Allocation Ruling

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THE SECOND DEPARTMENT "TIME ON THE RISK" ALLOCATION RULING IN LEAD PAINT CASES WILL NOT BE "THE LAST WORD"

A New York intermediate appellate court has made a ruling on allocation of the settlement of a lead paint claim between consecutive insurers of the same building. This ruling is significant, not only to lead paint cases, but to any toxic tort cases arising in New York. In **Serio v. Public Service Mutual Insurance Co.**, Docket No. 13599, (April 23, 2003) the Appellate Division, Second Department held as follows:

"Where the exposure occurred over a period of three years, and where the two insurers covered that loss, respectively, during consecutive periods of two and one years, we hold that each insurer shall bear a share of liability for the purpose of funding their negotiated settlement with the injured parties, directly proportionate to each insurer's time on the risk"

In **Serio**, Public Service Mutual Insurance Company ("Public Service") provided $1,000,000 in liability coverage for two consecutive one-year terms from June 1, 1993 to June 1, 1995. First Central Insurance Company ("First Central") provided identical coverage for the period June 29, 1995 to June 29, 1996. On or about March 19, 2002 the parties in the underlying personal injury action stipulated to settle for the sum of $390,000. However, the two insurance companies reserved their rights to seek a judicial determination as to their proportionate contribution obligations to the settlement.

Since First Central was in liquidation, the Superintendent of Insurance commenced an action in Supreme Court, Nassau County seeking a declaratory judgment. The "other insurance clauses" in all three policies contained the same "method of sharing." Since First Central policies covered only one relevant year, it argued that it should pay only one-third of the settlement. Public Service argued that the decision of the Appellate Division, First Department in **American Empire Ins. Co. v. PSM Ins. Co.,** 259 A.D.2d 341 687

NYS2d 32 (1st Dept. 1999) was applicable. In that case where three insurers argued over their liability for a lead paint exposure case, the First Department found equal apportionment rather than pro rata, to be the appropriate analysis in accordance with the "other insurance" provisions of the policies.

In **Serio**, First Central attempted to distinguish the **American Empire** holding of the First Department on the grounds that that case focused on issues of what events "triggered coverage, rather than on the issue of time on the risk."

In **Serio**, the Second Department ruled in favor of First Central, based on the decision of the New York Court of Appeals in **Consolidated Edison Co. of New York v. Allstate Ins. Co**., 98 NY2d 208, 746 NYS2d 622 (2002). As explained in the **Serio** decision, the court in **Consolidated Edison** "adopted a 'time on the risk' analysis in a case involving the cleanup of toxic substances that had leaked into the soil and ground water…[and a] succession of twenty four insurers had provided coverage over the years, and it was impossible to pinpoint the exact times of the contamination vis-à-vis the terms of the various insurers' policies."

In **Con Edison** the utility sought "joint and several allocation" which would "allow it to collect all of its damages from any one of the liable insurers leaving the insurers to fight out issues of contribution and indemnification." The Court of Appeals, upheld the trial court's decision, as affirmed by the Appellate Division which adopted a pro rata allocation based on the language of the policies providing that each was to pay for losses arising "during the policy period." Thus, based on **Consolidated Edison**, the Second Department in **Serio** ruled that Public Service had to pay two-thirds of the settlement based on its two years of coverage and that the Superintendent of Insurance, on behalf of First Central, was only liable for one-third based on its one year of coverage.

In **Serio**, the Second Department pointed out that: "the instant case is the first lead-paint case in New York to employ a time on the risk analysis." While the court did not address what significance its decision might have on other types of cases, it did make numerous references to other types of toxic tort cases such as asbestos, breast implant and other cases involving environmental contamination.

What is significant about this decision by the Second Department in **Serio** is that it did not focus on the other insurance clauses in the policies which were used by the trial court to reason that the policies should share equally without regard to the time on the risk.

The Court in **Serio** also made a significant distinction between its analysis and the analysis in the earlier First Department decision in **American Empire**. The Court stated:

"We note, however, that the apportionment issue in **American Empire** was decided upon an analysis of when each policy was triggered, and in recognition of the equal apportionment required by the "other insurance clauses" of the policies. Unlike **American Empire** the instant case presents no "triggering" issue. The instant case presents a single, narrow issue; how shall two insurers apportion liability as between themselves for a continuing loss that occurred during the both of their consecutive policy periods.

The Court in **Serio** also distinguished Consolidated Edison's for this reason:

"**Consolidated Edison** also is factually distinguishable from the instant matter insofar as it posed the issue of whether pro-rated apportionment or joint and several apportionment was appropriate, whereas the instant case pits pro-rated apportionment against equal apportionment."

Despite this distinction in **Consolidated Edison**, the Court in **Serio** held that it was applicable and supported its allocation based on time on the risk.

The **Serio** case does not address one issue that remains unclear in lead paint cases. In **Serio**, the carriers appear to have assumed that each policy was triggered based on the exposure of the child to lead paint during the policy period. There appeared to be no issue as to whether the child was injured during each policy period. Since New York is an "injury- in-fact" jurisdiction, in order for a policy to be triggered there remains the issue of whether an injury occurred during the policy period. Indeed, in the earlier **American Empire** case, the First Department specifically discussed the evidence of injury to the child in earlier policy periods. In other words, in the case of a settlement even where the infant has been exposed over several policy periods, one or more of the insurers may argue that, despite the exposure, there was no injury in fact during the applicable policy period. However, this requires medical evidence as historically was required in asbestos cases.

When asbestos litigation first arose, it was assumed by plaintiffs that the mere exposure to asbestos triggered coverage and some courts initially so held. However, many courts then began to require medical proof, which ultimately lead to expert opinions that exposure caused injury and that the injury continued in successive policies, sometimes by continued exposure, and sometimes simply through the presence of asbestos fiber in the lungs of the injured person.

It is also not clear whether the **Serio** analysis will be accepted whole-heartedly by the New York Court of Appeals. In the **Consolidated Edison** case, the Court of Appeals commented that the trial court's analysis "was not error." 746 NYS2d at 630. The Court also observed, without discussion, that there are other relevant proration issues such as how to treat self-insured retention periods of no insurance, periods where no insurance is available and settled policies. Id. In **Consolidated Edison**, the utility asserted that there was damage during all of its policy periods. The judge at concluded that it was therefore appropriate that all insurers should respond based on the damage "during the policy period." The Court of Appeals accepted this analysis but remarked that "this is not the last word on proration." Id. The same can be said of the holding by the Second Department in **Serio**.