

# Carter-Wallace: A Ticket To Ride For Excess Carriers?

by Peter J. Lynch

Until July 1998, upper level excess carriers involved in New Jersey coverage cases had few, if any, options available to them to obtain a dismissal from a lawsuit which seemed unlikely to impact their coverage. For example, a carrier whose coverage incepted excess of \$15 million, when sued by an insured with out of pocket costs for environmental remediation of only one or two million dollars might well feel the injustice of increasing litigation and transaction costs, without being able to do anything about it. Such a situation obviously raised the question of whether there was a real controversy (a "justiciable controversy") between the parties, but a dismissal motion based upon those grounds faced stiff opposition. The insured could point to the uncertainty of future expenses, the near certainty that the regulators involved would ask for more and more expensive clean up, the carriers' typical contractual promise to be liable for "all sums," and New Jersey's Entire Controversy Doctrine as support for the need to keep all its carriers in the litigation, regardless of how unlikely their ultimate involvement seemed.

Without a justiciability argument, excess carriers have usually been forced to remain in a case, monitoring and participating in it to the extent appropriate under their particular insurance contract. Alternatives such as a reverse bifurcated "damages first" trial, or simply ignoring the litigation as unlikely to impact coverage would usually be impractical or unavailable.

In July 1998, however, the New Jersey Supreme Court decided Carter-Wallace, Inc. v. Admiral Insurance, et al., 154 NJ 312 (1988). This case involved a second layer excess carrier, whose coverage was impacted only when the Policyholder's damages exhausted \$5.1 million of underlying coverage. The Policyholder had sent some of its waste to a landfill later designated as a Superfund site, and was participating as a "potentially responsible party" in the clean up of the site. The lawsuit involved insurance policies extending over seventeen year "trigger period," and the Court held that the costs must be allocated to each year of the coverage, prorated by the available limits within each year, and that within each year all primary and underlying excess coverages would have to be exhausted before the second layer excess carrier would be obligated to pay on its policy.

Therefore, Carter-Wallace offers a way for an upper level excess carrier to demonstrate the mathematical likelihood - or unlikelihood - that a given claim will have no impact on its coverage. For example, a carrier might argue as follows:

1. As of January 1, 1999, Policyholder Corporation admits that it has incurred \$100 million in damages.
2. Between 1950 and 1969, the twenty years Policyholder operated its factory in Mill Town, New Jersey, and polluted the site, it admits that it purchased \$300 million in insurance.
3. Defendant Insurer issued a single second layer excess policy to Policyholder, in 1960, for \$5 million excess of \$10 million.
4. During the 1960-61 policy year, there was \$15 million in available insurance. This was 5% of the total insurance available.
5. 5% of Policyholder's total claim is allocated to the 1960-61 policy year. This is a total of \$5 million.
6. Therefore, since Defendant Insurer is not obligated to pay until \$10 million of underlying coverage has been exhausted, Defendant Insurer should be dismissed from the lawsuit.

Policyholder's counsel could be expected to oppose the motion with arguments such as the following:

First, the Policyholder's liability at some other site or sites has not been determined; second, the amount of total damages is subject to change; third, the "trigger period" to be used in Carter-Wallace calculations is uncertain, and must be the subject of further discovery; and fourth, language in the policies at issue, such as that dealing with aggregates, complicates the Carter-Wallace calculations.

In response, the Court should be urged to require the Policyholder to proceed with its lawsuit on the basis of the insurance contract and the law, rather than possibilities and educated guesses about future liabilities and damages. Trigger periods should be fairly easy to determine, especially under New Jersey law. Disputes about contractual language such as aggregates should not delay motions to dismiss under Carter-Wallace, since these involve strictly legal determinations which can and should be made by the Court.

Even if the Court denies a motion to dismiss, or will not permit the parties to pursue dismissal motions, there are options available to an excess carrier now that the Carter-Wallace decision has been handed down. The Court can be asked to stay the discovery obligations of defendant carriers with policy attachment points above a level that seems likely to be the highest impacted by a Policyholder's claims. The Court may require that non-participating carriers agree to be bound by procedural and substantive decisions affecting their liability in the event that the layers involving these carriers are later reached. If the Court can be convinced to dismiss these carriers it will probably be without prejudice to their being brought back into the litigation if circumstances later warrant. In Manorcare, Inc., et al. v. Aetna Casualty & Surety Co., et al., Judge Wells of Burlington County granted such a motion, and stated that "implicit in all of this is an acknowledgement that the carriers remain 'on the risk' under their policies with [the] exact extent of their exposure awaiting appropriate allocation proceedings." Depending upon their layer of attachment, excess carriers might also be exempted from general discovery obligations, but be required to provide policy details or other information "critical to an eventual, horizontal or vertical allocation which approaches their respective attachment points." See, Manorcare.

In Pfizer, Inc. v. Employers Insurance of Wausau, a decision handed down by Judge Hamlin of Middlesex County in January of 1998 approximately six months before the Carter-Wallace decision, the Court dismissed higher level carriers on a lack of judiability theory because there was no evidence that their layers would be reached. The Court noted that it had the power to "dismiss from litigation without prejudice such parties whose coverage is not likely to be implicated. This reflects a worthy and necessary policy for the Court not to be concerned with issues that may never arise or that are not properly before the Court. They are unnecessary complications, that increase the costs of litigation between the parties. . . ." The Carter-Wallace decision, which followed the ruling in Pfizer by about six months, now provides the New Jersey Supreme Court's approval of a more general and mathematical basis by which a trial Court can be urged to implement the policy goals stated in the Pfizer ruling.

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