

New York Court of Appeals Holds That Multiyear Excess Policies Provide Annual Limits of Liability

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Proskauer's Insurance Recovery and Appellate Groups recently achieved a major victory for Union Carbide ("UCC") in the New York Court of Appeals in a decision that affirms the importance of following form provisions to promote consistency in the kind of multiyear insurance programs commonly used by major companies and protects the annualized limits normally contemplated by such programs. In *Union Carbide Corp. v. Affiliated FM Insurance Co.*, the New York Court of Appeals held that multiyear excess liability policies that followed form to underlying policies with annual aggregate products limits of liability likewise provided annual limits, even though the declarations to the excess policies did not state that the aggregate limits provided were annual rather than for the full three-year period of the policies in question. Thus, the court determined that the policies provided up to three times the amount of coverage that the insurers contended they were obligated to pay.

In the 1970s, UCC built a coverage program consisting of multiple layers of excess policies with multiyear terms. UCC's first-layer excess insurers issued policies with three-year terms, which provided aggregate limits of \$5 million for products liability. These underlying policies contained language providing that the aggregate limits in question would be the limits for each consecutive 12 months of the policy period. Thus, it was clear and undisputed that the underlying policies provided three annual products limits, up to \$5 million each. Above these policies, UCC purchased multiple layers of subscription form excess policies, each of which provided that "subject to the declarations set forth below," the insurance provided would "follow all the terms, insuring agreements, definitions, conditions and exclusions" of the underlying first layer policy. The declarations in the policies at issue stated that the limit of liability was "\$30,000,000. each occurrence and in the aggregate excess of \$70,000,000.," but did not state whether that "aggregate" was for the entire three-year policy term or, like the underlying coverage, annual.

UCC sold asbestos in the 1970s; claims were made against it for product liability; and it incurred substantial defense costs, settlements and judgments. Some of its excess insurers refused to pay on these claims, so UCC sued them. One issue in the coverage litigation was whether UCC's excess insurers were required to pay annual aggregate products limits. The insurers maintained that the limits were not annualized because the declarations to their policies did not specify annual aggregate limits and trumped the following form language that would otherwise require the excess policies to follow the underlying, annualized policies, and because the subscription pages, which identified "total" limits of liability for each subscribing insurer, also did not specify that the total was payable annually. UCC maintained that the following form language in the excess policies made clear that the excess policies followed the underlying policies with respect to annualization; that the policies could not be applied if the following form language was read out of them as the insurers urged; and that abundant extrinsic evidence supported the conclusion that the parties intended the excess policies to be consistent with the underlying parties with respect to annual aggregates.

On the parties' cross-motions, the trial court granted UCC partial summary judgment, holding that the policies provided annual aggregate limits. The insurers appealed and a divided Appellate Division held for the insurers, concluding that because the following form language in the excess policy was "subject to" the declarations, and the declarations did not mention annual limits, the aggregate limits stated there were for the entire three-year policy period. UCC obtained permission to appeal to the state's highest court.

The New York Court of Appeals concluded that UCC should be granted summary judgment on the annualization issue, noting that the following form clauses in the excess policies "serve[d] the important purpose of allowing an insured to obtain uniform coverage," and that it was "implausible" that an insured with a large and complex coverage program would buy "policies that differed, as between excess and policy layers, in the time over which the policy limits were spread." Additionally, noting that the excess policies at issue afforded identical aggregate and per-occurrence limits of \$30 million, the court observed that if \$30 million was the most the policies would pay under any conditions (as the insurers argued), there would be no reason for having separate aggregate and per-occurrence limits – an anomaly for which the insurers had no explanation.[\[1\]](#)

This is the first time that any state’s high court has addressed the issue of annualization of multiyear policies, particularly in the context of a following form program. Resolution of that issue can potentially multiply or decimate coverage for policyholders with multiyear, multilayers coverage programs and substantial, long-term liability risks. As the Appellate Division decision that was overruled illustrates, many courts struggle with the challenge of interpreting the terse policy language of excess policies to reach a result in keeping with the parties’ intentions and the over all coverage program. The Court of Appeals’ *Union Carbide* decision provides valuable guidance to courts that confront this critical issue in the future.

[\[1\]](#) In a separate holding, the Court of Appeals also concluded that there was an issue of fact as to whether UCC was entitled to an additional full \$5 million aggregate limit of liability for a two-month “stub” extension period for which UCC had purchased coverage extending the coverage afforded by one of its three-year excess policies.

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