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In this article we explore two recent Pennsylvania Supreme Court decisions. One case addresses the assignability of bad faith actions. The other case explores multiple-triggers in asbestos litigation.

Two Significant December Decisions:
Pennsylvania Supreme Court Declares Insurance Bad Faith Claims Assignable and Court Examines "Multiple Trigger" Theory in Asbestos Cases

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In mid-December the Pennsylvania Supreme Court ruled on two significant issues that could great affect the insurance industry. The first looked at the right to sue an insurer for bad faith and the second at the "multiple-trigger" theory in asbestos cases.

First, let's examine the ruling the bad faith case where justices considered the question, can an insured assign the right to sue his or her insurer for bad faith under Pennsylvania's insurance bad faith statute ,42 Pa.C.S. §8371? In *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, (Pa. Dec. 15, 2014) the Pennsylvania Supreme Court accepted certification from the federal Third Circuit Court of Appeals to answer that question.

The case arose from an auto accident in which plaintiff Wolfe was rear-ended by the insured. Prior to suit Wolfe demanded $25,000 to settle and the insurer offered $1,200 of the $50,000 policy limit. Wolfe rejected the offer and filed suit. Discovery revealed that the insured had been intoxicated at the time of the accident and Wolfe amended his complaint to include a punitive damages claim. The insurer advised the insured that punitive damages weren't covered under the policy.

No further settlement discussions ensued and Wolfe's case went to trial. The trial resulted in a judgment in Wolfe's favor for $15,000 in compensatory damages and $50,000 in punitive damages. The insurer paid the compensatory award only. Wolfe and the insured then entered into an agreement whereby Wolfe agreed not to execute against the insured in exchange for an assignment of the insured's claims against the insurer.

Wolfe then brought suit for statutory and common law bad faith against the insurer as the insured's assignee. The insurer brought a motion for summary judgment, arguing that the insured's claim under Pennsylvania's insurance "bad faith" statute is not assignable. The District Court denied the motion and the bad faith case went to trial, resulting in a verdict in favor of the insured. The insurer appealed to the Third Circuit Court of Appeals which lodged a petition for certification with the Supreme Court.

The insurer's position derived from the common law principle of champerty, the involvement of intermeddlers who pursue litigation for profit-making purposes. Champerty traditionally precludes assignment of tort claims. The insurer argued that the cause of action under Section 8371 is an unliquidated tort claim and thus not assignable.

The damages awardable under Section 8371 do not compensate the plaintiff's loss, but instead compensate the insured's loss resulting from the insurer's conduct. Permitting assignment of the claim under Section 8371 to the plaintiff, the insurer argued, would give the plaintiff a speculator's interest in the litigation.

Finally, the insurer contended that allowing assignment of Section 8371 claims is bad policy because it would create a perverse incentive for plaintiffs to pursue unreasonable settlement demands, thus

undermining the court favored policy of settling cases.

The Supreme Court eschewed determination and instead relied on principles of statutory construction. Therefore, the Court considered the occasion and necessity for the statute, the object to be attained by the statute's adoption, review of the previous legal landscape and appreciation of the consequences of the particular interpretation in an effort to determine the Legislature's intent. The Court noted that Section 8371 did not create a new cause of action, but instead provided remedies not usually available for a breach of contract onto the existing contractual action. Since the contract action is assignable, this militated in favor of assignability of the Section 8371 claim. The Court, however, also recognized that the remedies provided under Section 8371 are those associated with tort law, which implicated the champerty argument raised by the insurer.

Considering these factors the Court stated:

> On balance, however, we find that consideration of the occasion and necessity for Section 8371, the object to be attained, the previous legal landscape, as well as the consequences of our interpretation, favor Wolfe's position. Centrally, we simply do not believe the General Assembly contemplated that the supplementation of the redress available for bad faith on the part of insurance carriers in relation to their insureds would result either in a curtailment of assignments of pre-existing causes of action in connection with settlements or the splitting of actions.

In this matter, the Court betrayed its uncertainty about its own interpretation by inviting the Legislature to correct it, if the ruling was wrong.

The second significant ruling from the Court, addressing the "multiple-trigger" theory in the context of asbestos, was also handed down on December 15, 2014. In *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502 (Pa. 1993) the Pennsylvania Supreme Court adopted the "multiple trigger" theory[1] of liability insurance coverage in the context of asbestos bodily injury claims.

Until late last year however, the Pennsylvania Supreme Court had not spoken on whether the same theory applied where the claim was for progressive property damage. That question was addressed by the Court in *Pa. Nat'l Mut. Cas. Ins. Co. v. St. John*, 2014 Pa. LEXIS 3313, 2 (Pa. Dec. 15, 2014) in which the Court declined to apply the "multiple trigger" theory to claims for progressive property damage, instead opting for the traditional "manifestation" trigger. The Court's opinion also sheds light on the meaning of manifestation for purposes of triggering coverage.

[1] Under the "multiple trigger" theory, all policies on the risk from the date of first exposure to the harmful condition until the date the injury manifests are potentially responsible for defense and indemnity.

In 2002, the underlying plaintiffs decided to expand their dairy herd and milking facility. They hired a plumbing contractor to install a new plumbing system to serve a wastewater drainage system and a separate freshwater drinking system. The plumbing contractor subcontracted with a welding contractor to weld the pipes. The work was completed by July 1, 2003, at which time underlying plaintiffs began operations at the newly expanded facility.

Unknown to the underlying plaintiffs, the plumbing system was defective as the piping used was cracked. The welding on an intake pipe for the freshwater system was also defective. Combined, these defects allowed waste water to escape and enter the freshwater system supplying water to the dairy herd. Beginning in April 2004, the cows suffered various health and reproductive problems. The underlying plaintiffs first suspected that there was a problem with the drinking water in March 2006. At that point they investigated and discovered the defects in the system.

During the period July 1, 2003, to July 1, 2006, the plumbing contractor had been insured under three yearly CGL policies and one umbrella policy. The insurer filed a declaratory judgment action to determine its obligations under the four policies in effect during the relevant time periods, contending that only the CGL policy in effect during the period July 1, 2003, to July 1, 2004, applied to the claim. The underlying plaintiffs counterclaimed seeking a declaration that all of the policies were triggered or, in the alternative, that the CGL and umbrella policies in effect during the period July 1, 2005, to July 1, 2006, were applicable.

At the bench trial on the declaratory judgment action, the underlying plaintiffs testified that while the issues with the herd began in April 2004, the problems encountered were common to dairy farming and were not at an unusual level. Those problems increased over time to the point where they were occurring with unusual frequency. The underling plaintiffs claimed they did not suspect the issues were being caused by the water supply until March 2006 when they noticed the cows refusing the drink from the troughs.

The trial court and Superior Court held that only the policy in effect as of April 2004 applied. On appeal, the Supreme Court addressed two issues. First, which event was relevant for purposes of applying the manifestation theory; discovery of the injury or discovery that the injury was caused by the occurrence and, second, hether the multiple trigger theory applied.

The Court rejected the underlying plaintiff's assertion that application of the manifestation rule requires the cause of the injury to be known or reasonably discoverable. *St. John,* 2014 Pa. LEXIS 3313, 37. The Court explained that the language of the policies did not support the claim that coverage is triggered when both cause and effect are reasonably ascertainable. According to the Court, the policy language plainly states that coverage is triggered when "bodily injury" or "property damage" occurs during the policy period. Accordingly, coverage is triggered when any of the following are reasonably ascertainable:

physical injury to tangible property, loss of use of tangible property, bodily injury, sickness or disease. *St. John*. 2014 Pa. LEXIS 3313, 39. The policies simply say nothing requiring the cause of injury to be ascertainable before coverage is triggered. Id.

On a public policy level, the Court observed that there are sound reasons for extending coverage when the effects of injury first manifest, without requiring the cause of injury to be discoverable. First, it better protects against injured parties insuring themselves for events which have already taken place. Delaying trigger of coverage until the cause of an injury is reasonably ascertainable would allow a tortfeasor with knowledge of his or her potential liability to shift this burden to an unwary insurance company. Second, it adds certainty and predictability to a trigger of coverage analysis. Identifying the effects of actual injury is simpler and less involved than tracing injury to its probable cause. Finally, in the event the insurer eventually becomes insolvent, the insured is more likely to obtain coverage as the policy will be triggered at an earlier date, when injury first manifests. *St. John*, 2014 Pa. LEXIS 3313, 41-42.

Applied to the facts of the case, the Court concluded that the manifestation trigger meant that the policy in effect as of April 2004 applied since that was the date that the injurious effects of the negligent plumbing work were first observed. The fact that the cause of those injurious effects was not realized until two years later was irrelevant.

The Court also addressed the claim that the "multiple trigger" theory applied. [2] It explained that when the policy provision stipulating that the insurance applies when an "occurrence" causes "bodily injury" or "property damage" during the policy period (Section I., Subsection (1)(b)) was read together with the provision that stated that "bodily injury" and "property damage" which occurs during the policy period "includes any continuation, change or resumption of that 'bodily injury' or 'property damage' after the end of the policy period," (Section I, Subsection (1)(c)) the first manifestation rule made more sense. If a single occurrence could trigger coverage under multiple policy periods Subsection (1)(c) would be rendered largely irrelevant.

The parties' reasonable expectations also argued against adopting the "multiple trigger" rule for progressive property damage claims. The manifestation rule had served as the test for determining coverage under CGL policies—with the lone exception of asbestos bodily injury claims—since 1986. It was reasonable to believe that when the policies were drafted the parties intended to invoke the prevailing first manifestation rule. It was unlikely that the parties would have intended or expected a single occurrence, albeit with property damage continuing past the end of the respective policy period, to trigger coverage under multiple consecutive policies. If a different trigger of

[2] The Court stated that its disposition of the manifestation rule issue established that the manifestation rule was the proper approach and thus the its statements concerning the multiple trigger rule are *dicta*. St. John, 2014 Pa. LEXIS 3313, 46. Nonetheless, the Court's observations are clearly significant.

coverage was intended, the parties could have said so. Accordingly, the Court reasoned that the better position is to construe the policies as providing for coverage only under the policy or policies in effect at the time an occurrence first arises. *St. John*, 2014 Pa. LEXIS 3313, 56-57.

Finally, the Court rejected the claim that the reasoning for applying the "multiple trigger" theory to asbestos bodily injury claims in *J.H. France* applied equally to the claim at issue. The decision in *J.H. France* to apply the "multiple trigger" theory within the context of asbestos bodily injury claims was predicated in large part on the special "etiology and pathogenesis of asbestos-related disease." *St. John*, 2014 Pa. LEXIS 3313, 57-58. The "multiple trigger" theory is appropriate in that context because in latent disease cases like asbestosis or mesothelioma, the injuries may not manifest themselves until a considerable time after the initial exposure occurs. This raises the concern that insurance companies would be able terminate coverage during the latency period and effectively shift the financial burden from insurer to insured. *St. John*, 2014 Pa. LEXIS 3313, 60. That danger did not exist in the case before it where the injury had manifested less than a year after the work had been performed and where there was no indication of probable injury to the dairy herd prior to manifestation that would have caused the insurer to anticipate a future claim. In sum, the Court stated that the holding in *J.H. France* remained an exception to the general rule under Pennsylvania law that the manifestation rule governs trigger of coverage analysis for policies containing standard CGL language.

Although a strong statement in favor of the traditional manifestation rule, the Court's opinion in *St. John* similar to the decision in *Allstate Prop. & Cas. Ins. Co. v. Wolfe* may not be the final word on the subject. First, the *St. John* opinion was joined by only three of the six justices participating in the decision.[3] Second, the Court's decision on the applicability of the "multiple trigger" theory was not necessary to its decision and thus was dicta. Finally, the policy form at issue was a post 1998 ISO CGL form. [4] Subsection.1.(c)—the provision that states that "bodily injury" and "property damage" which occurs during the policy period "includes any continuation, change or resumption of that 'bodily injury' or 'property damage' after the end of the policy period" - was not added to the standard language until the 2001 edition. This leaves open the possibility that the "multiple trigger" theory might still apply to pre-2001 ISO CGL policies.

We will have to watch as new matters appear before the Court and the Legislature considers these topics, whether these rulings will be long-term or modified considerably in the next few years.

[3] The opinion was authored by Justice Baer and joined by then Chief Justice Castille and Justice Eakin. Justice Saylor filed a dissent. Justice Todd dissented on the basis that the appeal was improvidently granted. Justice McCaffery did not participate in the decision.

[4] As relevant to the time period in the case, the ISO CGL form was revised in 2001 and 2004.

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