide defense to Pilkington against any asbestos personal injury claims in connection with Libbey Owens' business.

The Ohio Supreme Court set the stage for Friday's decision in December 2006, ruling that a chose in action is transferable along with the assets and liabilities of an acquired entity.

While the state high court resolved the issue of whether a chose in action was transferable, the insurers maintained that in the case of Libbey Owens' acquisition the rights were not passed along to Pilkington, Tucker said.

Representatives for Liberty Mutual could not be reached for comment Tuesday, and a spokeswoman for One Beacon declined to comment on pending litigation, citing company policy.

Originally filed in an Ohio state court, the case was transferred to the district court in 2001. Pilkington seeks coverage for all liability and expense related to Libbey Owens' properties, including three sand ponds in Ohio and Illinois as well as a commercial oil site in Ohio.

Travelers reached a settlement with Pilkington in 2006, resolving claims for coverage in connection with the commercial oil site.

Pilkington is represented by Covington & Burling LLP.

Liberty Mutual is represented by Plunkett & Cooney PC, Ropes & Gray LLP and Manahan Pietrykowski DeLaney & Wasielewski.

One Beacon is represented by White & Williams LLP and McCarthy Lebit Crystal & Liffman Co. LPA.

The case is Pilkington North America Inc. v. Travelers Casualty & Surety Co. et al., case number 3:01-cv-07617, in the U.S. District Court for the Northern District of Ohio.