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REBUTTAL: Pa. Coverage Law Hasn't Traveled Back To '80s

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Suzan F. Charlton

In the wake of the Pennsylvania Supreme Court's recent 3-2 decision in Pennsylvania National Mutual Casualty Insurance Co. v. St. John, No. 86 MAP 2012, 2014 Pa. Lexis 3313 (Dec. 15, 2014), some have suggested that Pennsylvania law has suddenly traveled backward in time, to a decade when the "manifestation" trigger was still considered a viable insurance coverage theory. This time-travel scenario would magically obliterate all the Pennsylvania case law since the late 1980s where a multi-year trigger resolution was applied to claims involving long-tail injury or damage.[1] But that "Back to the Future" reading of St. John may be a fantasy — no less so than the classic 1985 film comedy of the same name.

In St. John, a contractor negligently installed a plumbing system that allowed "gray water" to poison a dairy herd's drinking water, resulting in decreased milk production and diseases in the herd. The problems with the herd were noticed within the first year, but the cause was not determined until two years later.

The dairy farm sued the plumbing contractor; the contractor sought coverage from its liability insurer, which had insured the contractor for all three years between installation of the plumbing system and discovery of the cause of the damage. A majority of the Pennsylvania Supreme Court, borrowing from a decades-old Superior Court malpractice case, held that only the first policy was required to cover the contractor's liability, i.e., the policy in effect "when either bodily injury or property damage becomes reasonably apparent."[2] Thus, according to the authors of a recent Law360 article on this subject, the "manifestation" trigger was revived in Pennsylvania.

Or was it?

Unlike J.H. France Refractories Co. v. Allstate Insurance Co.,[3] 534 Pa. 29, 37-39, 626 A.2d 502, 507 (1993) and a plethora of other multiple-trigger decisions involving long-term, latent injury and damage, the St. John decision involved observable, short-term property damage, as well as more recent policy language limiting coverage for any known "continuation, change or resumption of that 'bodily injury' or 'property damage' after the end of the policy period."[4] These distinguishing factors necessarily limit St. John to its own somewhat unusual facts.

Sick Cows Are Not Like Polluted Aquifers or Latent Diseases

The St. John case involved perceivable, short-term property damage — a dairy herd that was sickened within a year after the herd first began drinking contaminated water. The majority opinion in St. John distinguished the dairy damage case from multiple-trigger cases like J.H. France and the seminal Keene decision,[5] on the ground that the dairy's "damage was not concealed and undiscoverable for decades," and "did not lay dormant for an extended period," in contrast to the asbestos cases.[6]

This distinction makes all the difference. The latent, long-term damage in J.H. France and Keene, as well as that in other well-known cases decided under Pennsylvania law,[7] took place over decades, not a few years, and occurred underground or otherwise out of plain view. St. John thus has no application to most environmental pollution cases or long-term, latent bodily injury claims, which are governed by Pennsylvania's "multiple trigger" rule. Indeed, the St. John majority acknowledged as much:

The "multiple trigger" theory is applied in latent disease cases, like asbestosis or mesothelioma, because such injuries may not manifest themselves until a considerable time after the initial exposure causing injury occurs. The overriding concern in latent disease cases is that application of the D'Auria "first manifestation" rule would allow insurance companies to terminate coverage during the long latency period (of asbestosis); effectively shifting the burden of future claims away from the insurer to the insured (manufacturers of asbestos), even though the exposure causing injury occurred during periods of insurance coverage.[8]

Thus, the Supreme Court left a key justification for utilizing the multiple trigger theory of J.H. France intact.

The concern about shifting risk back onto a policyholder that had purchased liability insurance during a long latency period is not merely hypothetical. Coverage for latent ongoing disease or continuing environmental contamination was available under policies that covered "damage during the policy period" in the 1960s, '70s and early '80s. But the insurance industry had entirely cut off that protection by 1986, with the advent of so-called "absolute" pollution and asbestos exclusions and "claims-made" policies.

To apply a "first manifestation" trigger in a case involving such policies would allow pre-1986 insurers to escape their coverage obligations entirely, disingenuously pointing to a period when insurers had made that coverage unavailable, and thus effectively shifting the risk of long-term occurrence claims away from themselves and onto the policyholder. That is exactly the unfair result that the court warned against in St. John, but that did not arise under the very different facts of that case. Conversely, the risk of policyholders "insuring themselves for events which have already taken place"[9] is not present while the disease or pollution remains undetected. Thus, the multiple or continuous trigger remains the correct trigger theory for long-term, latent damage cases.

The Policies at Issue in St. John Are Not Like Commercial General Liability Policies of the 1970s and 1980s

The older Commercial General Liability (CGL) policies typically involved in environmental and latent injury coverage disputes do not contain exclusionary "known continuation, change or resumption" language. The insurance industry only introduced this provision in a 1999 endorsement (commonly referred to as the "Montrose endorsement," after the environmental coverage decision that inspired it[10]) and incorporated it into standard-form CGL policies starting in 2001. Before then, the CGL policy's

"occurrence" definition expressly included coverage for "continuous or repeated exposure to conditions," and contained no Montrose language or anti-stacking provisions.

In fact, in the course of multiple revisions of the standard CGL form during the 1960s and '70s, the insurance industry expressly rejected policy language that would have limited coverage to a single "manifestation" period, recognizing that, as drafted, multiple policies could respond to continuous damage claims.[11] When the insurance industry issued the new 1966 CGL form containing the "occurrence" definition that includes "continuous or repeated exposure to conditions," it "assur[ed] new customers that they would be protected against the new tort liabilities" involving gradual processes.[12] Indeed, a Liberty Mutual executive who was involved in promoting the new form emphasized that the occurrence definition specifically allowed multiple policies to respond to continuous damage:

So if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.[13]

More than a decade later, after the insurance industry was hit with thousands of asbestos liability claims in the late 1970s, insurers again considered — and again declined to adopt — language that would have imposed a manifestation limit on the trigger.[14]

Starting in the early 1980s, the courts first addressed the question of which policy or policies must respond to injury or damage spanning multiple time periods. At first they reached differing results, ranging from an "exposure-only" trigger, to a "manifestation-only" trigger, to a "first exposure through manifestation" trigger, which was otherwise known as the "continuous" or "injury-in-fact" trigger.[15] It was during this era of experimentation, in 1982, that the First Circuit initially adopted the "manifestation" approach in Eagle-Picher, a case where the policyholder had advocated that result.[16] During this same era, in a medical malpractice insurance case involving an undiagnosed latent disease, a Pennsylvania intermediate appellate court decided D'Auria, and held that coverage was triggered "when the injurious effects of the negligent act first manifest themselves in a way that would put a reasonable person on notice of injury."[17]

The courts' experimentation with the manifestation trigger was short-lived. In 1987, the year after D'Auria was decided, the First Circuit called its own prior manifestation ruling into question in the decision known as Eagle-Picher II. There, the court concluded that determining when manifestation occurred (i.e., when asbestos disease was "capable of diagnosis") was an "unanswerable" question:

For anyone to resolve the primary question before us — when should an asbestos-related disease be deemed capable of diagnosis — seems surely to require the wisdom of Solomon. This is so for at least two reasons. First, as the district court noted, the evidence adduced at trial indicates that the question of when any particular claimant's disease was "reasonably capable of medical diagnosis" is unanswerable. The best that can be hoped for is an informed estimate. Second, the two alternative methods proposed by the parties for making this "guestimate" — one a "macro," the other a "micro" approach — both appear to have significant shortcomings.[18]

Eventually it became clear that the manifestation trigger had been a failed experiment. By the 1990s, a consensus had formed around the multi-year trigger for long-tail harms, whether denominated as the "continuous" or the "injury-in-fact" trigger.[19] As of 2011, one insurance company's compilation of the trigger case law showed only one state high court still supporting the manifestation trigger for long-tail claims.[20]

Why Apply a Manifestation Trigger Here and Now?

As the dissent in St. John points out, the majority opinion suffers from less-than-rigorous intellectual analysis. A principal concern is that the appellants' argument, which the majority largely adopted, "does not hew to the policy language."[21]

For example, all parties agreed that the damage to the herd took place continuously during the three years when it was exposed to contaminated drinking water. The policies covered property damage during the policy period. Therefore, under the policies' plain language, each policy should have provided coverage. The majority opinion even acknowledges at least two reasonable interpretations of the policy language, which should have led it to apply contra proferentem, the rule of construction that requires the policy to be construed in the policyholder's favor and against the insurer.[22]

So, what was going on? It is impossible to divine the inner mental processes of each judge in the majority (one of whom, former Chief Justice Ronald Castille, is no longer on the bench), but a few factors bear mentioning:

- The same insurer issued all of the coverage at issue;
- The third coverage year had high limits, with umbrella as well as primary insurance;
- The plaintiffs apparently agreed that the damage arose out of a single occurrence, even though new cows and calves rotated into the herd throughout the coverage period; and
- The contractor had already been released after a settlement and payment of the full limits of the first primary policy, potentially causing the court to view the subsequent direct action against the insurer as a "shakedown" by the plaintiffs for more money.

With no other Supreme Court precedent to use as stare decisis on the manifestation trigger point, the Pennsylvania Supreme Court appears to have relied heavily on decades-old, lower court decisions like D'Auria rather than following its own decision in J.H. France. The best explanation for this reversion to lower court decisions from the 1980s, and the decision not to follow J.H. France, is that the policy language and narrow facts of the St. John case are distinguishable from the more recent body of Supreme Court case law. The majority opinion in St. John therefore should not be read as establishing a new trigger rule for Pennsylvania. As the court acknowledged, J.H. France's multiple trigger rule remains the principal Supreme Court guide for determining coverage for latent, long-term, continuous damage cases.

Going forward, insurance coverage lawyers will undoubtedly battle over whether their policy language and facts are more like those in J.H. France or those in St. John. But St. John ought to be confined to its own facts, while J.H. France should still govern long-tail latent injury and property damage claims. Pennsylvania law has not suddenly time-traveled back to the 1980s.

—By Suzan F. Charlton, Covington & Burling LLP

Suzan Charlton is special counsel in Covington's Washington, D.C., office.

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[1] See J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 37-39, 626 A.2d 502, 507 (1993); Rohm & Haas Co. v. Cont'l Cas. Co., 35 Phila. 193, 376, 1997 Phila. Cty. Rptr. LEXIS 98, *88 (Ct. Com. Pl. 1997); Koppers v. Aetna Cas. & Sur. Co, 98 F.3d 1440, 1445-46 (3d Cir. 1996); Triangle Publ'ns, Inc. v. Liberty Mut. Ins. Co., 703 F. Supp. 367, 371 (E.D. Pa. 1989) (expressly rejecting manifestation trigger for environmental coverage).

[2] St. John, 2014 Pa. Lexis 3313 at *42 (citing D'Auria v. Zurich Ins. Co., 507 A.2d 857, 861 (Pa. Super. 1986)).

[3] 534 Pa. 29, 37-39, 626 A.2d 502, 507 (1993)

[4] Id. at *55-56.

[5] Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981).

[6] Id. at *51, *61.

[7] See Rohm & Haas, 35 Phila. at 376, 1997 Phila. Cty. Rptr. LEXIS 98 at *88; Koppers, 98 F.3d at 1445-46; Triangle Publ'ns, 703 F. Supp. at 371 (expressly rejecting manifestation trigger for environmental coverage).

[8] 2014 Pa. Lexis 3313 at *60 (citations omitted).

[9] St. John at * 41.

[10] See Montrose Chemical Corp. v Admiral Insurance Co., 913 P.2d 878 (Cal. 1995).

[11] G. Anderson, J. Stanzler & L. Masters, Insurance Coverage Litigation, at 4-20, 4-24 to 4-30 (2d ed., 2015), and citations therein. This leading treatise contains an exhaustive compilation of the drafting history of the "occurrence" language in the standard CGL form.

[12] Id. at 4-19.

[13] Gilbert L. Bean, Assistant Secretary, Liberty Mutual Insurance Co., New Comprehensive General and Automobile Programs: The Effect on Manufacturing Risks, Mutual Insurance Technical Conference 6 (Nov. 15-16, 1965), cited in Anderson, Stanzler & Masters, Insurance Coverage Litigation, at 4-24.

[14] Anderson, Stanzler & Masters, Insurance Coverage Litigation, at 4-30 to 4-33.

[15] Compare, e.g., Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980) ("exposure-only" trigger), with Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) ("continuous" or "triple" trigger), with Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982) (Eagle-Picher I) ("manifestation-only" trigger), with American Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.3d 760 (2d Cir. 1984) ("injury-in-fact" trigger).

[16] Eagle-Picher I, 682 F.2d 12 (1st Cir. 1982).

[17] D'Auria v. Zurich Ins. Co., 507 A.2d 857, 861 (Pa. Super. 1986).

[18] Eagle-Picher Indus. Inc. v. Liberty Mutual Ins. Co., 829 F.2d 227, 232 (1st Cir. 1987) (Eagle-Picher II).

[19] See Munich Re, Environmental Coverage Case Law, at 13-33 (22nd ed., 2011) (compiling cases, including pre-2000 decisions from 36 different states supporting continuous or injury-in-fact trigger).

[20] See id. (citing Truk-Away of R.I., Inc. v. Aetna Cas. & Sur. Co., 723 A.2d 309 (R.I. 1999)).

[21] St. John, 2014 Pa. Lexis 3313 at *64 (Saylor, J., dissenting).

[22] Id. at *54-55 ("Fairly read, this language can be given one of two meanings.").