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Commentary

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[Editor's Note: John T. Waldron, III is a partner of K&L Gates LLP and is experienced in complex commercial litigation, including insurance coverage disputes Sara N. Brown is an associate of K&L Gates LLP. The views expressed in this article are not necessarily those of K&L Gates LLP or its clients. The authors wish to acknowledge Ali Ludin for her assistance with this article. Copyright © 2013 by John T. Waldon, III and Sara N. Brown. Responses are welcome.]

I. Introduction

The last few decades of tort litigation in America have been marked primarily by a surge in filings of asbestos, silica and other delayed manifestation bodily injury and property damage claims. These tort claims have in turn led to numerous disputes between tort defendants and their liability insurers over the financial responsibility for such claims. These fights over insurance rights typically involve questions of state law and hence litigants commonly need to examine the specific state law controlling their insurance policies to determine whether and to what extent insurance coverage exists.

Notwithstanding their prominence in asbestos and other litigation involving delayed manifestation claims, West Virginia courts have issued surprisingly few decisions that address the insurance issues that frequently arise in this context. As a result, the recent decision by Judge Andrew N. Frye, Jr. of the Circuit Court of Morgan County, West Virginia in *U.S. Silica Co. v. Ace Fire Underwriters Ins. Co.* ("U.S. Silica") is significant because it resolves matters of first impression under West Virginia law.

II. Background

U.S. Silica Company, formerly known as Pennsylvania Glass Sand Corporation ("USS"), was insured under primary policies issued by, *inter alia*, The Travelers Insurance Company ("Travelers"). Travelers issued to USS at least three primary comprehensive general liability insurance policies that provided coverage for claims for bodily injury caused by "accident." Travelers' policies included a duty to defend USS.

USS was sued in numerous silica claims alleging bodily injury as a result of exposure to silica or silica-containing products, and it sought defense and indemnification from Travelers for these claims. Travelers denied having any duty to defend these claims against USS.

In January 2006, USS brought an action in the Circuit Court of Morgan County, West Virginia to determine its rights to insurance coverage under the above-mentioned policies, requesting that the Court declare that Travelers has a duty to defend and indemnify the silica claims. USS eventually filed motions for partial summary judgment, seeking legal rulings on the key insurance issues raised in the case. The Court's ruling on these motions is the subject of this Article.

III. Discussion

A. As A Matter Of First Impression Under West Virginia Law, The Court Held That The Term "Accident" Unambiguously Includes Events That Take Place Gradually Over Time And Is Not Limited To Abrupt Events

Travelers' policies were accident-based policies, requiring that the bodily injury be "caused by accident":

> *[Travelers agrees] to pay on behalf of [USS] all sums which [USS] shall become legally obligated*

> *to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.*

The term "accident" was not defined in Travelers' policies.

Travelers contended that the term "accident" was limited to abrupt events happening at specific and identifiable points in time. Because the silica claims were alleged to arise out of continuous or repeated workplace exposure to silica over many years, Travelers' position was that no silica claims involved bodily injury "caused by accident." In support of its interpretation, Travelers argued that courts applying Pennsylvania law (which Travelers contended governed its policies) had held that "accident" is limited to abrupt events.

In contrast, USS argued that "accident" should be interpreted broadly to include injuries caused gradually over time, such as silica claims resulting from repeated workplace exposures. In support of its contention, USS relied on, *inter alia*, the definition of "accident" in Black's Law Dictionary and case law interpreting the term "accident" under Pennsylvania and other states' laws.[1]

Agreeing with USS, the U.S. Silica Court held that the term "accident" unambiguously includes events that take place gradually over time and is not limited to abrupt events. In so holding, the Court followed USS's reliance on Black's Law Dictionary and held that "[t]he ordinary meaning of 'accident' is reflected in the Black's Law definition as '[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.' " Opinion at 14 (quoting Black's Law Dictionary at 15 (8th ed. 2004), at 14(c) (9th ed. 2009).[2] Based on this definition, the Court concluded that the term "accident" was unambiguous and included the kind of repeated exposure to conditions over time at issue in USS's silica claims:

> *This Court finds no ambiguity in the term "accident" as it applies to the facts at hand. It is clear that the definition of accident is centered on whether the event is intended or unexpected, deliberate or unforeseen. The term does not require abruptness nor hinge on the amount of time the injury takes to manifest. Neither is the term limited by how long the occurrence lasts or if the occurrence consists of multiple exposures. Therefore, the Court must find, as a matter of law, that the claims allege bodily injury resulting from an accident.*

Opinion at 15-16.

While the Court was applying West Virginia law to the "accident" issue, it held that the same result would be reached under Pennsylvania law. Opinion at 6. In reaching this conclusion, the Court rejected Travelers' Pennsylvania case law, which Travelers had argued supported a narrow interpretation of "accident" that limited the term to abrupt events.[3] Instead, the Court followed the only two Pennsylvania cases that had addressed the issue and held that "accident" included events occurring gradually over time.[4]

In sum, the decision in U.S. Silica that "accident" is unambiguous and includes repeated workplace exposures to silica constitutes a decision of first impression under West Virginia law (and one of the only decisions applying Pennsylvania law) in the context of delayed manifestation claims. As such, it is a noteworthy decision that may help to resolve future insurance disputes involving accident-based policies under West Virginia and Pennsylvania law.

B. As A Matter Of First Impression Under West Virginia Law, The Court Held That The Continuous Trigger Of Coverage Applies To Delayed Manifestation Bodily Injury Claims

The U.S. Silica Court was also required to address the proper trigger of coverage – the issue of what must happen during the policy period for a policy to be potentially responsive to a claim. As the Court noted, "[t]he issue presented is one of first impression within this jurisdiction, inasmuch as the West Virginia Supreme Court of Appeals has never addressed the issue of when insurance coverage is triggered within the context of gradual bodily injury with a delayed manifestation." Opinion at 17.

By way of background, the Court identified several different trigger-of-coverage approaches that have been adopted in one or more courts:

> *In analyzing trigger of coverage issues, four primary theories have emerged:*
>
> *(1) the continuous or multiple trigger, which imposes a coverage obligation on all insurance policies in effect during the entire process of injury or damage;*
>
> *(2) the manifestation trigger, which imposes a coverage obligation only on those policies in effect at the time injury or damage becomes manifested;*
>
> *(3) the injury-in-fact trigger, which imposes a coverage obligation period on all policies in which injury or damage actually takes place; and*
>
> *(4) the exposure trigger which imposes a coverage obligation on those policies in effect when the first exposure to injury or damage causing conditions occurs.*

Opinion at 17 (citations omitted).

In arguing that the Court should adopt a continuous trigger, USS had pointed to the only West Virginia decision found to have addressed trigger of coverage in the context of gradually occurring damage — Wheeling Pittsburgh Corp. v. American Ins. Co., No. Civ.A. 93-C-340, 2003 WL 23652106 (W. Va. Cir. Ct. Oct. 18, 2003). Specifically, in Wheeling Pittsburgh, the court applied a continuous trigger to environmental property damage claims. Further, USS noted that, under any other state's law that might have been chosen, a continuous trigger should be adopted.[5]

Agreeing with USS, the U.S. Silica Court held that a continuous trigger applied under West Virginia law to the silica bodily injury claims at issue:

> *The Court finds that a continuous trigger theory is applicable to the instant case and will apply a continuous trigger of coverage to the pending silica claims as the suits allege continuing or progressively deteriorating bodily injury. Therefore, for the purposes of analyzing the trigger of coverage for the pending silica cases, bodily injury occurs at the time of first exposure and continues even after exposure has ceased. The effect being that insurers are obligated to indemnify insured for costs associated with liability beginning when the first exposure occurred (the beginning of the accident) and until the claim is brought, or until the underlying claimant dies, whichever occurs first.*

Opinion at 20 (footnote and citation omitted).

In addition to resolving this matter of first impression under West Virginia law, the Court also held that, to the extent Pennsylvania law applied, it was the same as West Virginia law and hence a continuous trigger would still be applicable. Opinion at 6, 6 n.2 (citing J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29 (1993)).

In sum, the U.S. Silica decision constitutes an instructive ruling on the trigger of coverage, resolving as a matter of first impression under West Virginia and Pennsylvania law that a continuous trigger applies to silica bodily injury claims.

C. The Court Held That, Under West Virginia Law, The Duty To Defend May Not Be Terminated By An Insurer Unless A Court Excuses The Attorney From Continued Representation, And That Pennsylvania Law On The Termination Of The Duty To Defend May Not Be Applied In West Virginia Courts

In USS's summary judgment motions, USS had relied primarily on the allegations in the complaints of the silica claimants to establish that Travelers had a duty to defend such claims. In its opposition, Travelers had argued that it should be permitted to take discovery of the extrinsic evidence developed in the underlying silica litigation to show that, even if the four corners of the complaint alleged a potentially covered claim, subsequent discovery could reveal that the claim was in fact not covered. For instance, under Travelers' theory, even if a silica complaint alleged exposure to silica prior to or during its policy period (hence stating a covered claim), discovery taken in the underlying silica case may demonstrate that the claimant was not exposed until after the expiration of Travelers' policies (and thus would not trigger such coverage). Based on such extrinsic evidence, Travelers believed its duty to defend, if ever commenced, may have already terminated.

Rejecting Travelers' position, the U.S. Silica Court held that West Virginia law restricts an insurer's ability to terminate the duty to defend once it has commenced:

> *In West Virginia, generally, once representation is taken on, the attorney-client relationship endures until the conclusion of the case, or until a Court excuses the attorney from continued representation. Courts allow an attorney to withdraw from representation by order, but withdraw[al] is by no means automatic. . . . In fact, attorneys are saddled with an ethical obligation to carry on representation when withdrawal would create a material adverse effect on the interests of the client. Even when good cause to terminate representation exists, a tribunal may, in its discretion, require an attorney to continue representation.*

Opinion at 7-8 (citing W.Va. T.C.R. 4.03(b) and W.Va. R. Prof'l Conduct 1.16). Thus, the Court held that, barring excusal by a court, an insurer's duty to defend continues until conclusion of the case, even if extrinsic evidence is developed that demonstrates that a claim falls outside the scope of coverage. Opinion at 8.

In so holding, the Court found that Pennsylvania law on the termination of the duty to defend would violate West Virginia public policy. Specifically, Travelers had argued that, under Pennsylvania law, an insurer could automatically terminate its duty to defend if discovery in the underlying tort action revealed that the claim was not covered. The Court held that, if Pennsylvania law so provided, it "would make the risk of a conflict of interest almost a certainty in claims where the circumstances do not reveal the facts necessary to unequivocally determine whether the claim falls outside the scope of coverage." Opinion at 9. The Court found such a potential for conflict of interest to offend the public policy and ethical rules of West Virginia:

> *To hold that the duty to defend may terminate almost automatically, would too strongly tempt the insured's attorney to pledge allegiance to his or her payor instead of his or her client creating a conflict of interest in violation of Rule 1.7 of the West Virginia Rules of Professional Conduct or face the possibility of a looming and astronomical cost with no guarantee that he or she would be released from representation. Allowing duty to defend to effectively terminate automatically could also leave the insured without representation or funds to defend itself against a claim which the insurer has begun coverage and has already began negotiations and other pretrial activities. Both of these possibilities offend this Court's notion of fairness and would injure the public good by fostering distrust and uncertainty between attorneys and their clients.*

Opinion at 10. Given that Pennsylvania law would violate West Virginia public policy, the Court held that it may not be chosen to apply. Id.

In sum, the U.S. Silica decision helps to clarify (1) that West Virginia applies a narrow and strict approach to the termination of the duty to defend and (2) that Pennsylvania law on the termination of the duty to defend may not be applied in West Virginia courts as it would offend West Virginia public policy.

D. Other Insurance Principles Under West Virginia And Pennsylvania Law

In the course of its ruling, the U.S. Silica Court also confirmed other significant insurance principles under West Virginia and Pennsylvania law, including the following:

- The duty to defend is broader than the duty to indemnify under both West Virginia and Pennsylvania law. Opinion at 6, 6 n.3, 7 n.4 (citing Horace Mann Ins. Co. v. Leeber, 180 W. Va. 375 (1988), and Alea London Ltd. v. Woodlake Mgmt., 594 F. Supp. 2d 547 (E.D. Pa. 2009)).

- Under both West Virginia and Pennsylvania law, in determining whether an insurer has a duty to defend, the Court liberally considers whether the allegations in the complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. Opinion at 6 n.3, 7 n.4 (citing Bruceton Bank v. U.S. Fid. Guar. Ins. Co., 199 W. Va. 548 (1997), and Techalloy Co., Inc. v. Reliance Ins. Co., 487 A.2d 820 (Pa. Super. 1984)).

- Courts liberally construe complaints in favor of finding a duty to defend and hold that insurers have a duty to defend where there is any potential for coverage. Opinion at 6 n.3, 7 n.4 (citing Aetna Cas. & Sur. Co. v. Pitrolo, 176 W. Va. 190 (1986), and Techalloy).

- If policy language is ambiguous, it is to be construed in favor of coverage under the doctrine of *contra proferentum*. Opinion at 16 (citing Pitrolo, 176 W. Va. at 194).

IV. Conclusion

In sum, the U.S. Silica decision is significant because it resolves matters of first impression under West Virginia law regarding insurance coverage for delayed manifestation claims, as well as clarifying Pennsylvania law on coverage for silica claims. Such guidance should help future courts applying West Virginia and Pennsylvania law, as well as policyholders and insurers, faced with such insurance coverage disputes.

Endnotes

1. *See, e.g., Beryllium Corp. v. American Mut. Liab. Ins. Co.*, 223 F.2d 71, 72-76 (3d Cir. 1955) (holding that exposure to conditions over multiple years constituted an "accident"); *see also Canadian Radium & Uranium Corp. v. Indem. Ins. Co. of N. Am.*, 104 N.E.2d 250 (Ill. 1952) (Illinois Supreme Court holding that the term "accident" included radium poisoning resulting from contact with radioactive substances for several months and rejecting insurer's position that "accident" does not include injury caused gradually over time by exposure to conditions; citing numerous cases from several jurisdictions); *McGroarty v. Great Am. Ins. Co.*, 43 A.D.2d 368, 351 N.Y.S.2d 428 (1974) (holding that damage was caused by "accident" even though the damage was the result of a "condition which developed, progressed and changed over a period of time"), aff'd, 36 N.Y.2d 358, 368 N.Y.S.2d 485, 329 N.E.2d 172 (1975); *Wolk v. Royal Indem. Co.*, 27 Misc. 2d 478, 210 N.Y.S.2d 677 (Sup. Ct. 1961) (rejecting insurer's defense that an "accident" required one specific event); *Rob-Bern Assocs., Inc. v. Chesky*, 32 Pa. D. & C. 3d 647, 654 (Pa. Ct. C.P. 1984) (following *Beryllium*); *see generally Repeated Absorption of Poisonous Substance as 'Accident' Within Coverage Clause of Comprehensive General Liability Policy*, 49 A.L.R.2d 1263 ("The few cases in which the question was directly in issue support the rule that the repeated absorption of a poisonous substance constitutes an accident within the coverage of a comprehensive general liability policy." (citing *Beryllium and Canadian Radium & Uranium Corp.*)).

2. The Court also noted that the Supreme Court of Appeals of West Virginia had adopted a definition of "accident" as "an event occurring by chance or arising from unknown causes" based on a non-legal dictionary definition. Opinion at 15 (citing *State Bancorp, Inc. v. U.S. Fid. and Guar. Ins. Co.*, 199 W. Va. 99 (1997) (quoting Webster's New Collegiate Dictionary 7 (1981)).

3. For instance, the Court distinguished two of Travelers' cases as workers compensation cases that were not instructive on the interpretation of "accident" under comprehensive general liability policies. Opinion at 6 n.1. Further, the Court rejected Travelers' reliance on *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29 (1993), as that case did not involve accident-based policies and indeed the policy there illustrated that the term "accident" could be reasonably understood to include continuous or repeated exposure to conditions. Opinion at 6 n.1, 14-15.

4. Opinion at 6 n.1 (citing *Beryllium Corp. v. American Mut. Liab. Ins. Co.*, 223 F.2d 71 (3d Cir. 1955); *Rob-Bern Associates, Inc. v. Chesky*, 32 Pa. D. & C. 3d 647, 654 (Pa. Ct. C.P. 1984)).

5. For instance, USS cited to *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993) (continuous trigger applies to silica and asbestos bodily injury claims under Pennsylvania law); *Nat'l Union Fire Ins. Co. v. Porter Hayden Co.*, 331 B.R. 652 (D. Md. 2005) (predicting that Maryland would adopt continuous trigger to asbestos bodily injury claims); *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 40 (1996) (continuous trigger applies to asbestos bodily injury claims under California law); Croskey, *et al.*, CAL. PRACTICE GUIDE: INSURANCE LITIGATION (The Rutter Group 2003), ¶ 7:175 (same; citing *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 689 (1995)). ■

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