
DOES CONTINUOUS TRIGGER THEORY APPLY WHEN MULTIPLE PROPERTY OWNERS ARE RESPONSIBLE FOR ENVIRONMENTAL CONTAMINATION?

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On April 17, 2009, the Appellate Division, in Franklin Mutual Insurance Company v. Metropolitan Property & Casualty Insurance Company, determined how the “continuous trigger” theory, first adopted by the New Jersey Supreme Court in Owens-Illinois, Inc. v. United Ins. Co., is applied when contaminated property changes ownership during the period of its contamination. 2009 N.J. Super. Lexis 79 (App. Div. 2009). See also 138 N.J. 437 (1994). Generally, under the “continuous trigger” theory of Owens Illinois, insurance coverage for certain environmental claims is based upon the time period for which each insurer is on the risk. The available insurance coverage is then prorated accordingly and capped by applicable policy limits. A continuous trigger is defined as the time period between the date of the first discharge of the hazardous material at issue or exposure, through the date of discovery of the discharge. Each policy in effect during the discharge period is triggered and treated as a separate occurrence. As the body of case law applying the continuous trigger only dealt with multiple insurance policies of a single insured/property owner, as opposed to insurance policies of multiple property owners, the issue in Franklin Mutual was one of first impression.

The facts of Franklin Mutual Insurance Company v. Metropolitan Property & Casualty Insurance Company are as follows: the underlying matter was a declaratory judgment action brought by Franklin Mutual. Franklin Mutual insured a residential property owned by Tsairis when oil contamination was discovered. Age

dating of the soil revealed that the discharge first began eighteen to nineteen (18-19) years before it was discovered. Prior to being insured by Franklin Mutual, the Tsairis’ were insured by Metropolitan Property & Casualty. They were also uninsured for some period of time. Metropolitan insured Tsairis for thirty-six (36) months; Franklin Mutual insured Tsairis for thirty-two (32) months; and the Tsairis’ were uninsured for forty-eight (48) months. Before Tsairis owned the property, it was owned by Clark. Neither Franklin Mutual nor Metropolitan insured Clark and neither pursued Clark for any portion of the cleanup costs. Thus, Tsairis’ insurers sought to allocate the cleanup costs amongst themselves. Ultimately, Franklin Mutual funded the remediation of the Tsairis property and filed suit against Metropolitan for reimbursement of a portion of the cleanup costs.

Ultimately, the parties could not agree on the method of allocation to be utilized. Metropolitan sought an allocation amongst all policies of insurance and against each homeowner for periods during the discharge period, regardless of who owned the property. Conversely, Franklin Mutual argued that only the insurance policies for Tsairis, the common insured, should be considered in determining coverage. Essentially, Franklin Mutual’s position was that the Owens Illinois formula did not create an allocation scheme among multiple parties responsible for an environmental tort under the New Jersey Spill Act. As such, it contended that when multiple parties/

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property owners were responsible for contamination, each party's share of liability should be assessed separately before an Owens Illinois allocation is made and obligations of common insurers are defined.

The Trial Court agreed with Franklin Mutual's methodology in determining allocation and concluded that the Owens-Illinois formula applies separately to each individual insured. The Appellate Division concurred, and held that, "allocation is only among insurers that provide coverage to the same insured, to indemnify that insured for its share of the cleanup costs." Franklin Mutual at 3. The Court based this statement on the reasoning set forth in Owens Illinois and upon the fact that the line of subsequent cases only focused, "on the allocation of an individual insured's propor-

tionate share of liability for cleanup costs for environmental contamination among that insured's carriers." Id. at 9. Thus, the Appellate Division refused to extend the Owens Illinois allocation formula to environmental claims involving multiple property owners. Therefore, the Owens Illinois formula is only to be applied in determining an insurance carrier's percentage of responsibility when a property owner is insured by multiple insurance carriers during the discharge period.

¹ The discharge period was defined as eighteen to nineteen (18-19) years (216-228 months). Tsairis owned the property for one hundred and sixteen months (116) of those months and Clark, a prior owner, owned the property the remainder of the time.

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