

Continuous-Trigger Theory, Construction Defects Coverage Update

November 15, 2023

Continuous-Trigger Theory – West Virginia

Westfield Ins. Co. v. Sistersville Tank Works, Inc.

--- S.E.2d ---, 2023 WL 7391646 (W. Va. Nov. 8, 2023)

The West Virginia Supreme Court of Appeals answered the following certified question from the U.S. Court of Appeals for the Fourth Circuit: “At what point in time does bodily injury occur to trigger insurance coverage for claims stemming from chemical exposure or other analogous harm that contributed to the development of a latent illness?” The Supreme Court concluded that the language in occurrence-based Commercial General Liability (CGL) policies was ambiguous and determined that a “continuous-trigger” theory applied to the policies. Under this theory, “damages that are caused, continuous, or progressively deteriorating throughout successive policy periods are covered by all the occurrence-based policies in effect during those periods.”

Beginning on Jan. 1, 1984, respondent Sistersville Tank Works, Inc. (STW) was covered under a CGL policy purchased from petitioner Westfield Insurance Company (Westfield). Westfield renewed coverage under a series of policies over 25 years until April 15, 2010. At different points between 2014 and 2016, three men were diagnosed with various forms of cancer. They filed a lawsuit against STW, claiming that they worked around tanks at STW’s chemical plant in West Virginia. They also claimed that they were exposed from 1960 to 2006 to cancer-causing chemical liquids, vapors or fumes that escaped from the tanks. The men alleged that the cancers were, in some part, caused by STW’s tanks.

Westfield denied coverage for the three lawsuits and filed a complaint for declaratory relief in the U.S. District Court for the Northern District of West Virginia. Westfield asserted that it did not have a duty to provide a defense or indemnification to STW because the claimants were diagnosed four or more years after expiration of the last CGL policy, and, therefore, STW could not establish an occurrence within the policy period sufficient to trigger coverage. The district court concluded that the insuring language in the Westfield policy was ambiguous and applied the continuous-trigger theory to clarify the ambiguous language. Westfield appealed to the Fourth Circuit and asserted that the district court should have adopted a “manifestation” trigger to limit the meaning of an occurrence to the point when an injury is diagnosed, discovered or manifested.

The Fourth Circuit certified the question to the West Virginia Supreme Court of Appeals, which held that a continuous-trigger theory applies, meaning “when a claim is made alleging a progressive injury caused by chemical exposure or other analogous harm, every occurrence-based policy in effect from the initial exposure, through the latency and development period, and up to the manifestation of the bodily injury, sickness, or disease, is triggered and must cover the claim.”

By: Joshua LaBar

Construction Defects – New Jersey

Asbury Blu Condo Ass'n, Inc v. Chubb Corp.

No. A-3114-20, 2023 WL 7139900 (N.J. Super. Ct. App. Div. Oct. 31, 2023)

A New Jersey Appellate Court affirmed the trial court’s judgment for the insurer-defendant, Great Northern Insurance Company (Great Northern), in a condominium water intrusion suit, finding that policy exclusions applied to bar the plaintiff’s first- and third-party claims for property damage.

Pioneer AP II, LLC (Pioneer) developed and sponsored a 24-unit condominium building in Asbury Park, known as the Asbury Blu Condominium, which was completed in 2007. Pioneer also established the Asbury Blu Condominium Association (the association) to, among other things, take control of managing, operating, maintaining, repairing and replacing the condominium’s common elements once the transition occurred. Due to market conditions, it took several years before the units were sold and the association took control of the building. During that time, water intrusion issues arose that were allegedly caused by faulty installation of doors, windows and curtain walls.

Great Northern issued a primary insurance to Onyx Management Group, LLC for continuous annual policy periods of Oct. 5, 2006 to Oct. 5, 2010. The policy, via endorsements, identified Pioneer as an additional insured and Asbury Blu as an insured property with an effective date of July 31, 2007. The association’s board members were executive officers of Pioneer and qualified as insureds under the policy. The policy was not renewed after Oct. 5, 2010.

In 2013, the association sued, among others, Pioneer and the association’s board of directors. The association also sought first-party coverage from Great Northern for the water damage. Great Northern declined to defend Pioneer and the association’s board of directors against the association’s lawsuit and denied coverage for the association’s first-party claim. The association settled its suit against Pioneer and the board of directors in exchange for the entry of a \$450,000 consent judgment and the assignment of insurance rights so that the association could pursue Great Northern.

In 2018, the association sued Great Northern seeking a declaration that Great Northern improperly refused to provide liability coverage to Pioneer and improperly denied the association’s first-party claim.

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Before the parties conducted discovery, the trial court held that Great Northern had no duty to defend and indemnify Pioneer for claims that arose between October 2006 and October 2008 per the policy's real estate development exclusion. Following discovery, the trial court ruled that claims arising from October 2008 to October 2010 were barred by the policy's construction or development exclusion because the association alleged that Pioneer's negligent construction and development of the building caused water infiltration that damaged the building and did not allege any claims that fell within the repair exception to this exclusion. The trial court also ruled that there was no liability coverage for the non-negligence claims because these were not occurrences within the meaning of the policy. Regarding the association's first-party property claims, the trial court determined that the construction defects exclusion applied to defeat coverage. The appellate court adopted as its opinion the trial court's written opinion, affirming the trial court's judgment in favor of Great Northern.

By: Amy L. Diviney