INTRODUCTION
Asbestos-related bankruptcies promise to serve as the backdrop for the resolution of a number of important insurance coverage questions over the next several years.1 The recent asbestos bankruptcies have already produced at least one noteworthy ruling2 and will no doubt give rise to a number of other important coverage issues in the future. Consequently, policyholders and their insurers may find of particular significance a recent unpublished decision, arising out of an earlier asbestos bankruptcy,3 of the California Superior Court. In Fuller-Austin Insulation Co. v. Fireman’s Fund Insurance Co.,4 the court rejected virtually every position advanced by the insurers of Fuller-Austin Insulation Co. (“Fuller-Austin”), making several important pro-coverage rulings on a number of key insurance issues. Certain significant aspects of the decision are discussed below.

BACKGROUND
The Fuller-Austin ruling arose out of a declaratory judgment action the company filed in California against its liability insurers prior to its bankruptcy filing. Fuller-Austin sought a declaration regarding its insurers’ obligations to provide coverage under various primary, umbrella and excess policies issued between 1944 and 1985 for bodily injury claims allegedly arising out of exposure to asbestos-containing products installed or removed by Fuller-Austin.5 On September 4, 1998, Fuller-Austin filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware, submitting a “pre-packaged” bankruptcy plan that was confirmed quickly. Under the plan, Fuller-Austin obtained a discharge of its asbestos-related liabilities, and the pending and future asbestos claims against it were channeled to a settlement trust (the “Trust”) created under the plan pursuant to 11 U.S.C. § 524(g). Ultimately, the plan was confirmed over objections by the insurers that were defendants in the declaratory action, objections which provide an important backdrop for considering the issues ultimately addressed in the Fuller-Austin decision.

Specifically, the objecting insurers raised challenges to confirmation on the grounds that the confirmation of the plan would “summarily adjudicate the liability of excess carriers under excess insurance policies.”6 The insurers claimed that confirmation of the plan would impose a judgment of liability against them, that the debtor would argue that such liability determination was binding, and that any effort to so bind the insurers violated the insurance contracts.7 Consequently, the objecting insurers argued that they had standing to object to the confirmation of the plan.

The principal provision of the proposed plan which gave rise to the insurers’ objections provided as follows:

**Liability for Asbestos Claims.** Unless the Bankruptcy Court orders otherwise, Confirmation shall constitute approval of a settlement pursuant to Bankruptcy Rule 9019 whereby Fuller-Austin and the Trust will be held to be liable for Asbestos Claims in an amount to be determined by the Bankruptcy Court, which shall be a determination of a sum that Fuller-Austin and the Trust

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shall be legally obligated to pay, in the same amount. Furthermore, unless the Bankruptcy Court orders otherwise, an Asbestos Claim that is Allowed shall constitute a judgment of liability against Fuller-Austin and the Trust shall be legally obligated to pay.8

In addition, the plan had provisions with respect to preservation of insurance claims that made clear that the Trust would be the successor to Fuller-Austin in pursuing insurance recoveries and would be similarly liable for the asbestos claims, and contained a provision stating that only the Trust could file objections to asbestos claims after the effective date of the plan.9 After objections from the insurers, the debtor ultimately amended the proposed plan of reorganization. That amendment eliminated the concept of an “Allowed Aggregate Asbestos Claim” (as addressed above) and added a new provision that provided for the maintenance of the California coverage litigation and adjudication of the claims and defenses of the objecting insurers in that action.10 In reliance on this amendment, the Court concluded that the rights of the objecting insurers were preserved for adjudication in the coverage litigation, and therefore ruled that the insurers did not have standing to object to confirmation of the plan.11

DISCUSSION
The Effect of Plan Confirmation:
Fuller-Austin Follows UNR

As demonstrated by the discussion above regarding the battles between Fuller-Austin and certain of its insurers at plan confirmation, one of the most important issues facing the California court in that coverage litigation was whether the confirmation of Fuller-Austin’s bankruptcy plan constituted a judgment or settlement that would give rise to the insurers’ coverage obligations. Fuller-Austin contended that the confirmation of its plan did constitute a judgment resolving its asbestos liabilities, and hence that the insurers were required to provide coverage immediately for the full amount of the asbestos liabilities resolved by the plan’s confirmation. The insurers argued that confirmation of the plan did not affect their obligations under the policies and that they would be required to provide coverage, if ever, only upon payment by Fuller-Austin to individual asbestos claimants. The insurers further asserted that the plan could not constitute a judgment because there was no “actual trial” of Fuller-Austin’s asbestos liabilities, and the plan did not constitute a settlement giving rise to their obligations because their consent to such a settlement was, according to the insurers, a prerequisite to coverage based on the “no action” condition contained in the policies.

The Court rejected the insurers’ positions, concluding that the confirmation of Fuller-Austin’s bankruptcy plan did constitute a judgment that gave rise to the insurers’ obligations. The Court noted that Fuller-Austin had put its carriers on notice that it would entertain global settlement negotiations with representatives of the present and future asbestos claimants in an attempt to reach a consensual bankruptcy plan resolving those liabilities and that Fuller-Austin had provided notice to the insurers of its bankruptcy plan and the related hearings. At the confirmation hearings, the bankruptcy court was required to assess the proposed plan to determine whether it was proposed in good faith and was not collusive. As such, the confirmation hearings satisfied the requirement in the “no action” clause of an “actual trial.”12

Following the decision in UNR Industries, Inc. v. Continental Insurance Co.,13 the Court concluded that the insurers are required to provide coverage for the full amount of the liability imposed on Fuller-Austin as a result of plan confirmation. The Court rejected the insurers’ argument that they were liable only for the amounts actually paid by Fuller-Austin and instead found that the insurers were liable for the full amount of Fuller-Austin’s liability.14

OTHER IMPORTANT COVERAGE RULINGS

In addition to its ruling relating to the effect of the confirmation of Fuller-Austin’s bankruptcy plan, the Court made several decisions on insurance issues that may be of interest to policyholders and insurers outside the context of bankruptcy-related cases.

For instance, the Court made a significant ruling regarding the trigger of coverage applicable under Louisiana law in the context of asbestos bodily injury claims. Prior to Fuller-Austin, the seminal decision on the trigger of coverage under Louisiana law in the context of asbestos bodily injury claims was Cole v. Celotex Corp.15 In Cole, the Louisiana Supreme Court applied the “exposure” trigger theory in a dispute regarding coverage for asbestos bodily injury claims. The Louisiana Supreme Court though, as noted in a concurring opinion in Cole, had not been required in that case to resolve whether the continuous trigger theory may be applied.

Echoing that concurring opinion, the Court in Fuller-Austin held that, because it would “fulfill Louisiana’s stated policy of maximizing insurance coverage under the circumstances presented by Fuller-Austin,” a continuous trigger of coverage applied to the policies governed by Louisiana law.16

Because application of the continuous trigger of coverage would result in the triggering of multiple policies, the Court in Fuller-Austin was required to address the extent to which each policy was obligated to respond. Adopting the pro-policyholder approach to the allocation of coverage, the Court held:
Each triggered policy has an independent obligation to pay in full up to policy limits any indemnity costs on an asbestos bodily injury claim and, if the policy contains a defense obligation, to pay in full any defense costs on the claim. Fuller-Austin is not required to share in the indemnity or defense costs of a claim based upon any uninsured or self-insured periods of time. 18

The Court also rejected the insurers’ argument that there should be “horizontal exhaustion” or exhaustion of all primary insurance before excess insurance could be accessed. In so doing, the Court distinguished “underlying insurance,” which determines the attachment point of excess insurance, from “other insurance,” which relates to a condition contained in Fuller-Austin’s policies that governs contribution between insurers:

In contrast to “other insurance,” “underlying insurance,” which is also defined within all applicable policies, sets the minimum attachment point that must be reached before that specific policy must respond. “Underlying insurance” refers only to the insurance identified in a specific policy as being specifically under that excess policy . . . . Accordingly, by definition, “underlying insurance” cannot include insurance policies issued in other policy periods. [The insurers’] attempt to expand the definition of “underlying insurance” to embrace all policies at lower levels or layers of coverage in all years does not comport with the language of the policies and is inconsistent with the case law [which] consistently distinguishes “underlying insurance” from “other insurance.” 19

The Court issued somewhat inconsistent rulings as to whether or not a solvent excess insurer is obligated to “drop down” to the extent that an underlying insurer is insolvent. On the one hand, the Court seemed to order such drop down, stating that “an excess insurance policy responds once the loss exceeds the available solvent coverage at lower layers.” 20 However, the Court then noted that Fuller-Austin “is not seeking to have any of the insurance companies ‘drop down’ below their stated attachment points and fill a gap caused by the insolvency of an underlying insurance company” and hence that, “the Court finds that, in accordance with its rulings on horizontal exhaustion/allocation and the impact of insolvencies, no excess insurance company is being required to ‘drop down,’ below its stated attachment point.” 21

CONCLUSION

In summary, the Fuller-Austin decision is significant for policyholders who seek to require insurers immediately to provide coverage for the full amount of their asbestos liabilities at the time of plan confirmation. Because of the importance of this issue, the recent asbestos-related bankruptcies are likely to give rise to further rulings on the effect of plan confirmation. Furthermore, the Fuller-Austin decision may generally be of interest to those involved in coverage litigation in connection with asbestos-related liabilities.

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ENDNOTES


2 Certain Underwriters at Lloyd’s, et al. v. Babcock & Wilcox Co., Nos. 01-0912 and 01-1187, 2002 U.S. Dist. LEXIS 874 (E.D. La. Jan. 4, 2002) (granting policyholders’ motions for summary judgment and ruling, inter alia, that The Babcock & Wilcox Company did not materially breach or anticipatorily breach its coverage-in-place agreement with the London insurers by submitting a proposed plan of reorganization that contemplated the possible assignment of the agreement to a claims-handling trust). (Kirkpatrick & Lockhart LLP represented The Babcock & Wilcox Company in the case.)

3 In re: Fuller-Austin Insulation Co., No. 98-02038 (Bankr. D. Del.).


5 During the pendency of the case, Fuller-Austin settled with all of its primary insurers and certain of its umbrella and excess insurers.

6 In re: Fuller-Austin Insulation, 1999 WL 812388, at *1 (quoting objections to approval of the disclosure statement and confirmation of the plan filed by insurers).

7 Id.

8 Id. at *2 (emphasis in original).

9 Id. at *2.

10 The provision provided as follows:

   Maintenance of the Coverage Litigation. Notwithstanding any other provision in this Plan, all claims and defenses of any Asbestos Insurance Company that is a party to the Coverage Litigation shall be adjudicated in the Coverage Litigation, and all rights of the Asbestos Insurance Companies under the Asbestos Insurance Policies shall remain unaffected by the Plan and the Confirmation Order.

   Id. (emphasis in original).

11 Id. at *3.

12 Statement of Decision at *20-22. Because the Court found the confirmation of the bankruptcy plan to constitute an adjudication, it concluded that the issue of whether or not the insurers had consented to the plan pursuant to the “no action” conditions in their policies to be “moot.” The Court noted though that, even if the confirmation of the plan constituted a settlement rather than a judgment, the “no action” clause was satisfied because Fuller-Austin had taken sufficient steps to permit the insurers to participate in the negotiations and proceedings leading up to confirmation of its bankruptcy plan. Id. at *23.


14 As referenced above, unlike UNR, in which the aggregate value of the asbestos claims (both present and future) had been determined in the bankruptcy proceedings with that determination binding UNR’s insurers, the parties in Fuller-Austin had agreed that the valuation of Fuller-Austin’s asbestos claims would be preserved and presented to a jury for determination. Thus, in a subsequent phase of the case, Fuller-Austin will be entitled to present evidence to a jury regarding the amount of its liability to present and future claimants. In this regard, the Court found that Fuller-Austin’s experts, Dr. Peterson and Dr. Florence, qualified as experts and that their testimony and methodologies in valuing asbestos liabilities were admissible: “The ability to calculate present and future asbestos liabilities and the methodologies employed by Fuller-Austin’s experts, Dr. Peterson and Dr. Florence, have been recognized in published opinions.” Statement of Decision, at *26.

15 Certain of the policies at issue in Fuller-Austin were governed by Louisiana law while others were governed by California law. The parties stipulated to the use of the continuous trigger of coverage for those policies governed by California law.


17 Statement of Decision, at *7.

18 Id. at *8.

19 Id. at *9 (citations omitted; emphasis in original).

20 Id. at *10 (emphasis added).

21 Id.