PENNSYLVANIA COMMONWEALTH COURT CONFIRMS "CONTINUOUS TRIGGER" FOR LATENT ENVIRONMENTAL PROPERTY DAMAGE CLAIMS

Date: 26 April 2017

Insurance Coverage Alert

By: John M. Sylvester, John M. Hagan

In a significant decision for Pennsylvania insurance law, the Pennsylvania Commonwealth Court has ruled that a "continuous trigger" of coverage applies to long-term, latent environmental property damage claims. Specifically, in *Pennsylvania Manufacturers' Association Insurance Co. v. Johnson Matthey Inc.*,[1] a unanimous panel of the court rejected an attempt by the insurer, Pennsylvania Manufacturers' Association Insurance Company ("PMA"), to apply a "first manifestation" trigger of coverage for the environmental coverage claim of the policyholder, Johnson Matthey Inc. ("Johnson Matthey"), under "occurrence-based" policies that PMA issued to Johnson Matthey in the 1960's and 1970's. Rather, the Court observed that the record of the case presented a long latency of continuing, undetected property damage taking place during the PMA policy periods, which supported a continuous trigger throughout that latency period, such as that adopted by the Pennsylvania Supreme Court for asbestos bodily injury claims in its seminal decision, *J.H. France Refractories Co. v. Allstate Insurance Co.*[2] The Commonwealth Court rejected PMA's argument that a recent Pennsylvania Supreme Court decision, *Pennsylvania National Mutual Casualty Insurance Co. v. St. John*,[3] which had applied a "first manifestation" trigger to a non-environmental property damage coverage claim, should be followed in this case.

In Pennsylvania, as in states across the country, policyholders have been required to clean up environmental contamination at the sites of old industrial plants — contamination that may have begun decades ago when those plants were in operation. For most of these policyholders, their historical general liability insurance policies provide a means to pay for these cleanup costs. Specifically, the general liability policies issued to companies in the 1950's through the mid-1980's were typically written on an "occurrence" basis such that, if environmental property damage was caused by an accident or an "occurrence," these policies would cover liability for that damage so long as the damage took place, at least in part, during the policy period. The policyholder's pre-1985 liability policies have been valuable sources of funds to pay for environmental cleanups because, starting in the mid-1980's, the insurance industry began inserting so-called "absolute pollution exclusions" into their general liability insurance policies, and those exclusions continue to be found in such policies to this day.

In 1993, the Pennsylvania Supreme Court issued a key ruling on the trigger-of-coverage issue in the context of long term, progressive injury claims when it handed down the *J.H. France* decision, which adopted a continuous trigger of coverage in the asbestos bodily injury context. Under the continuous trigger, all liability policies in effect over multiple consecutive policy periods could be triggered so long as the injury giving rise to liability had continued and progressed during those policy periods. The continuous trigger period extended typically from the date of first exposure to the injury-causing agent through and including the date of manifestation of that injury. In

©2005-2026 K&L Gates LLP. All Rights Reserved.

the case of asbestos bodily injury claims, that continuous trigger period could extend over many years, and even many decades.

Based on the holding of the *J.H. France* decision, Pennsylvania policyholders, and many of their insurers, had been operating for years with the understanding that, in the context of long-term environmental property damage claims, occurrence-based policies are governed by a "continuous trigger"— namely, all policies in effect during a continuous environmental damage process are triggered for coverage — even if that damage process did not become manifest until many years after it had commenced. However, some confusion regarding this trigger-of-coverage issue arose from the 2014 Pennsylvania Supreme Court decision in *St. John*, which applied a "first manifestation" trigger in the context of a property damage claim involving a three-year period of injury to cows that were sickened by contaminated drinking water. In *St. John*, the court held that the policy in effect in only the first of the three consecutive policy years when injury was occurring would be triggered because that was the year when the injury first became discoverable.

The *St. John* decision, which was specific to the very unique facts of that case, contained certain language suggesting that this "first manifestation" trigger rule may be applicable generally to all types of continuous-injury property damage liability claims. Consequently, in recent years, insurers such as PMA attempted to seize on this language to argue that Pennsylvania insurance law applies a "first manifestation" trigger of coverage to long-term, latent environmental contamination claims. The Commonwealth Court's recent *Johnson Matthey* decision, however, has expressly rejected that attempt and has made clear that Pennsylvania law applies a "continuous trigger" to latent-manifestation environmental property damage claims.

In the *Johnson Matthey* case, the Pennsylvania Department of Environmental Protection ("PaDEP") alleged that a predecessor of Johnson Matthey had operated the Bishop Tube site in Chester County, Pennsylvania, from 1951 though 1969. PaDEP further alleged that operations of that predecessor, along with the operations of subsequent property owners, contributed to environmental contamination at the site, including the migration of contaminants into groundwater at the site and on surrounding properties. In addition to naming Johnson Matthey as a potentially responsible party relating to the site, PaDEP also sued Johnson Matthey in a related action in federal court in 2010 to require a cleanup of the site.

Johnson Matthey sought insurance coverage from one of its historical liability insurers, for liability arising from PaDEP's claims and allegations. (PMA had issued general liability policies to Johnson Matthey and its predecessors that were in effect from at least April 1, 1969 through April 1, 1979.) In 2010, PMA agreed to defend Johnson Matthey under its policies for the defense of PaDEP's federal lawsuit. However, in 2015, relying upon the Pennsylvania Supreme Court's 2014 *St. John* decision, PMA informed Johnson Matthey that it was withdrawing its defense because the first manifestation of property damage at the Bishop Tube site allegedly happened after the expiration of its policies. Based on the *St. John* decision, PMA took the position that a "first manifestation" trigger applied to environmental property damage claims under Pennsylvania law. Also in 2015, PMA filed a declaratory judgment action against Johnson Matthey in Commonwealth Court (also naming PaDEP as a nominal defendant for procedural reasons) seeking a determination of no coverage for the Bishop Tube site. Subsequently, PMA filed its motion for summary judgment, arguing that the *St. John* decision called for application of a first manifestation trigger, which they contended would relieve it of any coverage obligation.

In its recent decision, the Commonwealth Court squarely rejected PMA's first-manifestation trigger argument and confirmed the application of a continuous trigger to environmental property damage claims under Pennsylvania

©2005-2026 K&L Gates LLP. All Rights Reserved.

law. The Commonwealth Court noted that the trigger of coverage under an occurrence-based policy is such that a policyholder cannot recover for continuing damage under policies issued *after* the first manifestation of damage. However, with respect to injury that happens *before* first manifestation, the Commonwealth Court found that *J.H. France* applied — and thus all occurrence-based policies in effect from date of first exposure until date of first manifestation were triggered. The Commonwealth Court, relying upon *J.H. France* and *St. John*, further reasoned that the long latency period of asbestos injuries provided justification for this continuous trigger. Also relying upon *St. John*, the Commonwealth Court noted that, if a first manifestation trigger were applied, such a latency period would permit insurers to exclude coverage for latent risks prior to manifestation, as the insurance industry has done for asbestos and pollution-related liabilities. Ultimately, the Commonwealth Court determined that the long latency period associated with the alleged continuing, undetected property damage at issue at the Bishop Tube site supported the application of a continuous trigger under PMA's policies.

The Commonwealth Court buttressed its holding by demonstrating that the language in the PMA policies supported the application of a continuous trigger. Specifically, those policies provide coverage for "property damage which occurs during the policy period," without reference to the timing of manifestation of damage. The court found that a continuous trigger is consistent with this policy language. By contrast, a first-manifestation trigger is inconsistent with that policy language.

In sum, based on its thorough analysis of the applicable policy language, Pennsylvania case law, and the nature of the progressive, latent environmental property damage at issue, the Commonwealth Court confirmed in *Johnson Matthey* that a continuous trigger applies to long term environmental coverage claims under Pennsylvania law. Policyholders will welcome this confirmation of their long-held understanding of the trigger of coverage applicable to environmental claims.

Notes:

[1] __ A.3d __, 2017 WL 1418401 (Pa. Commw. Ct. Apr. 21, 2017).

[2] 626 A.2d 502 (Pa. 1993).

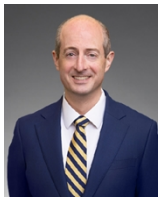
[3] 106 A.3d 1 (Pa. 2014).

KEY CONTACTS



JOHN M. SYLVESTER
PARTNER

PITTSBURGH
+1.412.355.8617
JOHN.SYLVESTER@KLGATES.COM



JOHN M. HAGAN
PARTNER

PITTSBURGH
+1.412.355.6770
JOHN.HAGAN@KLGATES.COM

©2005-2026 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.