IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Westfield Insurance Company,
Petitioner

vs.) No. 22-848

Sistersville Tank Works, Inc.,
Robert N. Edwards,
E. Jane Price, individually and as Executor of the Estate of Robert G. Price,
Douglas Steele,
Carol Steele,
Gary Thomas Sandy,
Peggy Sandy,
Reagle & Padden, Inc., and
David C. Padden
Respondents

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I. CERTIFIED QUESTION

"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 development of a latent illness." (JA3).

II. STATEMENT OF THE CASE

Pursuant to W. Va. R. App. P. 10(d), for Respondents' Brief, "no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner's brief". Petitioner Westfield Insurance Company's (hereinafter "Westfield") recitation of the relevant facts is heavily slanted from its perspective, and as such, Respondents' statement of the case is as follows.

A. Statement of Facts.

Sistersville Tank Works, Inc. (hereinafter "STW") is a family-owned and operated West Virginia corporation located in Sistersville, West Virginia. The current iteration of STW was formed in October of 1984, following the purchase of the assets and name, but not the liabilities from the Varlen Corporation. (JA230-234). STW manufactures, repairs, and installs industrial storage tanks for the chemical, petroleum, energy, and pharmaceutical industries—both domestic and international.

At the time that this action was initiated in the United States District Court for the Northern District of West Virginia, STW had been named as a defendant in four underlying actions in West Virginia circuit courts: (1) Edwards v. Covestro, Marshall County Civil Action No. 16-C-32, filed on February 22, 2016; (2) Price v. Sistersville Tank Works, Inc., Marshall County Civil Action No. 17-C-62H, filed on April 24, 2017; (3) Steele v. Sistersville Tank Works, Inc., Marshall County Civil Action No. 17-C-231H, filed on November 15, 2017; and (4) Sandy v. 3M Company,

Kanawha County Civil Action No. 17-C-965KAN, filed on July 5, 2017.[1] (JA499-562). In each of the cases pending in the Circuit Court of Marshall County—Edwards, Price, and Steele (hereinafter the "Underlying Actions")—the respective plaintiffs claim that they were occupationally exposed and/or her decedent was occupationally exposed to harmful chemicals as a result of STW's alleged negligent manufacture, installation, inspection, repair and/or maintenance of storage tanks at the industrial sites where the respective worker was employed. (JA499-562). The Sandy action is an asbestos case pending in Kanawha County, West Virginia; STW was dismissed from the action without prejudice on June 14, 2019. (JA497-498).

The Edwards, Price, and Steele plaintiffs were diagnosed with cancer in 2014, 2015, and 2016, respectively. (JA499-562). Each plaintiff alleges that his cancer, or the cancer of the plaintiff's decedent, was caused by exposure to harmful substances at worksites between the 1960s and the mid-2000s. (JA499-562). Each plaintiff alleges that harmful exposures were caused by alleged negligent manufacture, installation, inspection, repair and/or maintenance of chemical tanks and vessels by STW, a venue-giving defendant, at their or their decedent's respective worksite located in Marshall County, West Virginia. (JA499-562).

Specifically, Mr. Edwards alleges that he was diagnosed with renal cell carcinoma on April 22, 2014. (JA499-505). Mr. Edwards alleges that his renal cell carcinoma was caused by his exposure to nephrotoxic chemicals during his employment with Covestro's predecessor, Bayer Corporation (and its predecessor corporations) from 1962 to 2001, at a Marshall County, West Virginia, facility. (JA499-505). Mrs. Price alleges that her husband's acute myeloid leukemia and

[1] Westfield defended STW in three previous state court actions involving similar claims of latent bodily injuries resulting from exposure to hazardous substances under the 1989-2010 CGL Policy. Those previous actions were: Hubbard v. Amsted Industries, Inc., Kanawha County Civil Action No. 10-C-593, filed on March 29, 2010; Fischerkeller v. 20th Century Glove Corp., Kanawha County Civil Action No. 11-C-366, filed on March 30, 2011; and Bowen v. Axiall Corp., Marshall County Civil Action No. 14-C-173K, filed on October 23, 2014.

death were caused by his exposure to benzene and/or formaldehyde-containing chemicals throughout his employment at the same facility from 1960 to 1995. (JA524-542). Mr. Steele alleges that he was diagnosed with chronic lymphocytic leukemia caused by his exposure to benzene-containing chemicals throughout his employment by Axiall's predecessor, PPG, from 1968 to 2006, at another Marshall County, West Virginia, facility. (JA543-562).

B. Procedural History.

Westfield instituted the underlying declaratory judgment action before the District Court on June 13, 2018, seeking a declaration that it owes STW no duty to defend or indemnify in each of the Underlying Actions under insurance policies issued from 1989 to 2010. (JA9-79). STW filed its Answer and Counterclaim, and additionally filed a Third-Party Complaint against Reagle & Padden, Inc., and David C. Padden (hereinafter "Third-Party Defendants"), its long-standing insurance agency and agent with regard to the procurement of the insurance coverage in question. (JA80-122; 129-189).

While Westfield has defended STW in the Underlying Actions under reservations of rights, Westfield claims to have only insured STW from April 15, 1989 to April 15, 2010, under Policy No. 3471223 and Policy No. 3471224. (JA9-79). Policy No. 3471223 is a commercial general liability policy with a policy period from April 15, 1989 to April 15, 2010 (hereinafter the "1989-2010 CGL Policy"). The 1989-2010 CGL Policy specifically excludes coverage from claims arising from "products" and "completed operations". (JA18-75). Policy No. 3471224 is a "claims made" policy issued by Westfield from April 15, 1989 to April 15, 2001 (hereinafter the "1989-2001 Claims Made Policy"), which provided STW with "products/completed operations" coverage.[2] (JA17).

[2] Because none of the Underlying Actions were initiated within the 1989-2001 Claims Made Policy period, STW did not seek coverage under such policies before the District Court.

As noted, Westfield asked the District Court to interpret the 1989-2010 CGL Policy and find that Westfield owes no duty to defend or indemnify STW in each of the Underlying Actions. (JA9-79). Significantly, discovery revealed that Westfield also insured STW under a series of CGL and umbrella policies from January 1, 1985 to April 15, 1989, under which the District Court found that Westfield owes STW coverage for each of the Underlying Actions. Westfield has continued to deny the applicability of such policies for nebulous reasons.

Following STW's discovery of additional CGL and umbrella policies issued by Westfield to STW prior to April 15, 1989, which were not identified by Westfield in its Complaint, STW moved for leave to file its Amended Counterclaim to bring before the Court the additional Westfield policies, and the Court granted STW's motion. (JA129-189). These additional policies contain none of the exclusions relied upon by Westfield under the 1989 to 2010 CGL Policy. The Court later dismissed STW's Amended Counterclaim, without prejudice, on ripeness grounds.

Among the policies uncovered by STW, which Westfield failed to identify, is a CGL "renewal" policy with a policy period from January 1, 1988 to April 15, 1989 (hereinafter the "1988-1989 CGL Policy"). The policy period to the 1988-1989 CGL Policy originally spanned from January 1, 1988 to January 1, 1989; however the policy period was extended twice by Westfield, first to April 1, 1989, and then to April 15, 1989 (JA260-263). The 1988-1989 CGL Policy contains a $2,000,000 "General Aggregate Limit (Other than Products/Completed Operations)" and a $1,000,000 "Products/Completed Operations Aggregate Limit". (JA370-371). The original CGL policy sold by Westfield to STW was for a three-year term from January 1, 1985 to January 1, 1988, and the declarations page to the 1988-1989 CGL Policy identifies it as a "renewal" of the original policy. (JA370-372).

The "General Liability Coverage Renewal Declarations" (hereinafter "Declarations") identifies seven "Forms and Endorsements Applicable to This Coverage Part". (JA370-371). Each of the "forms and endorsements" identified in the "Declarations" to the CGL coverage is included with the appended 1988-1989 CGL Policy. (JA1048-1063). The most important of these forms is the "Commercial General Liability Coverage Form" identified as "Form CG00011185" (hereinafter "Coverage Form"). (JA354-362). The Coverage Form includes the Policy's "Insuring Agreement" and "Exclusions" for the bodily injury and property damage liability coverage. (JA354).

The "Insuring Agreement" provides that Westfield "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' which occurs during the policy period." (JA354). The Insuring Agreement provides further that the "bodily injury" and "property damage" must be caused by an "occurrence" and such "occurrence" must take place in the "coverage territory". (JA354). An "occurrence" is defined under the policy as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." (JA362). The Coverage Form includes a list of policy exclusions, none of which have application to any of the claims asserted against STW. (JA354-356). More significant is the absence of an exclusion for "products and completed operations" which is found in the 1989-2010 CGL Policy.

Along with the renewal of its original CGL Policy, STW renewed its Umbrella coverage with Westfield under Policy No. UXC5307375 (hereinafter "1988-1989 Umbrella Policy"). (JA373-389). This Westfield excess policy is an "umbrella" policy because, in addition to providing excess coverage for risks covered by the underlying policies, the policy provides both primary liability coverage and an independent duty to defend for certain risks not covered by the

underlying policies. The Declarations to the 1988-1989 Umbrella Policy provide $2,000,000 "General Aggregate" liability limits; $1,000,000 "Products/Completed Operations Aggregate" limits; and $1,000,000 "Each Occurrence" limits. (JA375). The "Insuring Agreement" to the 1988-1989 Umbrella Policy provides that Westfield "will indemnify [STW] for 'ultimate net loss' in excess of the applicable underlying limit which the insured shall become legally obligated to pay as damages because of . . . 'personal injury'. . . ." (JA376). The policy defines "personal injury" to include "bodily injury, shock, mental anguish, sickness or disease. . . ." (JA379). Pursuant to Section 2.3 of the policy, titled "DEFENSE OF SUITS NOT COVERED BY OTHER INSURANCE", Westfield owes STW an independent duty to defend "any suit seeking damages which are not payable on behalf of the insured under the" underlying policies because "such damages are not covered thereunder" or because the underlying limits have been exhausted. (JA373-389). As with the 1988-1989 CGL Policy, no exclusions under the 1988-1989 Umbrella Policy apply to the claims brought against STW.

Following the close of discovery, Westfield, STW, and Third-Party Defendants[3] each filed their respective dispositive motions. Westfield's Motion for Summary Judgment (JA492-496) asserted that it had no duty to defend or indemnify STW under either the 1989-2010 CGL Policy or the 1989-2001 Claims Made Policy. Westfield's Motion for Summary Judgment was based heavily upon the premise that, because no bodily injury had "manifested" throughout the duration of the Westfield policies issued to STW from 1985 to 2010, there had been no occurrence to trigger coverage under such policies. Westfield's Motion for Summary Judgment relied upon its assertion that the manifestation trigger of coverage should be adopted by the District Court. Westfield's Motion for Summary Judgment focused primarily on the coverage issues under the 1989-2010

[3] Based upon the District Court's finding of coverage in favor of STW, Third-Party Defendants' Motion for Summary Judgment was granted. Accordingly, Third-Party Defendants were dismissed by the Fourth Circuit.

Policies, which the District Court elected not to consider in view of its finding of coverage under the pre-1989 Policies.

STW's Motion for Summary Judgment (JA190-193) urged that the District Court find that coverage existed under the pre-1989 Westfield Policies, i.e., that were uncovered by STW during discovery, thus rendering any consideration of the 1989-2010 Policies moot. STW's Motion for Summary Judgment urged that coverage was triggered under the pre-1989 Westfield policies because the underlying state court plaintiffs were allegedly exposed to the harmful chemicals during the pendency of the pre-1989 Westfield policies, such policies did not contain a "products-completed operations hazard" exclusion, and such policies did not require that the claim be brought during the policy period. STW relied upon the continuous trigger of coverage.

On September 4, 2020, the District Court entered its Memorandum Opinion and Order (JA1641-1661) (1) granting STW's Motion for Summary Judgment and Third-Party Defendants' Motion for Summary Judgment and (2) denying Westfield's Motion for Summary Judgment. Judgments were entered in favor of STW and Third-Party Defendants. (JA1662).

The District Court held that coverage existed under the pre-1989 Policies that Westfield had failed to identify and that STW had located during discovery, and that consideration of the 1989-2010 Westfield Policies was rendered moot by such finding. Critically, the District Court rejected the manifestation trigger of coverage championed by Westfield, instead opting to apply the continuous trigger of coverage advocated by STW. By its ruling, the District Court predicted that the Supreme Court of Appeals of West Virginia would adopt the continuous trigger of coverage and reject the manifestation trigger of coverage based upon the relevant state authority, specifically (1) *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, Civil Action No. 93-C-340 (Ohio County Cir. Ct.)

(JA392-425); and (2) *U.S. Silica Co. v. Ace Fire Underwriters Ins. Co.*, 2012 W. Va. Cir. LEXIS 4449 (Nov. 27, 2017, Morgan Co. Cir. Ct.) (JA426-436).

Significantly, under the pre-1989 Policies, the District Court found coverage because the underlying state court plaintiffs alleged exposure during the duration of such policies, consistent with the continuous trigger of coverage. The District Court held that the occurrence language in the 1988-1989 Policy was ambiguous with respect to when the injury from a latent disease, such as those alleged by the underlying state court plaintiffs, would be deemed to occur, and, as such, should be construed in favor of coverage. Moreover, the District Court held that no exclusions under such policy applied, and it concluded that Westfield owed coverage to STW under the 1988-1989 Policy. Further, the District Court found that the terms of the 1985-1988 Policies contained the same terms as the 1988-1989 Policy because it was a renewal of the 1985-1989 Policies. Lastly, the District Court held that because coverage had been found under the pre-1989 Policies, the coverage consideration under the 1989-2010 Westfield Policies was moot.

Westfield initiated its appeal to the United States Court of Appeals for the Fourth Circuit on September 30, 2020. (JA1731-1732). Following briefing and oral argument, the Fourth Circuit certified the instant question to the Court to determine the appropriate trigger of coverage for claims involving latent injuries arising from exposure to chemicals or other analogous harms. (JA3). STW submits that the Court should adopt the continuous trigger of coverage, consistent with the District Court.

III. SUMMARY OF ARGUMENT

This matter is before the Court on a certified question to determine: "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 development of a latent illness?" (JA3).

Consistent with the District Court's holding, the Court should find that the continuous trigger theory of coverage applies, meaning that the bodily injury occurs at the time of initial exposure through the date of manifestation of the injury, and reject the restrictive, manifestation trigger of coverage.

For coverage to trigger under the relevant Westfield Policies, a "bodily injury" must result from an "occurrence" during the policy period. "Bodily injury" is defined under the policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." (JA1146-1149). Further, an "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." (JA362). The District Court found the occurrence language within the pre-1989 Policies to be ambiguous with respect to when the injury from a latent disease would be deemed to occur and, as such, held that such language should be construed in favor of coverage. While the underlying state court plaintiffs' injuries did not manifest during the pertinent policy, the bodily injuries claimed occurred during the pertinent policy period as a result of continued or repeated exposure to the harmful substances through the time of manifestation.

While there does not appear to be any controlling authority in West Virginia regarding the appropriate trigger of coverage to be applied in such cases, the continuous trigger is consistent with existing West Virginia state court authority. Indeed, in adopting the continuous trigger, the District Court relied upon West Virginia standing circuit court opinions, *U.S. Silica* and *Wheeling Pittsburgh*, and recognized that a significant number of other jurisdictions have rejected the manifestation trigger. In doing so, the District Court rejected the federal authority relied upon by Westfield: (1) *State Auto Prop. & Cas. Co. v. H.E. Neumann Co.*, 2016 U.S. Dist. LEXIS 130172 (S.D.W. Va. Sep. 23, 2016) vacated by *State Auto Prop. & Cas. Co.*, 2016 U.S. Dist. LEXIS 66099

(S.D.W. Va. Mar. 17, 2017); and (2) *Ball v. Joy Technologies*, 958 F.2d 35 (4th Cir. 1991). Moreover, the continuous trigger is consistent with the parties' course of performance related to the 1989-2010 CGL Policy wherein Westfield rejected the manifestation trigger in prior actions where it defended STW. Similarly, Westfield has taken an inconsistent position and urged adoption of the continuous trigger in another jurisdiction, where such a finding would bar coverage. Additionally, adoption of the restrictive manifestation trigger would serve to morph STW's more expensive "occurrence-based" policy into a lesser "claims made" policy depriving STW of the benefit of its bargain and depriving it of the coverage that it had purchased.

Adoption of the continuous trigger and rejection of the restrictive, manifestation trigger will provide clarity and consistency to the policy language, as well as for future courts and litigants.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Court's March 31, 2023, *Order*, the Court has scheduled this matter for oral argument under W. Va. R. App. P. 20 during the September 2023 Term of the Court.

V. ARGUMENT

A. Standard of Review.

"A *de novo* standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court." *Pajack v. Under Armour, Inc.*, 246 W. Va. 387, 391, 873 S.E.2d 918, 922 (2022), citing Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998). The West Virginia Uniform Certification of Questions of Law Act, W. Va. Code § 51-1A-1 *et seq*., provides at W. Va. Code § 51-1A-3, in pertinent part:

> The Supreme Court of Appeals of West Virginia may answer a question of law certified to it by any court of the United States . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision, or statute of this state.

Moreover, the Court has held that the decision to answer a certified question is discretionary, and that W. Va. Code § 51-1A-1 *et seq*., "does not impose an absolute duty . . . to answer such questions." *Abrams v. W. Va. Racing Comm'n*, 164 W. Va. 315, 317, 263 S.E.2d 103, 105 (1980).

B. Statement of Respondents Robert N. Edwards, E. Jane Price, individually and as Executor of the Estate of Robert G. Price, Douglas L. Steele, and Carol Steele.

Given their designation as Respondents in the instant appeal, Robert N. Edwards, E. Jane Price, individually and as Executor of the Estate of Robert G. Price, Douglas L. Steele, and Carol Steele ("the underlying state court plaintiffs") submit this response in the consolidated brief filed with their fellow Respondent, Sistersville Tank Works, Inc.

The underlying state court plaintiffs took no position on the substantive issues raised in this matter when it was pending before the District Court and the United States Court of Appeals for the Fourth Circuit. Likewise, the underlying state court plaintiffs take no position concerning the substantive issues presently before the Court.

C. Each of the underlying plaintiffs have alleged facts to support a finding that they suffered "bodily injury" from an "occurrence" within the "coverage territory".

The Fourth Circuit submitted a specific, certified question to the Court to determine: "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 development of a latent illness." (JA3). Notably, the Fourth Circuit did not pose the question as to whether the policy language is ambiguous regarding what constitutes a "bodily injury" from an "occurrence" during the policy period. Nonetheless, Westfield seeks to evade its coverage obligations by alleging that the policy language is unambiguous and that the underlying state court plaintiffs have not alleged facts to support a finding that they suffered a "bodily injury" from an "occurrence" within the

"coverage territory". Westfield's position is misplaced, and this issue remains before the Fourth Circuit to be determined after the Court addresses the instant certified question.

Under West Virginia law, unambiguous insurance policy provisions are to be applied according to their plain meaning. *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970). The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a question of law. Syl. Pt. 2, *Riffe v. Home Finders Assocs.*, 205 W. Va. 216, 517 S.E.2d 313 (1999). When a policy's provisions are ambiguous, they are to be construed liberally in the insured's favor. *Erie Ins. Prop. & Cas. Co. v. Edmond*¸785 F. Supp. 2d 561, 565 (N.D.W. Va. 2011); *see also Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 378, 376 S.E.2d 581, 584 (1988). A policy is ambiguous when it is reasonably susceptible of more than one meaning and reasonable minds may disagree as to its meaning. *Glen Falls Ins. Co. v. Smith*, 217 W. Va. 213, 221, 617 S.E.2d 760, 768 (2005). A court is to give the language of an insurance policy such a construction as to meet the reasonable expectations of the insured. *Bailes v. Erie Ins. Prop. & Cas. Co.*, 2010 U.S. Dist. LEXIS 5556 *5 (S.D.W. Va. Jan. 25, 2010). "[W]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." *Jenkins v. State Farm Mut. Ins. Co.*, 219 W. Va. 190, 194, 632 S.E.2d 346, 350 (2006) (citation omitted).

In addition to the District Court's finding that the policy language providing that coverage only applies to bodily injury and property damage which occurs during the policy period is ambiguous, in reviewing similar policy language in relation to latent disease, several courts throughout the country have as well. In *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), the court held: "In the context of asbestos-related disease, the terms 'bodily injury,' 'sickness' and 'disease', standing alone, simply lack the precision necessary to identify a point in

the development of a disease at which coverage is triggered." Moreover, in *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1222 (6th Cir. 1980), the court stated: "[T]here is usually little dispute was to when an injury occurs when dealing with a common disease or accident . . . [but] there is considerable dispute as to when an injury from [a latent disease] should be deemed to occur."

The policy language is reasonably susceptible to more than one meaning, and, as such, is ambiguous. Because the policy language is ambiguous, it should be construed liberally in favor of the insured, which is consistent with the District Court's finding of coverage under the continuous trigger. *See Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156, 160 (1986).

D. Consistent with the District Court, the Court should reject the manifestation trigger of coverage championed by Westfield and apply the continuous or multiple trigger of coverage theory to claims of latent injury that are due to long-term chemical exposure in West Virginia.

Westfield asks the Court (1) to apply the manifestation trigger of coverage to claims of latent injury due to long-term chemical exposure, and (2) to find that the District Court's application of the continuous trigger theory was erroneous. Contrary to Westfield's position, the District Court appropriately adopted the continuous trigger for claims of latent injuries due to long-term exposure, while rejecting the manifestation trigger. Similarly, the Court should adopt the continuous trigger of coverage and reject the manifestation trigger.

The term "trigger of coverage" is not a term that is found in the subject policies, but rather is a term of art used to describe that which must occur during the policy period under "occurrence-based" policies in order for the potential of coverage to arise under the policy. *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 913 P.2d 878, n.2 (1995).

> Unlike "claims-made" policies in wide use today, which require the assertion of a claim against the insured during the policy period, NGS's "occurrence-based" policies respond to liabilities arising out of "bodily injury" or "property damage" that took place during the time that such policies were in effect, even if the claim is not made until years after the termination of the policy.

Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1192 (2d Cir. 1995). Ordinarily, no thought need be given as to whether an injury has occurred during the policy period because the commission of a negligent act leads closely in time to an injury; however, in cases involving hazardous exposures or environmental contamination, the "bodily injury" or "property damage" may not be detected for many years. Courts have devised four "trigger of coverage" theories to determine whether latent bodily injury or property damage has occurred within the policy period under the insuring clause of the typical CGL and umbrella liability policies. The four "trigger of coverage" theories are (1) exposure trigger, (2) injury-in-fact trigger, (3) manifestation trigger, and (4) continuous or multiple trigger. *Imperial Cas. & Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437, 1441 (E.D.N.C. 1994).

The two triggers of coverage at the focus of this matter are the (1) continuous or multiple trigger adopted by the District Court and (2) the manifestation trigger rejected by the District Court. Under the continuous or multiple trigger theory, each "occurrence-based" CGL and umbrella liability policy insuring risk from the date of the initial exposure through the date of manifestation is triggered. *Keene Corp.*, 667 F.2d at 1041. Under the continuous trigger, "bodily injury" within the meaning of the policies is viewed to include "any part of the single injurious process" from the initial exposure through manifestation. *Id*. at 1047.

The manifestation trigger is much more restrictive and requires the claimant's injury to be diagnosed or discovered during the policy period in order to find coverage. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 34 (1st Cir. 1982). Under this theory, the fact that the

claimant may have been exposed to harmful substances during the policy period is immaterial. Likewise, the fact that claimant's cancer, asbestosis, or other disease process may have begun or progressed during the policy period is immaterial. Under the manifestation trigger, the date of the claimant's diagnosis is all that matters. *Id*.

The District Court properly considered all of the relevant authorities set forth by the parties and (1) determined that the continuous or multiple trigger should be utilized in West Virginia and (2) rejected the restrictive, manifestation trigger. Notably, in predicting what trigger of coverage the Supreme Court of Appeals of West Virginia would likely adopt, the District Court was "heavily persuaded by the analysis and application of the continuous or multiple trigger theory applied in two West Virginia circuit court opinions cited by defendant STW." (JA1654). Specifically, the District Court found persuasive the following finding by the Circuit Court of Morgan County, West Virginia, in *U.S. Silica Co.*:

> [T]hat a continuous trigger theory is applicable to the instant case and will apply a continuous trigger of coverage to the pending silica claims as the suits allege continuing or progressively deteriorating bodily injury. . . . The effect being that insurers are obligated to indemnify insureds for costs associated with liability beginning when the first exposure occurred (the beginning of the accident) and until the claim is brought, or until the underlying claimant dies[,] whichever occurs first.

U.S. Silica, 2012 W.V. Cir. LEXIS 4449 *30-31. (JA426-436).

The District Court's finding in favor of the continuous trigger theory was based largely upon *U.S. Silica Co.*, as well as *Wheeling Pittsburgh*. *Wheeling Pittsburgh* is the first known application of a coverage trigger in West Virginia. In *Wheeling Pittsburgh*, the Wheeling Pittsburgh Steel Corporation and its parent company brought an action for declaratory judgment in the Circuit Court of Ohio County, West Virginia, against several insurance companies that had insured the companies under successive umbrella liability insurance policies over a twenty-five year period. The plaintiffs sought a determination as to the appropriate trigger of coverage under

the policies and the liabilities of the insurers for the costs of remediating multiple industrial sites which had sustained progressive environmental contamination damages. (JA393). The Circuit Court ruled that the "continuous or multiple" trigger applies in West Virginia:

> [T]he Court finds and concludes that the continuous or multiple trigger theory is applicable to the present action insofar as all named defendants' policies in effect during the relevant time periods may be potentially invoked by the Plaintiff to provide coverage for actual property damages proven to be continuous or progressively deteriorating throughout the several policy periods. In adopting the continuous or multiple trigger approach, the Court notes, by way of example, the opinion of numerous other jurisdictions the Court finds persuasive. (citations omitted)

(JA416-417). Indeed, the sheer number of courts rejecting the manifestation trigger, in favor of one or more alternative triggers, is significant, including the highest courts of West Virginia's neighboring states, Maryland, Ohio, and Pennsylvania. (JA218-219).

While Westfield contends that the distinction between the property damage alleged in *Wheeling Pittsburgh* and the bodily injury alleged in each of the Underlying Actions is key, in reality it is immaterial because of the progressive nature of both the property damage and the latent injuries. Point of fact, the District Court was not deterred by this distinction when it referred to property damage and bodily injury jointly as "damages of a progressive or deteriorating nature." (JA1654).

In *U.S. Silica Co.*, the Circuit Court of Morgan County, West Virginia, adopted the continuous or multiple trigger of coverage as well. (JA426-436). *U.S. Silica Co.*, involved an action for declaratory judgment requesting that the court declare the insured's right to a defense and indemnity under CGL policies issued by Travelers Indemnity Company. (JA426-436). In several underlying actions, U.S. Silica was alleged to have caused the claimants' bodily injuries from exposure to silica sand. (JA430-431). The court looked to the decision in *Wheeling*

Pittsburgh, as well as decisions by the Pennsylvania Supreme Court and the California Supreme Court, in adopting the continuous or multiple trigger of coverage:

> This court finds that a continuous trigger theory is applicable to the instant case and will apply a continuous trigger of coverage to the pending silica claims as the suits allege continuing or progressively deteriorating bodily injury. . . . The effect being that insurers are obligated to indemnify insureds for costs associated with liability beginning when the first exposure occurred (the beginning of the accident) until the claim is brought, or until the underlying claimant dies whichever occurs first.

(JA432-435). While such authority was not binding upon the District Court, such decisions are illustrative of how West Virginia courts have viewed the same issue. STW urges the Court to follow the *U.S. Silica Co.*, and *Wheeling Pittsburgh* opinions and adopt the continuous trigger of coverage for latent injuries.

Westfield attempts to distract from the authority upon which the District Court relied by continuing to attempt to use the veracity *vel non* of the Underlying Actions as a way to avoid coverage by suggesting that the underlying state court plaintiffs and STW have not been able to prove that an injury occurred during the policy period. However, the issue of coverage is based upon the allegations as set forth in the Underlying Actions pursuant to the eight corners rule. *See Erie Ins. Prop. & Cas. Co. v. Viewpoint, Inc*., 2013 WL 828327 *3-4 (N.D.W. Va. Mar. 6, 2013) (resolution of the duty to defend question "is made by comparing the four corners of the underlying complaint with the four corners of the policy") (internal quotations and citation omitted).

On the other hand, in urging the Court to adopt the manifestation trigger, Westfield asks the Court to give greater weight to the predictions of other federal courts over that of the West Virginia circuit courts as to the application of West Virginia law, a view which is unsupported by *Erie*. The District Court considered the merits of the manifestation trigger and properly rejected it in favor of the continuous or multiple trigger. The Court should do the same.

Westfield relies upon *State Auto* to support its flawed position that the District Court erred by not adopting the manifestation trigger, and to support why the Court should adopt the manifestation trigger in West Virginia. *State Auto* illustrates the difficulty in adopting any trigger theory to be applied on a prospective basis other than the continuous or multiple trigger. *State Auto* found its application of the manifestation trigger to be justified, due in part in that case on the grounds that the policy language was ambiguous and that the application of the manifestation trigger supported coverage under the policy. *Id*. at 59. This is a critical distinction. *State Auto* also found that the manifestation theory comported with the "reasonable expectations" of the parties by protecting "the insured against unknown risks." *Id*. at 61. *State Auto*'s reliance on the ambiguity of the policy language and the reasonable expectations of the insured appears to contradict the suggestion that the manifestation trigger should be applied prospectively in other latent disease cases.

Likewise, Westfield relies heavily upon *Ball* to support its position that the District Court should have applied the manifestation trigger and that the Court should adopt the manifestation trigger in West Virginia. Critically, the Supreme Court of Appeals of West Virginia has expressly rejected *Ball* as an incorrect statement of West Virginia law, and the District Court correctly rejected the manifestation trigger in favor of the continuous or multiple trigger. *See Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999). In *Ball*, the plaintiffs claimed they were exposed to toxic chemicals in the course of their employment and that their exposure constituted physical injuries entitling them to recover damages for emotional distress and medical monitoring costs. *Ball*, 755 F. Supp. at 1348. The employer was granted summary judgment on the grounds that exposure to toxic chemicals alone, without a physical manifestation of injury, is not an actionable injury under West Virginia law. *Id*. at 1371. The decision was affirmed upon

appeal. *Ball*, 958 F.2d at 39. *Ball* is readily distinguishable because the issues therein, emotional distress and medical monitoring, are not the same as the specific latent injuries claimed in the Underlying Actions, i.e., the cancers have been diagnosed.

The *State Auto* and *Ball* opinions relied upon by Westfield are readily distinguishable, and, in fact, *State Auto* supports an interpretation that favors a finding of coverage on behalf of an insured. Moreover, the additional authority referenced by Westfield in support of the manifestation trigger in West Virginia is not applicable, as West Virginia's use of the manifestation trigger in other instances has not involved long-term exposure leading to latent diseases, as is the issue presented to the Court upon the certified question.

Additionally, by lobbying for the application of the manifestation trigger, Westfield demonstrates its own remarkable flexibility, as well as the malleability of its policy language because, in a 2005 declaratory judgment action it brought in Ohio, Westfield successfully argued for the diametrically opposite position that it is now taking against STW. *Westfield Ins. Co. v. Milwaukee Ins. Co.*, 2005-Ohio-4746, 2005 Ohio App. LEXIS 4255 (Ohio 12th App. 2005). In *Milwaukee*, Westfield successfully argued for the continuous trigger of coverage theory under "occurrence-based" CGL policies that are the same as the subject policies at issue in this matter. Specifically, Westfield argued that the court should apply a continuous trigger to its CGL policies in order to "fully give[] effect" to the language of the policy:

> A continuous trigger approach has also been employed by Ohio courts in asbestos bodily injury claims, which also involve long latency between exposure to harmful asbestos fibers and the manifestation of disease. [citations omitted]
>
> In summary, Ohio and many other states apply the continuous trigger theory to determine whether insurers must defend their insureds where the damage is continuing. It is the most workable and natural approach where injury is continuing, and most fully gives effect to the "occurrence" language contained within the insurance policies at issue in this appeal.

(JA1254). In light of its successful fight for the adoption of a continuous trigger, Westfield's current position is difficult to justify. Indeed, Westfield's own flip-flop on the trigger of coverage question supports the conclusion that the policy language is ambiguous and should be construed in favor of coverage.

Moreover, the District Court properly rejected the manifestation trigger in view of the parties' course of performance under the CGL policies: a course of performance that informs their interpretation and construction of the contact's terms. *Kaiser Aero & Elcs. Corp. v. Alliant Techsystems*, 1997 U.S. App. LEXIS 35509 *14 (4th Cir. Dec. 17, 1997). As set forth herein, STW was named as a defendant in a prior civil action in 2014, Bowen, involving alleged benzene exposure that is very similar to the claims set forth in the Underlying Actions. (JA437-457). Notably, Westfield set forth its reservation of rights in the Bowen matter, agreeing to provide STW a defense and to accept coverage "to a limited extent" under the CGL policies:

> Westfield Insurance will agree to provide a defense to Sistersville Tank Works, Inc., in the above matter under a full and complete reservation of rights. Westfield is willing to accept coverage to a limited extent. Coverage is limited to the period of time during which the Plaintiff was exposed to asbestos and the bodily injury claimed by the Plaintiff occurred within the policy periods of the Westfield Insurance Commercial Liability policy.

(JA463). Westfield's concession of "limited" coverage in Bowen is a direct repudiation of the manifestation trigger under the insuring agreements to the CGL policies. By acknowledging coverage in Bowen during the period of exposure, Westfield rejected the manifestation trigger. Simply stated, if Westfield believed that its policy language required a manifestation trigger, it would not have looked to the time of exposure as a relevant consideration.

Finally, adoption of the manifestation trigger, as urged by Westfield, would effectively turn STW's "occurrence-based" 1988-1989 CGL and Umbrella Policies into "claims made" policies, to the substantial detriment of STW. *Trizec Properties, Inc. v. Biltmore Constr. Co.*, 767 F.2d 810,

n.6 (11th Cir. 1985); *see also Montrose Chemical Corp. v. Admiral Ins. Co.*, 3 Cal.App.4th 1511, 1528 (1992) ("To read an occurrence policy to afford coverage only when the injury or damage becomes manifest during the policy period . . . unfairly transforms the more expensive occurrence policy into a cheaper claims-made policy"). Such an outcome would be manifestly unjust and contrary to the language of the policy, and the District Court expressly rejected such outcome. This would deprive STW of the benefit of its bargain and deprive it of the coverage that it had purchased.

Accordingly, STW urges the Court to adopt the continuous or multiple trigger of coverage and reject the manifestation trigger of coverage, consistent with the District Court's holding, meaning that the bodily injury occurs at the time of the initial exposure through the date of manifestation of the injury.

E. West Virginia's recognition of a cause of action for medical monitoring is illustrative to the coverage issues here.

West Virginia's recognition of a cause of action for medical monitoring is illustrative to the coverage issues here. In *Bower*, the Supreme Court of Appeals of West Virginia rejected the *Ball* case relied upon by Westfield and recognized a cause of action for the recovery of medical monitoring expenses following exposure to harmful chemicals, even in the absence of a manifestation of physical symptoms or disease. *Bower*, 206 W. Va. 133. Significantly, it was held in *Bower* that exposure to harmful substances alone, even without the manifestation of physical symptoms, constitutes an "injury" sufficient to support a right of redress: "Although the physical manifestation of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; the exposure itself and the concomitant need for medical testing constitute the injury." *Id*. at 139.

While Westfield contends that West Virginia's recognition of a cause of action for medical monitoring in *Bower* is not analogous to the current matter, it is illustrative and supports a finding that the continuous or multiple trigger of coverage should be adopted in West Virginia.

VI. CONCLUSION

For these reasons as well as those otherwise apparent from the record, consistent with the holding of the District Court for the Northern District of West Virginia, the Court should find that the continuous or multiple trigger of coverage theory applies to claims for latent illness resulting from alleged chemical exposure, because the bodily injury occurs at the time of the initial exposure through the date of manifestation of injury.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Westfield Insurance Company,
Petitioner

vs.) No. 22-848

Sistersville Tank Works, Inc.,
Robert N. Edwards,
E. Jane Price, individually and as Executor of the
Estate of Robert G. Price,
Douglas Steele,
Carol Steele,
Gary Thomas Sandy,
Peggy Sandy,
Reagle & Padden, Inc., and
David C. Padden
Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certify that the foregoing RESPONDENTS' BRIEF was served upon counsel of record by the File&ServeXpress system on June 29, 2023:

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