Insurance Law - Indemnification - Multiple Insurers - Asbestos Claims

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INSURANCE LAW—INDEMNIFICATION—MULTIPLE INSURERS—ASBESTOS CLAIMS—The Supreme Court of Pennsylvania adopted the “multiple trigger” theory for liability and held that each insurer that provided coverage during the triggering periods was jointly and severally liable for the entire loss.


In 1979, a suit was brought against J.H. France Refractories Company (“France”) by Charles Temple’s estate (“Temple”) claiming that Temple had died from asbestos-related diseases as a result of his exposure to asbestos-containing products manufactured by France.\(^1\) France was insured by various insurance companies during the time it manufactured asbestos products.\(^2\) However, when France presented a claim based on this suit to the applicable insurance companies, they each refused to defend or indemnify France.\(^3\) Each relevant insurance policy contained identical provisions which determined when the insurance companies’ liabilities were to be activated.\(^4\)

In 1981, France filed a declaratory judgment action to determine the duties of each insurance company.\(^5\) The court of common pleas

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2. *Id.* During the time France manufactured asbestos-containing products, it was insured by the Pennsylvania Manufacturers Association, St. Paul, Allstate, U.S. Fire, Wausau, and Rockwood Insurance Companies. *Id.*

3. *Id.*

4. *Id.* at 505. Each policy stated that:

   [The Insurer] will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury . . . to which this insurance applies, caused by an occurrence, and [the Insurer] shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury . . . .

   “Bodily injury” means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom. . . .

   “Occurrence” means an accident, including continuous or repeated exposure to conditions, which result in bodily injury . . . neither expected nor intended from the standpoint of the Insured.

*Id.*

5. *Id.* at 504.
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granted summary judgment on the issue of coverage. The Superior Court of Pennsylvania reversed the decision. The Supreme Court of Pennsylvania reversed the superior court's determination and remanded the case. On remand, the trial court designated the obligations of the various insurers. Subsequently, the superior court, affirming in part and reversing in part, found the insurers liable but decided that the duty to indemnify should be determined on a pro-rata basis apportioned upon the amount of time each policy was in effect. France petitioned for allowance of appeal and the Supreme Court of Pennsylvania granted allocatur.

The main issue considered by the supreme court was the determination of the obligations of various insurers who provided coverage during periods to France for the numerous asbestos and asbestos-related disease cases filed against France. The court analyzed the question by separating it into two distinct issues. The first question presented was at what point in the asbestos disease process was liability coverage triggered. The second issue, contingent on the finding that the insurers' obligations had been triggered, was to determine how to apportion the obligations among the numerous insurers.

In determining at what stage of the asbestos disease process the insurers became liable, the court relied heavily on the medical evidence produced at trial. The evidence revealed that an asbestos-

7. Id. Relying on the fact that the trial court did not have jurisdiction, the superior court did not address the merits of the case. Id. The court found no jurisdiction because in a declaratory judgment action all parties must be joined and there were some claims against France that had not been joined. Id.
8. Id. The court held that the trial court did have proper jurisdiction despite the nonjoinder of several claims. Id.
10. France, 578 A.2d at 480.
11. France, 626 A.2d at 505. Allocatur is a word used to denote that a writ or order is allowed. BLACK'S LAW DICTIONARY 75 (6th ed. 1990).
12. France, 626 A.2d at 506-07. The court also considered the sub-issues of whether one of the policies had a valid occupational disease exclusion clause and whether the various insurers had acted in bad faith for initially refusing to defend or indemnify. Id. at 509-10.
13. Id. at 506-07.
14. Id. at 506.
15. Id. at 507.
16. France, 626 A.2d at 505-07. The evidence was provided by a clinical pathologist who was an expert in asbestos-related disease. Id. He defined injury as a "process which alters structure" applying the term regardless of whether he was referring to a cell, tissue,
related disease is an injury which occurs within minutes of initial exposure to asbestos and whose destructive powers continue to progress even though such exposure ends.\textsuperscript{17} The evidence further revealed that bodily injury on a cellular level occurred almost simultaneously with exposure to asbestos.\textsuperscript{18} The court held this constituted a discrete "injury," and that this form of injury triggered coverage under the insurance policies.\textsuperscript{19} Upon this evidence, the court adopted the "multiple trigger" theory of liability, determining that liability shall exist if either exposure, progression of pathology, or manifestation of the disease occurred while the insurer's policy was in effect.\textsuperscript{20}

In resolving the apportionment of liability issue, the court examined the relevant policies and found that the policies contained no reduction clauses for an injury which occurred during only part of the respective policy coverage.\textsuperscript{21} Based upon this, the court found that once liability of a given insurer was triggered, that insurer must be potentially liable for the entire claim regardless of an additional exposure or injury while another insurer was on the risk.\textsuperscript{22}

Thus, the supreme court, confronting the issue of indemnification between asbestos manufacturers and their insurers for the first time,\textsuperscript{23} adopted the approach whereby liability obligation was activated upon exposure, progression of the pathology, or manifestation of the disease.\textsuperscript{24} The court also held that once incurred, each and every separate policy would cover France's liability in

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\textsuperscript{17} Id. at 506. A contrary view theorizes that disease progression may be attributable to the inevitable decrease in respiratory functions due to the aging process, especially when combined with smoking or infection. Id.

\textsuperscript{18} Id. Evidence established that individual cells are damaged or killed within minutes of being invaded by an asbestos fiber. Id. at 505-06.

\textsuperscript{19} Id.

\textsuperscript{20} Id. The court called this the multiple trigger theory. Id. This theory holds that several stages may trigger liability. Id. The first triggering stage is an inhalation exposure, whereby cell damage occurred on contact. Id. at 506-07. Next, there is a progression of the pathology, identifiable by tissue scarring and functional impairment within a month of initial exposure. Id. Finally there is a manifestation of a recognizable disease, identifiable by symptoms of severe functional impairment. Id.

\textsuperscript{21} France, 626 A.2d at 508.

\textsuperscript{22} Id. The supreme court rejected the superior court's ruling that France should be included as a self-insurer in apportioning liability for the period of time for which it was uninsured. Id. The court found this to be a "judicial fiction" upon which there was no basis for estimating the coverage or limits of such a policy. Id.

\textsuperscript{23} Id. at 510.

\textsuperscript{24} Id. at 507.
totality.\textsuperscript{25}

In the late 1960s and early 1970s, a growing amount of litigation began to center upon asbestos manufacturers, their insurers, and their liability for diseases caused by asbestos products. In 1973, the landmark case of Borel v. Fiberboard Paper Products Corp.\textsuperscript{26} first established that an injured worker who had been exposed to asbestos could recover against the asbestos manufacturer.\textsuperscript{27} The issue involved the duty of an asbestos manufacturer to warn its employees of the dangers of asbestos.\textsuperscript{28} The court held that the injured worker only needed to prove that a given manufacturer’s products contributed to the worker’s asbestos-related disease at any time in order to trigger joint and several liability on the part of that manufacturer.\textsuperscript{29} Thus, under Borel and its offspring, a claimant needed only to prove that he or she was exposed to an asbestos product and was injured as a result of that exposure.\textsuperscript{30} Borel also established that the manufacturer had a duty to warn the users of its products of the long-term dangers attributable to asbestos.\textsuperscript{31} This decision resulted in a mass of toxic tort litigation and laid the foundation for various theories of insurance indemnification.\textsuperscript{32}

\textsuperscript{25} Id. at 508. The court also held that the insurers did not act in bad faith for initially refusing to defend or indemnify. Id. at 510. The court further found that it was permissible for the insurers to decide among themselves which would undertake the defense. Id. In addition, the court stated that a products hazard restriction clause contained in one of the policies was valid. Id. at 509-10.

\textsuperscript{26} 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

\textsuperscript{27} Borel, 493 F.2d at 1081. In Borel, an insulation worker with a 33-year exposure period sued 11 different manufacturers of asbestos products, alleging that his exposure to their products caused him to develop asbestosis. Id. at 1081, 1086.

\textsuperscript{28} Id. at 1081.

\textsuperscript{29} Id. at 1095-96. The effect of this holding was to shift the burden of proof to each defendant to show which portion of the harm it caused and to hold each defendant jointly and severally liable for the total damage if the defendant were unable to show any reasonable basis for division. Id.

\textsuperscript{30} Id. at 1094. See Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982) (holding that asbestos products were not cancer-promoting as a matter of law); Migues v. Fiberboard Corp., 662 F.2d 1181 (5th Cir. 1982) (holding that Borel cannot be read to stand for the proposition that in all cases, asbestos products were unreasonably dangerous as a matter of law); Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975) (holding that the asbestos manufacturer breached its duty to warn of an unreasonably dangerous product); Beshida v. Johns-Manville Products Corp., 447 A.2d 539 (N.J. 1982) (holding asbestos manufacturers strictly liable for injuries caused by their products irrespective of manufacturers’ knowledge and actions).

\textsuperscript{31} Borel, 493 F.2d at 1089.

\textsuperscript{32} Gail B. Agrawal, Comment, Asbestos: Who Will Pay the Plaintiff?, 57 Tul. L. Rev. 1491, 1495 (1983). The floodgates opened because Borel held that claimants did not have to identify a specific culpable manufacturer but merely had to allege that they were at one time exposed to the defendant’s products. Id.
As the number of products liability suits began to escalate, asbestos manufacturers turned to their insurers to provide legal defense for those actions and indemnification for any losses incurred. As the courts began to struggle with this issue, some decided to apportion liability upon an exposure theory. Under the exposure theory, the insurer that carried the risk during the time of a worker's initial exposure must defend the entire claim and pay any potential judgments. The leading case adopting this exposure theory was *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*

The United States Court of Appeals for the Sixth Circuit was faced with the issue concerning the insurance carriers' duty to indemnify asbestos manufacturers for any subsequent judgment amounts. The Sixth Circuit adopted the exposure theory principally due to the medical evidence at trial which conclusively established that an injury (in the sense that there was tissue damage) occurred shortly after initial inhalation of asbestos fibers. The court concluded that it was the injury and not the discovery that made the manufacturer liable.

The competing view was embodied in *Eagle-Picher Industries v. Liberty Mutual Insurance Co.*, the leading case adopting the manifestation theory. The court was faced with choosing between

34. See *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), cert. denied, 454 U.S. 1109 (1981) (adopting the exposure theory holding that the burden of apportionment shall be on the carriers when each insurer has been on the risk for an indivisible injurious process); *Forty-Eight*, 633 F.2d at 1226 (holding that it was the injury itself and not the discovery that made the manufacturer liable).
36. 633 F.2d 1212 (6th Cir. 1980), cert. denied, 454 U.S. 1075 (1981). This case presented a novel question of insurance law due to the fact that asbestos manufacturers faced huge potential liability on account of the numerous lawsuits filed by employees who had been exposed to asbestos products allegedly produced by the various companies. Id. at 1213.
37. Id.
38. Id. at 1218. This evidence revealed that asbestosis is a latent disease and that "each tiny deposit of scar-like tissue causes injury to a lung", prompting the court to find each such injury as an occurrence for purposes of determining which coverage applied. Id. at 1217.
39. Id. at 1220. The court held that each insurer on the risk at any point during a worker's exposure to asbestos, including defendant manufacturer's insurance company for periods of time when it was uninsured, must bear its pro rata share of indemnification costs. Id. at 1224-25.
41. *Eagle-Picher*, 682 F.2d at 12. Defendant filed a declaratory action for defense and indemnification costs against its numerous insurance companies for the asbestos suits that had been filed against it. Id. at 16.
the two theories of insurance coverage. The court in *Eagle-Picher* noted that the manifestation theory assigns full responsibility of indemnification for defense and judgment or settlement costs to the insurance company whose policy was effective on the date of manifestation of injury. The First Circuit held that the appropriate time for determining which of several policies would be liable was that date when medical diagnosis of the asbestos-related disease became reasonably ascertainable. The court looked to the policy language and found that it clearly read that each occurrence was made up of both an exposure and a resulting bodily injury. The court concluded that it was the resulting bodily injury and not the exposure which must take place during the policy period. The court pointed out that most insurers favor the manifestation theory, and that this theory had been followed in other jurisdictions because it meant that only one insurer would be required to defend and indemnify the manufacturer.

In the midst of the exposure versus manifestation debate in determining the various insurers' liability, the case of *Keene Corp. v. Insurance Co. of North America* was decided by the District of Columbia Circuit Court of Appeals. In *Keene*, the court addressed the issue of determining the extent of asbestos disease liability coverage for each of the policies. This case expanded the realm of insurer liability by implementing a multiple trigger approach, namely, that inhalation exposure, exposure in residence, and manifestation of a recognizable disease would all trigger coverage under the insurance policy. The court also found that each insurer on the risk at any time between the initial exposure and manifestation

42. *Id.*
43. *Id.*
44. *Id.* at 25. The policy at issue was clear in that it required that an exposure result in an injury during the coverage period. *Id.* at 24. See note 4 and accompanying text for the relevant policy provisions.
45. *Id.* at 17.
46. *Eagle-Picher*, 682 F.2d at 17. The court held that if a single exposure to asbestos had been intended to trigger coverage, the policy language would have reflected this intent rather than defining an “occurrence” in part as a “continuous or repeated” exposure to conditions. *Id.* See note 4 and accompanying text for the relevant policy provisions.
47. *Id.* at 16. See also *American Motorists Insurance Co. v. Squibb & Sons, Inc.*, 406 N.Y.S.2d 658 (N.Y. App. Div. 1978) (holding a drug manufacturer's comprehensive general liability policy was held to be predicated upon result).
48. 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982). In this case, the manufacturer sought defense costs and indemnification, which each of the various insurers who had provided coverage to the manufacturer refused. *Keene*, 667 F.2d at 1038.
49. *Id.*
50. *Id.* at 1043-47.
of disease was liable to the manufacturer for the entire defense and
indemnification cost. The court rejected the exposure theory be-
cause under such a theory the insured would be uncertain as to
liability from exposure occurring before purchase of the policy. The
court declined to adopt the manifestation theory because by
the mid-1970s, most insurers had stopped issuing policies that ade-
quately covered asbestos-related diseases. Thus, the circuit court
recited that if liability were triggered only upon manifestation, in-
surers would avoid the duty of indemnification altogether. The
tribunal reasoned that when it became known that an action had
occurred which would potentially trigger liability coverage, the in-
surer on the risk at that time was liable for the full loss.

In 1985, the Superior Court of Pennsylvania in Vale Chemical
Co. v. Hartford Accident and Indemnity Co. was faced with an
issue of first impression for this jurisdiction in determining which
insurance indemnity theory to apply. The court reasoned that in
the context of a disease with a long latency period, such as asbesto-
sis, the term “bodily injury” was too vague to precisely identify at
what point the physical damage or disability occurred and when
liability was subsequently triggered. Thus, the court decided to
follow Keene and interpreted bodily injury to encompass any part
of the various injury stages that asbestos-related diseases entail.

Later in 1985, the United States Court of Appeals for the Third
Circuit in ACandS, Inc. v. Aetna Casualty and Surety Co. was

51. Id. The court recognized and found joint and several liability upon the fact that
asbestos-related diseases cannot be attributed to just one of the several different exposures.

52. Id. at 1044-45.

53. Keene, 667 F.2d at 1045 n.22. Although asbestos had been in commercial use
since the early 1900s, it was not until the early 1970s that the dangers of exposure to asbes-
tos became fully recognized. Id. When the surfeit of litigation began, the insurers attempted
to shield themselves from liability by no longer covering such diseases. Id.

54. Id. at 1044. In construing the policy coverage, the court said that one must con-
sider the reasonable expectations of the insured and give effect to the policies' dominant
purpose of indemnity. Id.

55. Id. at 1046-47.

1986).

57. Vale Chemical, 490 A.2d at 900.

58. Id. at 901.

59. Id. at 902.

60. 764 F.2d 968 (3d Cir. 1985). The contracting company in ACandS that installed
insulation products sought indemnification and defense costs for the thousands of lawsuits
filed against it for alleged personal injury as a result of exposure to its products. Id. at 969.
faced with the issue of insurance indemnification. This case required the court to interpret insurance contracts between a Pennsylvania company and its insurer. The court reasoned that the goal of such an interpretation was to ascertain the intent of the parties as evidenced by the writing. The court applied Pennsylvania law which required that ambiguities in an insurance policy be interpreted in the insured’s favor. The Third Circuit followed Vale and Keene and continued the trend towards adopting the multiple trigger approach to indemnification.

The France decision clarified the law of indemnification in Pennsylvania. The decision did not base liability solely upon an exposure to asbestos. However, such an exposure theory is often viewed as a favorable one for the insured because it maximizes the potential coverage for any loss. The Supreme Court of Pennsylvania also declined to saddle the entire indemnification burden on the one unlucky insurer whose policy happened to be on the risk on the date of manifestation. In contrast, the supreme court, in adopting the multiple trigger theory, used the fairest method of allocation for all parties involved. It provided the insured party with its best chance of recovery by maximizing the potential amount of coverage. It also acted to soften the financial blow to the insurers that could have otherwise been found potentially solely liable under either the exposure or manifestation theory. Accordingly, in Pennsylvania, all losses are spread among all insurers to the fullest extent. A later insurer benefits greatly under the multiple trigger theory because its potential liability is essentially decreased upon the spreading of losses as opposed to being found the sole responsible insurer upon manifestation.

61. ACandS, 764 F.2d at 972.
62. Id.
63. Id. at 973.
64. Id. See also Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563 (Pa. 1983) (holding that insurance policies must be strictly construed against the insurer).
65. ACandS, 764 F.2d at 973.
67. Id. at 507.
68. Forty-Eight, 633 F.2d at 1220.
69. France, 626 A.2d at 507.
70. Id.
71. Id.
72. Id.
73. Id.
74. France, 626 A.2d at 506-07.
However, this decision may not be enough to avert the economic realities of a future financial disaster. The increasing number of product liability suits brought against asbestos manufacturers threaten to bankrupt both the manufacturers and insurers and further erode our shrinking industrial base. There have been seventeen reported corporate bankruptcies stemming from the financial strain of asbestos litigation, thus putting more pressure on the remaining defendants whose own resources are limited. The cost of defending asbestos suits in the future has been conservatively estimated by the United States Department of Labor to be $228 billion. Economic resources are not endless and insurers will eventually be forced to place much of the burden of their defense and judgment costs on future consumers. Thus, in the future, this author contends that the multiple trigger theory of insurance indemnification may result in higher premiums, lower coverage amounts, and possibly a total lack of coverage for not only asbestos manufacturers but everyone.

This threat might not be imminent if Congress would become involved in implementing a federal system for occupational disease relief which would ultimately lead to prompt, fair and uniform compensation. Such a system could be operated by an appointed agency which would assign and collect damages and collect them from the various manufacturers to be placed in a relief fund. This agency could then distribute the money in an efficient and expedient manner according to a predetermined amount depending on the specific medical diagnosis. Unfortunately, this may result in some plaintiffs receiving lower awards, but they would receive their relief much faster than through the judicial relief system currently in place.

The current litigation system is uncertain because insurers must defend and indemnify asbestos claims based on the plaintiff's


choice of forum.\textsuperscript{77} The fact that plaintiffs may choose to file suit in a notoriously pro-plaintiff forum makes it increasingly difficult for insurers to be financially prepared in terms of structuring their rates or predicting their capital needs.\textsuperscript{78} It has cost approximately $7 billion in litigation costs for the American legal system to defend asbestos suits in the 1980s and early 1990s.\textsuperscript{79} Of this $7 billion, 60\% of it has gone to lawyers, expert witnesses, and court costs; almost everyone except the asbestos victims.\textsuperscript{80} Eliminating the judicial system from the resolution of the asbestos controversy would remove the court costs, attorney fees and administrative expenses and put the money back in the pockets of the victims. This would also serve the purpose of shortening the time period between filing of the claim and receiving relief.

This author concludes that if the current system of judicially handling asbestos claims is left intact, the possible ramifications of an uninsured nation, unemployment and a further de-industrialization become quite real. It is now up to everyone to reevaluate this troubled system.

\textit{Martin L. Ryan}

\textsuperscript{77} Agrawal, cited at note 32, at 1517.  
\textsuperscript{78} \textit{Id.} at 1517-18.  
\textsuperscript{79} Edley & Weiler, cited at note 75, at 384.  
\textsuperscript{80} \textit{Id.}