

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

DOCKET NO. 0017 E.D.
APPEAL DOCKET 1999

CONSULTING ENGINEERS, INC. and PAUL K. GOLDBERG,

Appellants

v.

INSURANCE COMPANY OF NORTH AMERICA, SELECTIVE WAY INSURANCE
COMPANY, LUCJAN ZLOTNICKI and ANDREI NEUMAN

Appellees

REPLY BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

Appeal from the June 9, 1998 Order of the Superior Court of
Pennsylvania, Superior Court Docket No. 01434PHL97,
denying Application for Reargument of that Court's
March 31, 1998 Order which affirmed the Order of the
Court of Common Pleas of Philadelphia,
May Term, 1998, No. 602, dated February 25, 1997 and entered
March 18, 1997

John A. MacDonald, Esquire
Attorney I.D. No. 47892
ANDERSON, KILL & OLICK
1600 Market Street
32nd Floor
Philadelphia, PA 19103
(215) 568-4202

Attorney for Amicus Curiae
and United Policyholders

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and Indemnity Co.,***
347 Pa. Super. 510, 490 A.2d 896 (1985),
rev'd on other grounds, 512 Pa. 290,
516 A.2d 684 (1986).

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I. INTRODUCTION

The question before this Court is whether two insurance companies insurance policies provide insurance coverage for personal injury offenses that first began during a prior policy period. In part, this Court has already resolved that question. As set forth below, the Selective insurance policy provides insurance coverage for "personal injury" offenses such as malicious prosecution on an "occurrence" basis using the standard "occurrence" definition. This Court analyzed "occurrence" insurance coverage and the "occurrence" definition and held that:

[T]he insurers which drafted the "occurrence" definition obviously contemplated the possibility of injury resulting from continuous or related exposure to conditions, and specified that the process of exposure was to constitute one occurrence. If prolonged exposure, constituting one occurrence, resulted in injury, and if the injury occurred during the time a given policy was in effect, then the injury is an insurable risk under the terms of that policy. Being defined as one "occurrence," the entire injury and all damages resulting therefrom fall within the indemnification obligation of the insurer. In other words, *once the liability of a given insurer is triggered, it is irrelevant that additional exposure or injury occurred at times other than when the insurer was on the risk. The insurer in question must bear potential liability for the entire claim.*

in *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 40-41, 626 A.2d 502, 508 (Pa. 1993) (emphasis added); see also, *Vale Chemical Co. v. Hartford Accident and Indemnity Co.*, 347 Pa. Super. 510, 490 A.2d 896 (1985), *rev'd on other grounds*, 512 Pa. 290, 516

A.2d 684 (1986). Thus, with respect to Selective's "personal" injury insurance coverage, the answer to the Question Presented is "yes." Under the established case law of this Court, if an insurance policy provides insurance coverage for a malicious prosecution that began prior to the policy period, the policy will provide insurance coverage if the malicious prosecution continues into the policy period, absent an applicable exclusion.

The Defendants suggest that the interpretation of the effect of "occurrence" coverage and the "occurrence" definition is limited to toxic tort cases. There is nothing in the language of the "occurrence" definition nor in this Court's *J.H. France* decision that remotely indicates that the "occurrence" definition and the "continuous trigger" that it so obviously provides is limited to toxic tort cases. In the standard form Comprehensive General Liability insurance policies interpreted in *J.H. France*, the "occurrence" definition applied to all "bodily injury" and "property damage." In Selective's insurance policy the "occurrence" definition also applies to "personal injury."

INA's insurance coverage for "malicious prosecution" is not written provided on an "occurrence" basis, although INA claims to this Court that its insurance policy does in fact provide "occurrence" coverage for "malicious prosecution." If INA is bound to its judicial representations, then *J.H. France* governs INA's policy as well. As

set forth within, the answer to the Question Presented with respect to INA is "yes," as well, although for different reasons. INA provided insurance coverage on an "offense-committed" basis. Under Pennsylvania law, the tort of malicious prosecution includes the "continuation" of a wrongful litigation. As the malicious prosecution continued during INA's policy periods, INA insurance policies provide insurance coverage as well.

II. ARGUMENT

A. TRIGGERS OF COVERAGE ARE DEPENDENT UPON THE LANGUAGE OF THE SPECIFIC INSURANCE POLICIES

Insurance coverage for "personal injury" offenses typically includes false arrest, malicious prosecution, libel, slander, and wrongful entry offenses. The question of the timing of insurance coverage is part of what is common known as the trigger of coverage. The trigger of coverage is usually found in the insuring agreement portion of the insurance policy.

A single liability insurance policy may have several insuring agreements, with a different insuring agreement applying to different types of coverage. The majority of current CGL insurance policies provide one insuring agreement for liability for property damage and bodily injury and a separate insuring agreement for personal injury offenses.

B. THERE CAN BE VARIOUS TYPES OF TIMING DEVICES OR TRIGGERS OF COVERAGE USED IN INSURANCE POLICIES

One aspect of the trigger of coverage, the aspect at issue herein, is that it determines which policy period or periods will provide coverage. There is no magic or set formula for how insurance companies design their timing devices and there are a number of timing devices that have been used or considered at various times. From the mid-1940s through 1965, the standard-form CGL insurance policy used the trigger of injury "caused by accident." Thus the trigger of the policy was when the accident occurred. The "caused by accident" formulation was useful in most contexts, but caused problems when applied to long-term exposure cases. In the mid-1965, the standard-form policy was changed to an "occurrence" trigger, which both provided coverage in continuous or repeated exposure cases specifically provided insurance coverage for injury or damage caused during the policy period. One feature of the "occurrence" insurance policy is that in a long-term injury case, multiple policy years are triggered and multiple limits apply.¹ *J.H. France*, 534 Pa. 29, 626 A.2d 502, 509 (Pa. 1993). Insurance companies were happy to

¹ For instance, if the injury was caused over a three-year period, then three years of "occurrence" policies apply, multiplying or "stacking" the available dollar limits of coverage. With three successive "occurrence" insurance policies, each of which provides \$1 million in limits, there would be \$3 million of total limits available for the injury.

provide insurance coverage on an "occurrence" basis for most policyholders and for most injuries. The vast majority of liability insurance coverage sold since 1965 has been on the standard-form CGL "occurrence" basis.

In a minority of situations, such as professional malpractice insurance, insurance companies have been unwilling to provide "occurrence" coverage. Several theoretical devices were available to limit insurance coverage such that coverage for a continuous injury or exposure would be limited to a single policy period. Two ways to accomplish are by confining insurance coverage to the policy period during which the claim is first made against the policyholder by including "claims-made" language in the insuring agreement (the "claims-made trigger) or to confine insurance insurance coverage to the policy period during which the injury or damage "first "manifests itself."

Of these two formulations, the insurance industry chose the first and the insuring agreement of such policies provides that coverage applies if the claim is first made during the policy period. To the best of United Policyholder's knowledge and belief, no liability insurance policy has been written on a "first-manifestation" basis.² Some courts

² The "first-manifestation" trigger was considered at various times by the insurance industry. That record is in the public domain, although not before the Court. If the Court is inclined to consider the first-

have been misled into applying a judicially-created "first-manifestation" trigger, but none of these courts have ever pointed to any specific language setting forth such a trigger. INA and Selective have argued to this Court that insurance coverage for malicious prosecution must be limited only to the time at which the "malicious prosecution" was first manifested. That argument, however, is not supported by any of the language in their respective insurance policies.

C. THE TRIGGERS OF COVERAGE IN THE RESPECTIVE INSURANCE POLICIES

It is the policy language that determines the period during which the insurance policy may be triggered.

1. Selective's Insurance Policy Provides "Occurrence" Coverage for "Personal Injury" Offenses.

Selective's insurance policy contains noticeable differences from INA's with respect to the insuring agreement for personal injury insurance coverage. Like INA's insurance policy, Selective's insurance policy provides "bodily injury" and "property damage" insurance coverage on an "occurrence" basis. Unlike INA's insurance policy, Selective *also* provides "personal injury" insurance coverage on an "occurrence" basis:

manifestation trigger, it is respectfully suggested that this Court remand this matter for the purposes of obtaining a complete record of the industry's consideration of the "first manifestation" trigger.

SECTION II A. BUSINESS LIABILITY

COVERAGE E - BUSINESS LIABILITY COVERAGE

We will pay for the benefit of insured all sums which they become legally obligated to pay as damages because of bodily injury, property damage, or *personal injury caused by an occurrence covered by this insurance*. This includes damages arising out of the business and premises described here, or those newly acquired or formed by you during the current policy period as provided in the definition of insureds.

SECTION I & II. GLOSSARY

5. *Occurrence* means an accident, *including continuous or repeated exposure to substantially the same harmful conditions*.

6. *Personal injury* means *injury which arises out of any of the following offenses committed in the conduct of your business which occurs during the policy period:*

*False arrest, detention or imprisonment, or *malicious prosecution*.

Boiled down to its essence, Selective's insurance policy provides insurance coverage for injury arising out of malicious prosecution including continuing or repeated exposure to the same harmful conditions.

There is no need to look further than the language that

Selective chose in order to resolve this matter. Having chosen to provide insurance coverage for personal injury offenses on an "occurrence" basis, utilizing the "occurrence" definition, Selective's "personal injury" coverage is triggered on an "occurrence basis." Thus, "once the liability of a given insurer is triggered, it is irrelevant that additional exposure or injury occurred at times other than when the insurer was on the risk. The insurer in question must bear potential liability for the entire claim." *J.H. France*, 534 Pa. at 40-41, 626 A.2d. at 508. Selective should not be allowed to eviscerate the coverage that it sold to Pennsylvania policyholders by manufacturing a "first-manifestation" trigger out of whole cloth.

2. The INA Insurance Policy Contains an "Offense-Committed" Trigger for Personal Injury Claims

INA's policy has two different triggers, one for "bodily injury" and "property damage," and another for "personal injury." The insuring agreement of the "bodily injury" and "property damage" liability portion of the INA insurance policy provides that:

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

We will pay those sums that the insured

becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B. This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence." The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend any "suit" seeking those damages.

DEFINITIONS

SECTION V-

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Thus, for "bodily injury" and "property damage" claims, but with the notable absence of "personal injury" claims, INA's insurance policy provides standard "occurrence" coverage. This coverage features the "multiple" or "continuous" trigger of coverage, allowing multiple policies to be triggered in continuous injury cases. See, *J.H. France*, 534 Pa. 29, 626 A.2d at 509. INA and Selective claim that the "occurrence" policy has at least two different triggers, a "multiple" or "continuous"

trigger, that applies in limited circumstances and a "first manifestation" trigger that applies in most circumstances. There simply is no support in the "occurrence" language for two different triggers, one for continuous injuries resulting from toxic torts, another for all other types of injuries. Again, as this Court held:

*[T]he insurers which drafted the "occurrence" definition obviously contemplated the possibility of injury resulting from continuous or repeated exposure to conditions, and specified that the process of exposure was to constitute one occurrence. *** In other words, once the liability of a given insurer is triggered, it is irrelevant that additional exposure or injury occurred at times other than when the insurer was on the risk. The insurer in question must bear potential liability for the entire claim.*

J.H. France, 534 Pa. at 40-41, 626 A.2d at 508 (emphasis added).

This Court cannot affirm the Panel's decision below without doing violence to the sound reasoning of *J.H. France* and ignoring the plain language and implication of the "occurrence" definition.

There are indeed two different triggers in INA's insurance policy, but that is because there are two different types of insuring agreements, one on an "occurrence-basis," one on a "non-occurrence-basis." The insuring agreement for "personal injury" liability³ reads as

³ INA defines "personal injury" as:

10. "Personal Injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:
 - a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. Wrongful entry into, or eviction of a

follows:

**COVERAGE B. PERSONAL AND ADVERTISING INJURY
LIABILITY**

1. Insuring Agreement.
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this insurance applies....
 - b. This insurance applies to "personal injury" only if caused by an offense:
Committed in the "coverage territory" during the policy period;
and....

This language is obviously not the "occurrence" language used in the earlier portion of INA's insurance policy. The timing or "trigger" in an "occurrence" insuring agreement is timed by "bodily injury" or "property damage" occurring during the policy period. Neither does INA's insuring agreement resemble, even remotely, anything like the theoretical "first-manifestation" trigger where the policy is triggered by the first manifestation

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- d. person from, a room, dwelling or premises that the person occupies; Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organizations' goods, products or services; or
 - e. Oral or written publication or material that violates a person's right of privacy.

of injury. INA's personal injury coverage insuring agreement is triggered by an "offense committed during the policy period." Thus, this coverage is on an "offense" committed" basis.

D. RESPONSE TO PUBLIC POLICY ARGUMENTS

As insurance companies specializing in liability insurance coverage, Selective and INA are in the business of torts and are experts in torts. Selective and INA specialize in defending torts and, if that defense is unsuccessful, in indemnifying torts, they do so in thousands of cases per year. INA should have even greater expertise in this area than most insurance companies as INA commenced business in 1792 and has been providing insurance coverage for over 200 years. (Best's Insurance Reports, Property-Casualty United States, 1120-1 (1998 Ed.)).

Because they sells insurance coverage for the tort of "malicious prosecution," and hence promise Pennsylvania policyholders they will defend malicious prosecution claims, Selective and INA certainly must be aware of elements of the malicious prosecution statute, 42 Pa. C.S. Section 8352 et. seq., and specifically that the tort was a continuing offense that was not complete until the underlying litigation terminated in favor of the defendant. When Selective and INA each decided to provide insurance coverage for malicious prosecution, Selective and INA undoubtedly first made themselves aware, if they were not already aware, of the elements of

the tort and the fact that the tort included wrongful continuation of a malicious prosecution which later turned sour. Selective and INA also undoubtedly were aware that the tort applied to litigation initially brought in good faith, but turned sour. Selective and INA, being in the business of defending malicious prosecution torts, must have also been aware of the statute of limitations decision in *Ludmer v. Nernberg*, 520 Pa. 218, 553 A.2d 924 (1989). Selective and INA presumably decided to sell Pennsylvania policyholders insurance coverage for personal injury offenses such as malicious prosecution because they believed that they could make a profit. If Selective and INA were not aware of all of the implications of their own insurance policy language, then they had no business collecting premiums for insurance coverage for malicious prosecution which they respectively promised their policyholders that they would provide on an "occurrence" or "first-manifestation" basis, respectively.

Selective and INA could have written their respective "personal injury" insuring agreements differently. Selective and INA did not. Selective and INA could have written a "first-manifestation" trigger or limitation. Selective and INA did not. Selective and INA could have written an exclusion for malicious prosecution offenses that began prior to their policy periods. Selective and INA did not. INA, for one, was very aware of the continuing nature of "personal injury" "offenses." INA specifically

excluded from coverage "advertising injury: ... (2) Arising out of the oral or written publication of material whose first publication took place before the beginning of the policy period." (Coverage B, Exclusions, 2(a)(2)). INA wrote no such exclusion for malicious prosecution. Neither did Selective.

Despite their sophist arguments and citations to various judicial decisions across the country,⁴ Selective and INA's policy language simply can not be read to provide for a "first-manifestation" trigger for "bodily injury," "property damage," or "personal injury," or to exclude "personal injury" coverage for malicious prosecutions that began prior to INA's policy period, but continued into INA's policy period.

Finally, Selective and INA throw up the red herring, regrettably followed by some courts, that the "first manifestation" rule is necessary to protect unwary insurance companies from fraudulent policyholders that first file malicious litigation and then run an and purchase after-the-fact insurance coverage. To the extent that this is a real problem, Pennsylvania common law has provided an effective remedy for over six decades. The remedy is an action for fraud in the procurement of insurance. See e.g., *Tudor Ins. Co. v. Township of Stowe*, 697 A.2d 1010, 1010 (Pa. Super. 1997) and the cases discussed therein. Indeed, the "first manifestation" trigger would not even solve the problem, as the hypothetical fraudulent

⁴ Selective and INA have not established how many of these opinions have interpreted personal injury insurance coverage provisions that are identical to their respective provisions.

policyholder merely need purchase the requisite amount of insurance coverage immediately prior to initiating the wrongful litigation.


In sum, the plain words of Selective's insurance policy indicate that it provides insurance coverage for personal injury offenses, including malicious prosecution, on an occurrence basis. Under *J.H. France* that means that Selective's insurance policy provides insurance coverage as long as there was continued or repeated exposure to or injury from malicious prosecution during Selective's policy period. INA's insurance policy provided insurance coverage on an "offense-committed" basis, which provided coverage for a personal injury offense committed during the policy period. INA's insurance policy provides insurance coverage as long as the malicious prosecution was either instituted, continued, or unfavorably concluded during its policy period. The answer to the Question Presented, in both instances is "yes." These sophisticated, sophist, billion-dollar insurance companies do not need this to protect them by creating a "first-manifestation" trigger out of whole cloth. These companies were always able to write a "first-manifestation" trigger into their insurance policies. Selective and INA simply chose not to do so.

CONCLUSION

For the reasons set forth within, United Policyholders respectfully asserts that the Panel's opinion below be reversed.

Respectfully submitted,

August 4, 1999



JOHN A. MacDONALD, ESQUIRE
Attorney I.D. No. 47892

CERTIFICATION OF SERVICE

I, John A. MacDonald, Esquire, hereby certify that I caused to be served a true and correct copy of the foregoing Reply Brief for Appellants and Reproduced Record upon the following counsel by having the same sent Federal Express.

Andrew J. Gallogy, Esquire
Margolis, Edelstein
Independence Square West
6th and Walnut Streets,
4th Floor
Philadelphia, PA 19106

Andrew L. Braunfeld, Esquire
Masterson, Braunfeld, Maguire & Brown
702 One Montgomery Plaza
Norristown, PA 19401

James B. Crummett, Esquire
James B. Crummett & Associates
Suite 105
Six Neshaminy Interplex
Trevose, PA 19053

Stephen Springer, Esquire
Bochetto & Lentz, P.C.
1524 Locust Street
Philadelphia, PA 19102
(215) 735-3900


JOHN A. MacDONALD, ESQUIRE

Dated: August 4, 1999