Court of Appeal, Fourth District, Division 1, California.

OHIO CASUALTY INSURANCE COMPANY, Plaintiff and Respondent, v. HARTFORD ACCIDENT AND INDEMNITY COMPANY, Defendant and Appellant.

No. D018546.

Decided: April 11, 1995

Hawkins, Schnabel, Lindahl & Beck and Timothy A. Gonzales, Los Angeles, for defendant and appellant. Daley & Heft, Robert R. Heft and Margaret H. Buckley, Solana Beach, for plaintiff and respondent.

In this declaratory relief action involving an insurance coverage dispute over the defense and indemnity obligations of three successive liability insurers of the same construction company, Hartford Accident and Indemnity Company (Hartford) appeals the judgment awarding Ohio Casualty Insurance Company (Ohio) indemnity for the money it paid to settle the underlying construction defect lawsuit and apportioning the costs of defending the underlying lawsuit equally among the three insurers.

Since Ohio's policy was in effect before the construction defects that were the subject of the underlying lawsuit became apparent, this case presents the issue of whether the theory that coverage is triggered by the manifestation of damage is properly applied to insulate a premanifestation insurer from liability.

While the issue of when coverage is triggered in third-party liability cases involving progressive property damage currently is pending before the Supreme Court,[1] we shall apply precedent from this court and conclude the manifestation trigger was properly applied here to eliminate the indemnity obligations of Ohio, a premanifestation insurer.

FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the parties' stipulation, this case was tried by reference on stipulated facts before Justice Gerald Lewis, retired, presiding as referee. (Code Civ. Proc., § 638.) The parties stipulated to the following facts.

In October 1980, Wyland Enterprises entered into a subcontract with Hescon Developers, Inc., to complete the lath and plaster at Hescon Heights Development, a condominium project that was completed in April 1982.

As early as February 25, 1986, the Hescon Heights Homeowners Association was aware of water intrusion into units of the project when water stains were observed on the ceiling of a unit in the complex. In May 1986, the homeowners association retained Jack C. Stevenson Architect, Inc., to investigate roof leaks and other construction defects at the project. During inspections starting in June 1986, Stevenson and his staff discovered defects related to the lath and plaster work completed by Wyland Enterprises. Stevenson opined water intruded into the units because of gaps between the stucco and wood trim on the exterior of the units. He also opined the water began to infiltrate or leak into the units from the first time it rained in 1981. According to Stevenson, once the rain entered, the building paper behind the stucco began deteriorating.

In March 1989, the homeowners association filed a construction defect lawsuit against Hescon Developers, Inc., and Wyland Enterprises, among others. (Hescon Homeowners Association v. Hescon Developers, Inc. et al. (Super Ct. San Diego County, 1989, No. 609649).) The complaint alleged a variety of construction defects, including defects in the lath, plaster and wood trim on the buildings in the project.

Wyland Enterprises was insured successively by Ohio, Hartford and Golden Eagle Insurance Company under standard comprehensive general liability policies. Wyland Enterprises's coverage for the relevant periods ran as follows:

Ohio accepted the defense of Wyland Enterprises and ultimately negotiated and paid a settlement in the amount of $32,500 in January 1991. Ohio also incurred $27,491.70 in fees and costs in defense of Wyland Enterprises. Before the settlement was reached, Ohio had tendered the defense of Wyland Enterprises to both Hartford and Golden Eagle Insurance Company. On July 11, 1991, Ohio filed this declaratory relief action for equitable subrogation and contribution.

Justice Lewis found all three insurers had a duty to defend Wyland Enterprises, but only Hartford had a duty to indemnify because the damage to the property had manifested during Hartford's policy period. Based on these findings, the trial court, pursuant to Code of Civil Procedure section 638, entered judgment ordering Hartford to indemnify Ohio for (1) $32,500 paid in settlement on behalf of Wyland Enterprises and (2) $9,083 or one-third of the $27,250 incurred in the defense of Wyland Enterprises. The judgment also ordered Golden Eagle Insurance Company to indemnify Ohio for $9,083 or one-third of the defense costs.[2]

DISCUSSION

Hartford contends that Ohio should be responsible for the indemnity obligation because Ohio's policies were in effect at the time the property damage took place. We reject the contention on the basis of precedent from this court, recognizing manifestation of damage as the trigger for coverage in progressive property damage cases.

In Home Ins. Co. v. Landmark Ins. Co. (1988) 205 Cal.App.3d 1388, 1393, 253 Cal.Rptr. 277 (Home), we held "as between two first-party insurers, one of which is on the risk on the date of the first manifestation of property damage, and the other on the risk after the date of the first manifestation of damage, the first insurer must pay the entire claim."

In Prudential–LMI Com. Insurance v. Superior Court (1990) 51 Cal.3d 674, 699, 274 Cal.Rptr. 387, 798 P.2d 1230 (Prudential), the Supreme Court adopted the reasoning of Home, embracing a manifestation rule for determining insurance coverage in cases of progressive property damage in the context of first-party property insurance. The Supreme Court reasoned that prior to the manifestation of damage, a property loss is still a contingency under the policy so that the insured has not suffered a compensable loss. (Ibid.) Once the loss has manifested, the risk is no longer contingent. In conformity with the "loss-in-progress" rule, postmanifestation insurers are not responsible for any potential claim relating to previously discovered and manifested loss. (Ibid.) However, the Supreme Court specifically limited its holdings to the first-party insurance context, leaving the issue of whether the manifestation of damage theory applied in the third-party liability context to another day. (Id. at p. 698, 274 Cal.Rptr. 387, 798 P.2d 1230.)

However, shortly before Prudential, in Fireman's Fund Ins. Co. v. Aetna Casualty & Surety Co. (1990) 223 Cal.App.3d 1621, 1626–1628, 273 Cal.Rptr. 431 (Fireman's Fund), this court held the manifestation rule should apply to third-party liability insurance policies—as well as to first-party policies—in the context of a dispute between several insurers as to their respective liabilities. We noted the distinction between the first-party type of policy and a third-party liability policy was not legally relevant in this context since the "loss-in-progress" rule, which provides an insurer can only insure against contingent or unknown risks [3] and was the underpinning of Home, was equally applicable to both policy types. (Id. at p. 1627, 273 Cal.Rptr. 431.) We also found it significant that the claimant in Home and Fireman's Fund had received insurance proceeds and thus the questions before the court only involved allocating losses between insurers. That situation—also present here—allows a court to adopt a rule based primarily upon public policy considerations, and makes it less important to focus on insurance policy language interpreted in light of the insurer's reasonable expectation of coverage. (Id. at pp. 1627–1628, 273 Cal.Rptr. 431.)

In Pines of La Jolla Homeowners Assn. v. Industrial Indemnity (1992) 5 Cal.App.4th 714, 720–722, 7 Cal.Rptr.2d 53 (Pines of La Jolla), we again held the manifestation rule applies to third-party liability policies. In Pines of La Jolla, we reversed a summary judgment granted to the insurer based on an "other insurance" clause in a liability insurance policy, and held that triable issues of fact existed as to when damages caused by different defects at the project first became manifest.

Noting that the successive insurers only undertook the risk of injuries occurring during their respective policy period, in Pines of La Jolla, supra, 5 Cal.App.4th at pages 720 to 721, 7 Cal.Rptr.2d 53, we described the manifestation rule as follows:

"An injury does not necessarily occur when the wrongful act is committed, either for the purpose of accrual of the injured parties' cause of action [citation] or for the purpose of determining whether the tortfeasor's liability insurer must provide coverage for the injury. [Citation.] Instead, an injury occurs when appreciable damage is suffered by the injured party. [T]he 'time of the occurrence of an accident within the meaning of an indemnity policy is . the time when the [third] party was actually damaged.' (Quoting Remmer v. Glens Falls Indem. Co. (1956) 140 Cal.App.2d 84, 88, [295 P.2d 19].) [Citations.]

"Moreover, once the contingency insured against (i.e., the damage occurring during the policy period) has materialized, . the insurer is liable for all losses connected therewith, even though the damage may continue to grow after the policy has lapsed. [Citation.] . [O]nce the loss has 'occurred,' the insurer's contractual liability arises, the only issue then being the extent of its liability. It is immaterial that such liability is not fully ascertained until after the policy period. [Citation.] Furthermore, since an insurer may only insure against contingent or unknown risks of loss, a policy issued after the 'loss in progress' has begun does not cover such loss. [Citations.]"

Here, Justice Lewis, relying upon Fireman's Fund and Pines of La Jolla, applied the manifestation rule and found Hartford totally responsible for the indemnity obligation because the property damage manifested during Hartford's policy period. This ruling was in keeping with the above-mentioned precedent from our court adopting the manifestation rule. We have been presented with no compelling reason here to abandon the rule, and we decline to do so.

Hartford argues that no distinction has been drawn in Pines of La Jolla and other previously cited cases between the concept of actual "damage" and that of "manifestation." Agreeing with our comment in Pines of La Jolla that "injury does not necessarily occur when the wrongful act is committed," Hartford argues that injury exists when damage has resulted regardless of whether the nature of the damage is obvious or is latent and undiscovered. Moreover, Hartford contends the concept of "manifestation" is not clearly defined in our prior authority and urges that it should not be applied where, as here, the damage has happened but the injured party has not observed it.

In accordance with the stipulated facts in this case, the structure sustained damage when water intruded into the gaps between the stucco and wood trim on the exterior of the units, and the damage progressed for an extended period before it became noticeable in the interior of the structure. Thus, we are faced with a factual scenario in which the parties agree property damage existed during the premanifestation carrier's policy, but it simply had not progressed to the point where it was observable without destructive testing. Hartford therefore urges the conclusion that injury occurred during Ohio's policy period, triggering coverage.

We reject this conclusion and adhere to what we believe to have been the intent of our earlier opinions: that damage is "manifested" only when it becomes sufficiently apparent to be noticeable by a reasonable person on the property. So long as the damage is concealed—that is hidden, latent or otherwise not reasonably discoverable—damage is not "manifested." Stated differently, and drawing upon the phraseology of our Pines of La Jolla opinion, until concealed damage is outwardly observable, no damage has been "suffered by the injured party." (Pines of La Jolla, supra, 5 Cal.App.4th at p. 721, 7 Cal.Rptr.2d 53.) Absent manifestation, there is no injury and without injury, there is no occurrence within the meaning of the policy.

Hartford's position that Ohio, as a premanifestation carrier, has an indemnity obligation cannot succeed under a manifestation theory; it can only succeed under an exposure or continuous coverage theory, which, in the context of construction defect litigation, has been rejected by the courts of this state, most particularly this court.

There are sound public policy reasons supporting the manifestation rule rather than the exposure or continuous coverage rule. As one court put it:

"The manifestation trigger creates greater certainty for insurers: Once their policies expire, they need not fear liability for property damage that was festering unseen during their policy period. Consequently, insurers need not maintain reserves to cover liabilities arising from expired policies, and this benefit should be passed on to insureds through lower insurance costs. Likewise, the manifestation trigger satisfies the reasonable expectations of insureds: Even after their policies expire, they are guaranteed coverage for property damage that manifested prior to the expiration date, even if the damage progresses." (Chemstar, Inc. v. Liberty Mut. Ins. Co. (C.D.Cal.1992) 797 F.Supp. 1541, 1551, affd. (9th Cir.1994) 41 F.3d 429.)

We recognize Fireman's Fund and Pines of La Jolla did not deal with premanifestation carriers. However, we see no logical ground for distinguishing between the potential liability of premanifestation and postmanifestation carriers. The objective of certainty and finality in the determination of liability among a series of insurance carriers is equally satisfied by the exclusion of a premanifestation carrier as it is by the exemption from potential liability of postmanifestation carriers.

Hartford's reliance on toxic tort and asbestos cases, such as Garriott Crop Dusting Co. v. Superior Court (1990) 221 Cal.App.3d 783, 270 Cal.Rptr. 678, and Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal.App.4th 715, 15 Cal.Rptr.2d 815, that apply a continuous injury trigger is misplaced. In those types of cases, unlike construction defect cases, it can be established with some degree of certainty that damage to the environment or bodily injury occurs upon first exposure to the damage causing condition. As we stated in Home:

"Common sense tells us that property damage cases, even those involving continuous damage such as the one before us, differ from asbestos bodily injury cases where injury is immediate, cumulative and exacerbated by repeated exposure. We believe the rationale for apportioning liability in the asbestos cases is not a basis to deviate from settled principles of law applicable to this case." (Home, supra, 205 Cal.App.3d at p. 1395, 253 Cal.Rptr. 277.)

Also misplaced is Hartford's reliance on out-of-state authority, such as American Employer's Ins. v. Pinkard Const. (Colo.App.1990) 806 P.2d 954, which adopted an exposure trigger rather than a manifestation trigger in a construction defect case. Where "California case law exists, contrary authority from other states is usually regarded as unimportant." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 778, p. 750.) This is particularly so where that California authority is by this court. (Fireman's Fund, supra, 223 Cal.App.3d at p. 1623, fn. 1, 273 Cal.Rptr. 431.)

DISPOSITION

Affirmed.[4]

FOOTNOTES

1. See, e.g., Montrose Chemical Corp. v. Admiral Ins. Co. (1992) 30 Cal.App.4th 1474, 5 Cal.Rptr.2d 358, review granted on May 21, 1992 (S026013); Stonewall Ins. Co. v. City of Palos Verdes Estates (1992) 29 Cal.App.4th 98, 9 Cal.Rptr.2d 663, review granted on August 27, 1992 (S027319); Zurich Ins. Co. v. Transamerica Ins. Co. (1994) 29 Cal.App.4th 1240, 34 Cal.Rptr.2d 913, review granted on February 16, 1995 (S043323).

2. Golden Eagle is not a party to this appeal.

3. See Insurance Code sections 22, 250.

4. Ohio's motion for sanctions is denied.

HALLER, Associate Justice.

FROEHLICH, Acting P.J., and NARES, J., concur.