



## **Reinsurer and Third Party Claims Administrators Not Proper Defendants in Asbestos Coverage Action**

Mark A. Rabinowitz • 312.382.3150 • [mrabinowitz@cozen.com](mailto:mrabinowitz@cozen.com)

Daniel R. Johnson • 312.382.3188 • [djohnson@cozen.com](mailto:djohnson@cozen.com)

On February 29, 2012, Judge Rita Novak, of the Circuit Court of Cook County, Ill., issued a ruling of major significance granting the Motion to Dismiss filed by Cozen O'Connor on behalf of its clients and holding that a policyholder could not hold a reinsurer or third-party claims administrators liable for allegedly assuming the direct insurer's insuring obligations or tortious interference. Navistar, Inc. (Navistar) filed a declaratory judgment action against 10 primary and excess level insurers seeking to recover losses allegedly incurred by thousands of plaintiffs who sued Navistar in underlying actions as a result of their alleged exposure to asbestos-containing products. Navistar later amended its complaint to assert claims against National Indemnity Company (NICO), the reinsurer of four of the underlying direct insurers, and Resolute Management, Inc. and Resolute Management Services Limited (collectively, Resolute), the claims handlers for those insurers. According to Navistar, NICO and Resolute (the NICO entities) assumed the direct insurers' obligations by "assum[ing] full control over claims handling and collection responsibilities for the claims made under the policies that the agreements purport to 'reinsure.'" Navistar further alleged that NICO's reinsurance contracts with the direct insurers "are not traditional reinsurance and were intended to directly benefit" Navistar. Navistar also alleged that the NICO entities had tortiously interfered with Navistar's policies with its direct insurers by inducing the direct insurers to breach their policy obligations by failing to pay or settle Navistar's claims.

The NICO entities moved to dismiss the claims on the basis that Navistar's allegations that the NICO entities assumed the insurers' obligations were conclusory, factually unsupported and refuted by the parties' actual agreements. Resolute also sought to dismiss Navistar's tortious interference claim on the grounds that a party exercising business judgment

on behalf of another pursuant to a contractual obligation is protected by law from claims for tortious interference asserted by third parties.

The court began by observing that:

Generally, a contract of reinsurance is an agreement whereby a reinsurer promises to indemnify an insurer if the insurer is compelled to pay its insured under a direct insurance policy. As a separate agreement, solely between the reinsurer and the insurer, the ordinary reinsurance contract is totally distinct from the underlying policy and creates no privity whatsoever between the reinsurer and the underlying policyholder. Accordingly, an underlying insured cannot maintain an action premised upon a contract of reinsurance absent special circumstances.

The court noted that "the express provisions of the operative agreements" disavow any third party rights and, therefore, "foreclose any contention that the agreements themselves establish any contractual rights of Navistar as against the NICO defendants" because they "made abundantly clear" that "they had no intention when they entered into this contract" to "confer any rights on any third-parties as a third-party beneficiary to their contract."

The court also rejected Navistar's argument that other provisions in the agreements and the surrounding circumstances are sufficient to survive a motion to dismiss and permit discovery to investigate the true nature of the parties' agreements. The court held that its "touchstone" for determining whether or not the NICO entities assumed the insurers' obligations is whether the reinsurance agreements were contracts of indemnity or assumption.

The court stated that “the notion of special circumstances is an exception” that should be “confined to special situations” and not interpreted “so broadly as to swallow the rule.” The court held, “the language of the contracts here, the relationships of the reinsurers and certain insuring defendants” and Navistar’s allegations do not “permit the court to find the kind of special circumstances that would create a right of action in the insured, here Navistar, as against the reinsurers.”

Turning to the tortious interference claim, the court stated that “a defendant is privileged to interfere with another’s contract to protect a conflicting interest which the law deems to be of equal or greater than the plaintiff’s contractual right.” Navistar argued an exception applied because the NICO entities had an incentive to delay or deny the payment of the insurers’ claims since NICO’s reinsurance limits never will be reached and they “only make money if they can delay payments long enough to obtain a return on their invested funds before paying the claims.” The court held that Navistar’s “allegations do not meet that standard” because whether

NICO’s reinsurance limits ever will be reached is “unknowable” at this time and “controlling the payments to reduce claims so that they fall within the limits of the reinsuring obligations benefits the certain insuring defendants as well as the reinsurers and, therefore does not support the proposition that NICO is acting solely for its own benefit.” The court, therefore, dismissed the tortious interference claims.

Undoubtedly, this ruling will not deter policyholders from seeking to join a reinsurer or claims administrator as a defendant in a coverage action. However, this decision suggests that reinsurers and claims administrators are not proper defendants under certain circumstances.

---

*To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact Mark A. Rabinowitz at 312.382.3150 or [mrabinowitz@cozen.com](mailto:mrabinowitz@cozen.com) or Daniel R. Johnson at 312.382.3188 or [djohnson@cozen.com](mailto:djohnson@cozen.com).*