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Environmental Law

'Continuous Trigger' Happy? Not So Fast, Appellate Division Says

Remind carriers that their obligation is to their insured

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The New Jersey Appellate Division recently addressed the applicability of the insurance allocation formula for so-called "continuous trigger" cases, as developed by the New Jersey Supreme Court in *Owens-Illinois, Inc. v. United Ins. Co.,* 138 N.J. 437 (1994), and its progeny, where environmentally contaminated property underwent a change in ownership during the period when contamination was occurring.

According to *Owens-Illinois,* when "progressive indivisible injury or damages results from exposure to injurious conditions" over a period of many years, such as in the case of long-term environmental contamination, and that injury or damage results in liability to an insured, the continuous trigger theory applies to provide coverage under successive insurance policies that were in place over the entire period that the contamination occurred. Where those policies were issued by multiple insurance carriers, the *Owens-Illinois* line of cases established a method of allocating the coverage obligation among the various carriers based on both "time on the risk" (i.e., the number of years a carrier provided coverage) and "degree of risk assumed" (usually measured in terms of a carrier's policy limits).

In *Franklin Mut. Ins. Co. v. Metropolitan Prop. & Cas. Ins. Co.,* 406 N.J. Super. 586, 968 A.2d 1191 (App. Div. 2009), the Appellate Division held that the allocation required by *Owens-Illinois* is performed only among insurance carriers that provide coverage to the same insured for that insured's share of liability for cleanup costs. To the extent contamination may have occurred prior to the insured's ownership of the property, that period of contamination is not part of the continuous trigger period.

The property at issue in *Franklin Mutual* was sold by the prior owner, Clark, to the current owners, Paul and Carol Tsairis, in December 1995. Nearly10 years later, in August 2005, it was discovered that home heating oil was leaking into the soil from two underground storage tanks on the property. Studies indicated that the fuel had been leaking for approximately 18 or 19 years, meaning that the contamination had begun during Clark's ownership of the property.

Metropolitan insured the property from December 1999 to December 2002. Franklin Mutual insured the property from December 2002 until the contamination was discovered. No carrier for the Tsairises was identified for the first four years they owned the property, nor was any carrier identified for the period of contamination during which Clark owned the property. Franklin Mutual paid nearly $44,600 to remediate the contamination at the property and then sued, seeking a declaratory judgment that Metropolitan was liable to contribute its proportionate share of insurance coverage for the cleanup costs.

At trial, Metropolitan argued that its proportionate share of cleanup costs should be calculated by dividing the number of years that it had provided coverage by the total number of years that the contamination had occurred, assuming that some unknown carrier or carriers had provided insurance coverage for the thirteen years that preceded Metropolitan's policies. Metropolitan argued that its approach was consistent with the policy of maximizing resources to cope with environmental damage, as the Court expressed in *Owens-Illinois*.

By contrast, Franklin Mutual argued that Metropolitan's allocated share should be 31.03 percent. Franklin Mutual considered only the period of

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contamination during the time that its and Metropolitan's insured owned the property, from December 1995 until the contamination was discovered in August 2005, or 116 months. Franklin Mutual divided Metropolitan's coverage period of 36 months by 116 months to arrive at 31.03 percent. Franklin Mutual's view was that *Owens-Illinois* does not create a scheme for allocation among different tortfeasors responsible for environmental damage. Instead, it provides a method of allocation of responsibility among various insurance carriers where an individual insured has more than one carrier during the continuous trigger period. The trial court agreed with Franklin Mutual and entered judgment in its favor. Metropolitan appealed.

The Appellate Division affirmed the trial court's judgment, holding that the *Owens-Illinois* allocation formula is intended to allocate responsibility for a particular insured's share of cleanup costs when that insured has more than one carrier that provided coverage during the period of contamination. The court began its analysis by restating the basic principle that a carrier's obligation to respond to a claim is "triggered" by an event or events determined by the terms of the insurance policy. The difficulty with environmental contamination claims is that the event which triggers a carrier's liability typically cannot be isolated to a single moment. Instead, environmental damage "usually is attributable to events that begin, develop and intensify over a sustained period of time," during which successive insurance policies issued to an insured — possibly issued by different carriers — may have been in effect.

In response to that difficulty, the Supreme Court in *Owens-Illinois* adopted the continuous trigger theory, under which the damage caused by ongoing contamination is considered to be a separate occurrence under each applicable policy period, thereby triggering coverage under each policy. Because the continuous trigger theory would often result in multiple carriers' policies being triggered, "a means was necessary . . . to fairly allocate responsibility for remediation costs between or among those policies." To address that need, the *Owens-Illinois* Court provided a method of allocation that prorates a carrier's responsibility based on policy limits and years of coverage.

Metropolitan's approach to allocation, which took into account the entire 19 year period of contamination, appeared to confuse two separate issues. "The allocation of an insured's proportionate share of liability among its insurers is a separate question from the insured's proportionate share of liability for the cleanup costs." A responsible party may be held liable for all or part of the costs of remediation, depending on a number of factors, including whether the applicable law provides for joint and several liability, the party's own level of responsibility for actually causing the contamination, and the availability of other responsible parties to shoulder their proportionate share of the cleanup costs. Regardless of whether a particular insured is liable for 100 percent of cleanup costs or some smaller share, the *Owens-Illinois* formula does nothing more than allocate that share among the insured's various insurers "because carriers are only responsible for defending and indemnifying their insureds." The appeals court observed that the line of cases following *Owens-Illinois* focused on the allocation of a particular insured's share of liability for environmental cleanup costs "among that insured's carriers." For those reasons, the appellate court agreed with Franklin Mutual's allocation, which was based on the 10 years of contamination starting when the carriers' mutual insured purchased the property and ignored the previous nine years of contamination when title to the property was held by the prior owner.

The court's decision in *Franklin Mutual* appears fairly intuitive. After all, as the court noted, an insurance carrier is only responsible to defend and indemnify its own insured. Before the insured purchases a piece of property, it presumably has no insurance coverage for that property. Since the insured has no coverage to be triggered during that time, it makes little sense to extend a "continuous trigger" to that pre-ownership period. Furthermore, where the insured is jointly and severally liable for the entire cleanup, as the Tsairises were in *Franklin Mutual,* it is eminently fair to allocate a carrier's coverage responsibility based on the degree of, and extent to which, the carrier retained the insured's risk of liability. Part of the risk that a carrier assumes when it issues coverage for environmental damages is the risk that its insured will get stuck for the full amount of cleanup costs.

Rather than breaking any new ground, the *Franklin Mutual* decision reflects the approach that most insurance carriers already take to allocation for environmental claims. The opinion does, however, succinctly restate the basic principles of *Owens-Illinois* and its progeny and remind carriers that their obligation is to their insured.

This does not mean that carriers are helpless to minimize their own liability. Indeed, one of the collateral effects of the *Franklin Mutual* decision will be to underscore the incentive for insurance carriers — to the extent they are not already doing so — to become more proactive in finding and joining other responsible parties (and their carriers) who are capable of shouldering their proportionate share of cleanup costs, thereby reducing the insured's proportionate share, and by extension, the carrier's allocated share. While the costs involved in *Franklin Mutual* were relatively low, in cases involving multi-million dollar cleanups at commercial properties that have undergone one or more changes in ownership during the course of undiscovered contamination at the property, a carrier could substantially reduce its own liability through this proactive approach. To the extent *Franklin Mutual* achieves this goal; the decision will promote the policy espoused in *Owens-Illinois* of maximizing resources to cope with environmental damage. ■