

Insurance Coverage Bulletin

Pennsylvania

August 2005

**PICADIO
SNEATH
MILLER &
NORTON, P.C.**

4710 U.S. STEEL TOWER
600 GRANT STREET
PITTSBURGH, PA 15219-2702
(412) 288-4000
FAX: (412) 288-2405

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Third Circuit Applies Cause Of Loss Test To Find One Occurrence In Asbestos Coverage Litigation And Enforces Non-Accumulation Clause

On August 15, 2005, the United States Court of Appeals for the Third Circuit issued a precedential opinion in Liberty Mut. Ins. Co. v. Treedale, Inc., 2005 U.S. App. LEXIS 17149 (3d Cir. 2005), applying the “cause of loss” test to asbestos bodily injury claims brought against an insured and finding the manufacture of asbestos containing products to be one occurrence. In addition, the Court enforced a Non-Cumulation provision in ten umbrella excess liability policies to find that the limit of only one of those policies would be paid and the policies could not be “stacked.”

Several thousand asbestos exposure claims had been filed against Treedale, a manufacturer of an asbestos containing product. Liberty Mutual issued primary insurance policies to Treedale from May 1, 1975 to February 1, 1985, and defended and indemnified Treedale pursuant to the primary policies, all of which were exhausted. Liberty Mutual also issued umbrella excess liability (“UEL”) policies to Treedale during the same period, the first eight of which contained limits of \$2 million per occurrence and in the aggregate. The last two UEL policies had limits of \$5 million per occurrence and in the aggregate.

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Third Circuit Holds Pennsylvania Writ of Summons Generally Not Removable

The Third Circuit recently settled the issue of whether a writ of summons triggers a defendant’s time to remove a case to federal court in Sikirica v. Nationwide Ins. Co., 2005 U.S. App. LEXIS 16077 (3d Cir. August 4, 2005). There, the insured’s bankruptcy trustee instituted an action against Nationwide via a writ of summons which was served on Nationwide on April 29, 2002. Earlier in the month, the trustee had demanded \$300,000 via a letter to Nationwide. Thus, the trustee argued that Nationwide was on notice of diversity jurisdiction prior to the filing of the complaint. The complaint was filed and served on July 8, 2002 and Nationwide removed the case on July 22, 2002. The trustee filed a motion to remand which the district court denied. The district court then granted Nationwide’s motion to dismiss and the trustee appealed. The Third Circuit affirmed, finding that Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999), had implicitly overruled Foster v. The Mutual Fire, Marine & Inland Ins. Co., 986 F.2d 48 (3d Cir. 1993), with respect to a writ of summons being sufficient to trigger removal. The Third Circuit also recognized that in Pennsylvania, unlike in New Jersey and other states, a writ of summons generally does not provide information regarding diversity or any other material information about the case, and thus interpreting the removal statute to mean that the complaint is the “initial pleading” will make removal uniform throughout the Third Circuit. The court further noted that since the complaint was the initial pleading and the complaint provided notice of the grounds for removal, the second paragraph of § 1446(b), regarding “other papers” providing notice of federal jurisdiction, did not apply because that paragraph only

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The Court first addressed whether all of the asbestos claims arose from a single occurrence, i.e., the manufacture and the sale of the asbestos containing product, or whether the claims arose from multiple occurrences, i.e. each claimant’s exposure to asbestos. Applying the “cause of loss” test, adopted in Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3d Cir. 1982), the district court found there was one occurrence. The Third Circuit affirmed. The policy defined “occurrence” as “injurious exposure to conditions, which results in personal injury . . . neither expected or intended from the standpoint of the insured.” The Limits of Liability section of each UEL policy stated:

Regardless of the number of insureds under this policy or the number of persons or organizations who sustain personal injury . . . the company’s liability is limited as follows:

Each occurrence – the limit of liability stated in the declarations as applicable to “each occurrence” is the limit of the company’s liability for all damages, direct and consequential, because of all personal injury . . . sustained by one or more persons or organizations as the result of any one occurrence.

Finally, for the purpose of determining the limits of the company’s liability, the policy provided:

All personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as the result of one and the same occurrence.

The Third Circuit noted that its Appalachian decision controlled, even though it had not specifically applied Pennsylvania law, since the Pennsylvania Superior Court had adopted the Appalachian cause of loss test in D’Auria v. Zurich Ins. Co., 507 A.2d 857 (Pa. Super. 1986), and the Circuit had applied Appalachian in determining the number of occurrences under Pennsylvania law in Scirex Corp. v. Federal Ins. Co., 315 F.3d 841 (3d Cir. 2002). The Third Circuit rejected Treesdale’s argument that reliance on a common source (the manufacture and sale of the asbestos containing

product) was illogical because the manufacture and sale of asbestos containing products is neither an “exposure” to anything nor a “condition” to which a claimant could be exposed. The Court noted that Treesdale selectively parsed the policy and ignored the clear language of the “Limits of Liability” section that referred to limits on a per occurrence basis, and not on a per claim or per person basis. According to the Court, a single occurrence could clearly result in injury to multiple persons under the policy language, “and it could hardly be otherwise given the structure of the policy.”

Treesdale argued that Appalachian did not apply to asbestos litigation in light of J.H. France Refractories v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993) (adopting the “triple trigger” theory of insurance coverage). The Third Circuit noted that J.H. France addressed only the question of when a sufficient injury occurs to trigger the insurer’s indemnification obligation, and had nothing to do with the distinct “occurrence” question.

The Non-Cumulation provision in each UEL policy provided:

Non-cumulation of liability – Same Occurrence – if the same occurrence gives rise to personal injury . . . which occurs partly before and partly within any annual period of this policy, then the each occurrence limit and the applicable aggregate limit or limits of the policy shall be reduced by the amount of each payment made by the company with respect to each occurrence, either under a previous policy or policies of which this policy is a replacement, or under this policy with respect to previous annual periods thereof.

Liberty Mutual contended that the Non-Cumulation provision was intended to prevent stacking or cumulation of policy limits of its consecutive UEL policies that apply to the same occurrence. The Non-Cumulation provision ensured that if an occurrence has been covered by one policy in a line of successive policies, then only one occurrence limit will apply. Treesdale argued that the Non-Cumulation provision did not apply because Treesdale could access the UEL policies in reverse chronological order, thereby precluding there ever being a “payment made . . . under a previous policy.” Treesdale relied upon J.H. France

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to contend that to afford the coverage promised by the insurance policies, the insured should be free to select the policy under which it is to be indemnified, and thus, Treesdale could choose which of the ten triggered UEL policies should provide coverage first. Under that approach, the Non-Cumulation provision would become inoperative if Treesdale selected the last issued UEL policy. The Third Circuit rejected Treesdale's "reverse chronological order" theory finding it to be obtuse and inconsistent with the clear language of the provision. The Court also accepted Liberty Mutual's argument that each successive UEL policy was a "replacement" of the prior policy, finding that the terms "renewal" and "replacement" mean essentially the same thing.

The Court also rejected Treesdale's argument that the Non-Cumulation provision eliminated coverage, finding that instead it operated like other anti-stacking provisions which Pennsylvania courts had enforced in the automobile insurance context. Finally, the Court rejected Treesdale's argument that the Non-Cumulation provision was unenforceable because it frustrated Treesdale's reasonable expectations that it would receive coverage under all 10 policies it purchased. The court noted that in Pennsylvania, an insured's expectation cannot override policy limitations that are clear and unambiguous.

In sum, Liberty Mutual was only obligated to pay the \$5 million limit of liability of one UEL. ♦

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applies if the initial pleading does not provide grounds for removal and the complaint did so provide. Thus, the demand letter sent prior to the writ of summons was irrelevant as an "other paper" and Nationwide's notice of removal 30 days after service of the complaint was timely. ♦

Philadelphia Common Pleas Court Finds Asbestos Claims Arising Out Of Each Construction Site To Be One Occurrence

On August 19, 2005, the Court of Common Pleas of Philadelphia issued a decision in Kvaerner E.S., Inc. v. One Beacon Ins. Co., 2005 Phila. Ct. Com. Pl.

LEXIS 377, in which it held that asbestos personal injury claims arising out of each construction site would be considered one "occurrence." Kvaerner's activities which triggered the underlying personal injury asbestos claims against it arose from various locations where Kvaerner constructed furnaces. The insurance policies issued by One Beacon and Century Indemnity defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." In addition, the "Limits of Liability" provision stated that "for the purpose of determining the Company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general condition shall be considered as arising out of one occurrence."

Kvaerner argued that all of the asbestos personal injury claims embodied in the underlying suits should be identified and correlated by construction site, and that each construction site should be considered an occurrence. The insurers argued that all asbestos related personal injury claims were caused by a single occurrence, i.e. the continuous or repeated exposure to the asbestos.

The Court applied the "cause of the loss" test articulated by Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3d Cir. 1982), and found that the construction of furnaces at each construction site constituted a separate occurrence, "and that at each construction site there was a new exposure and another occurrence," citing Stonewall Ins. Co. v. Asbestos Claims Mgmt. Co., 73 F.3d 1178 (2d Cir. 1995) (installation of asbestos at each building was a separate occurrence because each installation created exposure to a condition which resulted in property damage neither expected nor intended.). The Court noted that Kvaerner's activities which triggered the underlying claims did not arise from a single negligent practice that could be considered one cause, "such as distributing a uniformly defective product from a single manufacturer or selling a product containing asbestos from one location." Rather, the exposure arose from construction of furnaces at different sites, at different times and for varying lengths of time. Consequently, the claimants that were exposed to asbestos at the same location and at the same time were exposed to "substantially the same general condition." ♦

Third Circuit Finds Asbestos Personal Injury Plaintiffs Not Entitled To Intervene In Coverage Dispute Between Policyholder And Insurer

The Third Circuit has held that asbestos personal injury plaintiffs had no right to intervene in a coverage dispute between the asbestos manufacturer and its insurers. In Liberty Mut. Ins. Co. v. Treedale, Inc., 2005 U.S. App. LEXIS 17151 (3d Cir. 2005), asbestos personal injury plaintiffs contend that they were entitled to intervene in a declaratory judgment action between Treedale and its umbrella liability insurer pursuant to Fed.R.Civ.P. 24, and were otherwise necessary and indispensable persons under Fed.R.Civ.P. 19(a). The district court found that those plaintiffs did not have a “sufficient interest in the litigation,” the second element of a Rule 24(a)(2) inquiry. The Third Circuit affirmed, finding that “the mere fact that a lawsuit may impede a third party’s ability to recover in a separate suit ordinarily does not give the third party a right to intervene.” The Court then agreed that the asbestos personal injury plaintiffs were not entitled to permissive intervention under Fed.R.Civ.P. 24(b) because their claims did not involve common questions of law or fact with a

declaratory judgment action between the insurer and its insured.

The Court also found that the asbestos personal injury plaintiffs could not qualify as necessary parties under Rule 19(a)(2)(i) because their interest did not “relate to the subject of the action,” i.e., they did not have a legally protectable interest in the Liberty Mutual umbrella policies. Moreover, the Court rejected Treedale’s argument that Erie R. Co. v. Thompkins, 304 U.S. 64 (1938), required the district court to apply Vale Chem. Co. v. Hartford Acc. & Indem. Co., 516 A.2d 684 (Pa. 1986) (holding that all persons asserting claims against the insured must be joined to an action under the Pennsylvania Declaratory Judgment Act). Since Vale addressed procedural and jurisdictional rather than substantive issues, Erie did not require application of Vale to procedural questions of intervention or necessary parties under the federal rules. ♦

For any questions on the topics addressed in this newsletter, please call Alan Miller at 412-288-4004 or Bridget Gillespie at 412-288-4017. ♦

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Picadio Sneath Miller & Norton, P.C.
4710 U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219