BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow

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Binding Authority: So Long, Farewell, Auf Wiedersehen, Goodnight

It is with mixed emotions that I write to tell you that this will be the last issue of *Binding Authority*. On one hand, it is a sad moment. *Binding Authority* has been a thrill to write for the past four years. Its singular mission has been to report on and analyze just-issued insurance coverage decisions -- but in an entertaining and light-hearted style. I always took the cases seriously -- just not myself.

The other side of the emotional coin is the reason why *Binding Authority* is riding into the sunset – to make way for something bigger and better. Well, bigger for sure. Better? You'll be the judge of that. I will soon be launching a new (and still free) electronic insurance coverage newsletter. But unlike *Binding Authority*, this one will be published on a set schedule. In addition, while *Binding Authority* was always limited to a discussion of only one case, each issue of this newsletter will address many just-issued important insurance coverage decisions. *Binding Authority* was a low budget production. Its replacement will have a little more pizzazz and even its own website. But despite adding some glitz, the newsletter, most importantly, will follow the *Binding Authority* tradition of combining the serious and Sophomoric into the discussion of insurance coverage

You'll soon receive an official launch announcement, the first issue of the newsletter and easy instructions on how to subscribe. Your support for *Binding Authority* has been appreciated so much and I hope you'll do the same with my new newsletter. I look forward to earning that from you. Adieu, adieu, to you and you and you.

Coverage College Epilogue

The 6th White and Williams Coverage College was held on Thursday October 4th and what a day it was. It was, without a doubt, the best Coverage College we've ever had – and not just because the Phillie Phanatic made a surprise appearance and yukked it up with everyone at lunch. The attendance was the best ever, the sessions were superb and the final general session – Jay Levin and Doug Widin, policyholder lawyers from Reed Smith in Philadelphia, addressing mistakes that insurers make that can increase their exposure – was riveting. Everyone left buzzing about how much they learned from Jay and Doug. Thank you to everyone who attended.

Please Join Me…

I am excited to share with you that my stand-up comedy routine hits one of the biggest stages of them all next week. Randy Spencer, this really funny guy I know, who, amazingly, has the same DNA as me, will be appearing at Caroline's on Broadway (49th and Broadway in NYC) on Saturday October 13th at 4 PM in the New Talent Showcase. To perform on the venerable Caroline's stage will be the highlight of my stand-up career. If you are in the NYC area I could sure use the support. Translation -- Just laugh. Even if it's not funny. Please be my guest at the show. If you plan to come let me know and I'll get your name on the guest list. We can have a drink and reminisce about the good old days of *Binding Authority*.

Pennsylvania Supreme Court To Issue A Decision That Could Moooove Trigger of Coverage

Pennsylvania's Top Court To Address The Application of J.H. France to Property Damage

This week the Pennsylvania Supreme Court granted allocatur in *Pennsylvania National Mutual Insurance Company v. St. John* – an interesting decision that sets up an opportunity for the high court to address trigger of coverage for "property damage." While *St. John* is not a typical construction defect case involving a building (nor typical of anything for that matter) -- the court's decision is likely to have an impact in the CD area. And based on the Superior Court's November 28, 2011 opinion, and how the Supreme Court framed the issues for review, the court will no doubt be addressing how its seminal trigger of coverage decision in *J.H. France* fits into the mix.

St. John will answer how many CGL policies are obligated to provide coverage for "property damage" under the following circumstances. The St. John's operated a dairy farm. As part of expanding the size of their herd they hired a plumbing and heating company to install a drain and rinse water collection system. However, because of cracked PVC piping and a hole in the welding, contaminated "gray water" escaped from the drainage system and entered the cows' drinking water. *St. John* at 2.

The St. John's "noticed a significant drop in milk production in April, 2004, and subsequent increased health, reproductive and other problems in the herd. However, they assert that despite consultation with veterinarians and other experts they did not suspect the problem was contamination of the cows' drinking water. They assumed the problems were ordinary complications of a dairy operation, and attempted to address them accordingly." *Id.* The St. John's maintain that it was not until March 2006 that they discovered that the problems with the herd were associated with the gray water seepage and negligent installation of the drain and rinse water collection system.

Following a jury verdict against the plumbing and heating company and welding installer, and then a settlement with Penn National, the apparent CGL insurer for the plumbing and heating company, the case ended up as one involving direct claims by the St. John's against Penn National.

The competing coverage arguments were as follows.

The trial court and Superior Court agreed with Penn National that only the policy on the risk in 2004 was obligated to provide coverage because that is when the property damage was manifest. This is when there was a significant decline in milk production, followed by a variety of problems, including deformed calves, salmonella, laminitis and metabollic disorders. *Id.* at 8.

The St. John's saw it differently, arguing that two additional years of primary coverage were triggered, as well as an umbrella policy in one of the triggered years. The St. John's argued:

[T]he property damage was not manifest until March of 2006, when they realized that there was a problem with the drinking water for the cows. They maintain that even with reasonable diligence they could not determine that the earlier problems were caused by the defective installation of the gray water drainage facility. Therefore, they assert, the earlier problems did not constitute manifestation of property damage within the meaning of the policy terms. They also present an alternative argument that the property damage to the cows caused by the defective drainage installation constituted "continuous progressive" property damage compensable under the multiple-trigger theory of liability adopted by our Supreme Court in *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993), with respect to insurance coverage pertaining to asbestos-related disease claims.

Id. at 4-5. The Superior Court rejected these arguments.

The Superior Court's opinion in *St. John* raises numerous issues. Not to mention that there is a dissenting opinion (a tad longer than the majority) that rejected the argument that the effects of the negligence first manifested during 2004. The dissent was persuaded that the only notable effect during 2004 was fluctuating milk production -- an expected occurrence within the dairy industry. The dissent was also prepared to conclude that the "ongoing contamination of the herd's drinking water system is tantamount to continuous, progressive property damage that warrants application of the multiple trigger theory of liability insurance coverage our Supreme Court adopted in *J.H. France Refractories Co. v. Allstate Insurance Co.*, 626 A.2d 502, 507 (Pa. 1993), in relation to asbestos cases." *St. John*, dissent at 5-6.

I'll leave my discussion of *St. John* to this since the Supreme Court of Pennsylvania will soon have the last word. On October 1 the Supreme Court of Pennsylvania granted allocatur to address the following questions:

a. Did "manifestation" of the "property damage" to the St. Johns' dairy herd take place in late March 2006 when the cows were concurrently observed thrashing their heads about in their water bowls, refusing to drink, and giving dramatically less milk; rather than, as held by the trial court, in April 2004 based on a mere economic downturn from a decrease in milk production?

b. Does "manifestation" of "property damage" for purposes of triggering a commercial general liability insurance policy take place only after the injured party has the ability to ascertain the source of injury or damage is traceable to something out of the ordinary and usual course of events for which another may bear responsibility?

c. Does the "multiple trigger" theory of liability insurance coverage adopted by the Pennsylvania Supreme Court in *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626

A.2d 502, 507 (Pa.1993), apply to cases presenting continuous, progressive "property damage," so that all policies on the risk from exposure to the harmful condition through "manifestation" of the injury are triggered?

Please let me know if you have any questions.

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