Buchman in Law360: NJ Justices Deliver Broad 'Dual Capacity' Coverage Carveout

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In an article for *Law360*, Haynes Boone Partner **Barry Buchman** comments on the New Jersey Supreme Court's recent ruling applying a dual-capacity exclusion, which allowed Berkley Insurance to deny coverage to Mist Pharmaceuticals and its former chairman.

Buchman focuses on two issues: the breadth of the exclusion and whether Berkley acted fairly when it withdrew coverage after years of defending under a reservation of rights.

Read an excerpt below.

Barry Buchman of Haynes Boone echoed a dissenting opinion's criticism that the majority took an all-or-nothing approach to whether Berkley could withdraw coverage for all costs.

"There is a world where there's an allocation between covered and uncovered allegations in the underlying litigation," he told Law360. …

Buchman said that the principles of construction generally put the burden of proving an exclusion to the carrier, who had to show the exclusion is capable of no other reasonable construction.

He noted that Berkley could have used language similar to anti-concurrent causation clauses, which stipulate that when a loss is caused by both covered and uncovered perils, the whole loss is excluded.
"The carrier is the drafter of the policy, and it could have used language to make the exclusion clearer, and if it didn't do that, it bears the consequence of that lack of precision," he said. …

For Buchman, whether a reasonable policyholder could believe it had partial coverage was a factual question.

"Even if you weren't going to rule outright for the policyholder, there, arguably, at least, should've been an opportunity for a jury to weigh whether the carrier waited so long that it actually did prejudice the insured or create at least a reasonable belief in them that that wouldn't happen," he said. …

Buchman also noted that D&O cases are often tied to the state where a company is incorporated. "As a practical matter, how many future D&O coverage disputes are going to be governed by New Jersey law? Probably not as many as those that will be governed by Delaware law," he said.

Read the full article on *Law360* **here**.

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