LAW360 Insurance Authority

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

W.Va. Continuous Trigger Ruling Will Spur Allocation Fights

By **Shane Dilworth**

Law360 (November 17, 2023, 4:58 PM EST) -- The West Virginia Supreme Court's recent answer to a certified question that the continuous trigger theory applies to long-tail injury claims will open the door to battles between insurers over allocation, experts say.

Experts are divided on the significance of the West Virginia Supreme Court's answer to a Fourth Circuit question on the issue of the continuous trigger theory. (iStock.com/benkrut)

In suits filed by three Sistersville Tank Works Inc. workers claiming they developed cancer from exposure to chemicals on the job, the majority of justices concluded that coverage under policies issued by Westfield Insurance Co. began when the workers were first exposed to hazardous substances.

Under the continuous trigger theory, an occurrence happens when an individual is initially exposed to a hazardous substance and a latent injury begins to develop. When the theory is applied, the policy in effect at the time of each worker's initial exposure will provide coverage, as will each subsequent policy the company obtained until the individual's injury was diagnosed.

Mixed Reception To Ruling

Experts, however, are divided on the significance of the high court's answer to a certified question from the Fourth Circuit on the issue. Policyholder attorneys cheered the ruling.

Insurance recovery attorney John G. Koch, a shareholder at Flaster Greenberg PC, told Law360 the Mountain State majority's decision is extremely important.

"What is established in other states was not established in West Virginia," he said, explaining that the adoption of the continuous trigger theory brings West Virginia in line with several other jurisdictions that have ruled that injury or property damage that takes many years or decades to manifest will trigger occurrence-based policies in force while the injury or damage was developing over time. He also said the Mountain State high court majority made a point of documenting that no state has agreed that the manifestation theory applies to long-tail injury claims.

Under the manifestation theory, the policies in effect at the time an injury is diagnosed are triggered.

Courtney C.T. Horrigan, a partner at Reed Smith LLP in Pittsburgh, told Law360 the decision is fantastic. She said the ruling is an important addition to West Virginia jurisprudence because West Virginia did not have an intermediate court of appeals until recently and that the state is an active jurisdiction for injury cases involving exposure to harmful chemicals.

"Over the years, the trial courts in West Virginia have applied continuous trigger on a number of occasions," she said. "But this is the first time that the question came to the state supreme court for resolution."

Horrigan, who submitted an amicus curiae brief for United Policyholders in support of STW, also said that it is notable that the Mountain State high court reached a resolution of the question within months of receiving the certified question from the Fourth Circuit.

Policyholder attorney Jim Murray, a partner at Blank Rome LLP in Washington, D.C., also hailed the ruling, telling Law360 the decision is interesting because it is "a repeat of an issue that has been around for decades and much of the jurisprudence in this area on the definition of occurrence and the continuous trigger theory versus manifestation was litigated in the 1980s and 1990s."

Carrier-side experts, on the other hand, said the West Virginia Supreme Court majority's answer was not surprising considering the majority of courts addressing the issue apply the continuous trigger theory.

Jason Schulze, an insurance coverage partner at Hinshaw Culbertson LLP, told Law360 he was impressed with the thoroughness of the majority's opinion.

"Although the issue may have been new to the Supreme Court of Appeals of West Virginia, it has been analyzed by courts, including over 30 state Supreme Courts since the groundbreaking decision on the issue in 1981 by the D.C. Circuit Court in Keene Corp. v. Ins. Co. of N. America," he said. "The court analyzed a variety of sources, including decisions issued by courts around the country, contemporaneous sources addressing the 1966 CGL policy reforms, and scholarly publications from both the insurer and policyholder perspective."

One scholarly source looked at by the justices included "Allocation of Losses in Complex Insurance Coverage Cases," which was authored this year by Schulze and fellow Hinshaw & Culbertson partner Scott M. Seaman.

Schulze went on to say that the ruling will have a "minimal impact" on insurers writing policies in the Mountain State.

Carrier-side counsel Lee S. Siegel, a shareholder at Hurwitz Fine PC in West Hartford, Connecticut, told Law360 the majority's decision is what most insurance coverage experts expected as West Virginia is a policyholder-friendly state.

"What this decision does, and it follows the majority rule, is it maximizes insurance coverage for the payment of long-tail claims," he said.

Ambiguity Of Occurrence

In its Nov. 8 opinion, the majority found that the term occurrence in Westfield's commercial general liability policies with STW was ambiguous.

According to court records, STW was created in 1984 and purchased CGL policies from Westfield that were in effect from 1985 until 2010. Between 2014 and 2016, three former workers were diagnosed with various forms of cancer and filed individual suits in West Virginia state court in 2016 and 2017. The plaintiffs alleged that they became sick from exposure to liquids, vapors and fumes that escaped from STW tanks.

The coverage dispute emerged in 2018 after Westfield denied coverage for the suits and filed an action in West Virginia federal court. Westfield argued it has no obligation to defend against the actions since the plaintiffs were diagnosed years after the expiration of the last policy it issued to STW. Following discovery, the parties filed competing summary judgment motions.

In September 2020, U.S. District Judge John Preston Bailey of the Northern District of West Virginia said Westfield could not escape its coverage obligations since the policies were ambiguous as to when an injury "occurs during the policy period."

Westfield appealed to the Fourth Circuit, which **asked the Mountain State** high court to determine if the term occurrence was unclear.

According to the ruling, the majority of state high courts that have addressed the issue say that the continuous trigger theory applies in long-tail injury claims. West Virginia Supreme Court Justice Tim Armstead said a manifestation theory should apply.

In support of his opinion, the dissenting justice relied on the 2016 ruling in State Auto Prop. & Cas. Ins. Co. v. H.E. Neumann C o. o.

Open Door To Allocation Battles

Experts say the West Virginia high court majority's decision will inevitably lead to fights between insurers on which carrier will provide coverage and how much. That dispute won't arise in the STW case since the company was only insured by Westfield.

Blank Rome's Murray said the trigger issue needs to be determined before the question of allocation comes into play. Determining the amount of allocation, he said, varies depending on policy language and whether the jurisdiction applies an all sums or pro rata approach

to the costs an insurer must pay.

Under an all-sums approach, the insurers pay the full amount of their policy proceeds. The pro rata approach requires spreading the loss over every triggered policy period, he said.

Hurwitz Fine's Siegel said "a lot of states could have had trouble articulating a consistent theory" on allocation when policy language is different.

"Here, we had one viable carrier. In a lot of cases, you have carriers that long went into receivership long ago and don't exist anymore," Siegel said.

Representatives of the parties did not respond to requests for comment.

Westfield is represented by Brent K. Kesner and Ernest G. Hentschel II of Kesner & Kesner PLLC.

STW is represented by Patrick S. Casey, Sandra M. Chapman and Ryan P. Orth of Casey & Chapman PLLC.

The individual defendants are represented by David B. Lunsford of Hartley Law Group PLLC.

United Policyholders, amicus curiae for Sistersville Tank Works, is represented by Todd A. Mount of Shaffer & Shaffer PLLC and Courtney C.T. Horrigan, Dominic I. Rupprecht and Zachary S. Roman of Reed Smith LLP.

The case is Westfield Insurance Co. v. Sistersville Tank Works Inc. et al., case number 22-848, in the Supreme Court of West Virginia.

--Additional reporting by Hope Patti. Editing by Amy Rowe.
