

Pennsylvania Supreme Court Will Not Address Trigger for DEP Environmental Cleanup Action at This Time

By: Gregory Capps

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On July 18, 2018, in *Pennsylvania Manufacturers' Association Insurance Company v. Johnson Matthey, Inc., et al.*, No. 24 MAP 2017 (Pa. July 18, 2018), the Pennsylvania Supreme Court quashed the Pennsylvania Manufacturers' Association's (PMA) appeal seeking review of a ruling denying its motion for summary judgment for an order that coverage for the cleanup of a toxic waste site is limited to the policy in effect when property damage was first discovered. In short, the court found the lower court's ruling only narrowed the dispute between the parties and is, therefore, interlocutory and not appealable at this time.

In *Johnson Matthey*, PMA filed a petition for a declaratory judgment action in the Commonwealth Court of Pennsylvania requesting an order that it has no obligation to defend or indemnify Johnson Matthey in connection with a lawsuit filed by the Pennsylvania Department of Environmental Protection (DEP) in the United States District Court for the Eastern District of Pennsylvania seeking cleanup costs for environmental damage against Johnson Matthey. In response to PMA's petition, Johnson Matthey filed a counterclaim seeking, *inter alia*, a declaration that PMA has a duty to pay all defense and indemnity costs related to the site and that all remedial investigation costs incurred by Johnson Matthey were properly payable under the policies as defense costs. Johnson Matthey also filed a separate breach of contract claim.

In its motion for summary judgment, PMA asserted that the policies it issued from 1969 to 1971 were not "triggered" for the claim because the environmental property damage at issue was not first discovered until 1988. Essentially, PMA sought to have the court apply the Pennsylvania Supreme Court's first manifestation trigger ruling from *Pennsylvania National Mutual Insurance Company v. St. John*, 106 A.3d 1 (Pa. 2014), to the facts at issue. The lower court rejected PMA's argument and equated the underlying "latent contamination" claims at issue to asbestos bodily injury claims and applied the multiple or continuous trigger ruling of *J.H. France Refractories v. Allstate Insurance Company*, 626 Pa. 502 (Pa. 1993), which triggers all policies on the risk from exposure through manifestation. PMA filed a Notice of Appeal to the Pennsylvania Supreme Court from the lower court's ruling.

After the Notice of Appeal was filed, the Pennsylvania Supreme Court asked the parties to address the jurisdictional propriety of the appeal. The parties submitted briefs and, without oral argument, the court issued a *per curiam* decision, with two justices dissenting, ruling that the order is interlocutory and unappealable at this time. Relying on precedent, the court held that while the lower court's order effectively denied PMA's request for declaratory relief, it had not yet ruled on Johnson Matthey's broader counterclaims for declaratory relief and breach of contract. Consequently, the court reasoned that the lower court's ruling "merely narrowed" the parties dispute and is not appealable at this time. We, therefore, wait for another day for the Pennsylvania Supreme Court to consider the overall application of its prior ruling in the *St. John* case.

If you have questions or would like more information, please contact Gregory Capps (cappsg@whiteandwilliams.com; 215.864.7182) or another member of the Insurance Coverage and Bad Faith Group.

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