NEW YORK COURT OF APPEALS ROUNDUP:

SINGLE VS. MULTIPLE INSURANCE "OCCURRENCES," CLASS ACTIONS SEEKING TREBLE DAMAGES UNDER THE DONNELLY ACT, AND NOTICE OF PHOTO ARRAY IDENTIFICATION

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Since our last column appeared, the nomination to the Court of Appeals of the Honorable Theodore J. Jones Jr. was confirmed on February 13, 2007, and Governor Eliot L. Spitzer reappointed Chief Judge Judith S. Kaye for another term on the Court, subject to confirmation, which is expected.

This month we discuss recent decisions of the Court: determining that multiple plaintiffs' personal injury claims arising out of asbestos exposure constituted multiple "occurrences" and could not be grouped together to exceed a per-occurrence primary insurance policy limit; finding that actions to recover treble damages on antitrust claims brought under the Donnelly Act may not be maintained as class actions; and holding that the People's statutory obligation to give a defendant notice of an intention to offer identification evidence at trial does not extend to all police-arranged identifications, so that if a particular instance of identification will not be introduced during the People's case-in-chief, it need not be disclosed.

"Occurrence" Defined

The Court was called upon to define when circumstances giving rise to an insurance claim constitute a single "occurrence" vs. multiple "occurrences," in Appalachian Ins. Co. v. General Electric Co., a declaratory judgment action brought by excess insurance carriers against General Electric ("GE") and its primary insurance carrier. In an opinion by Judge Victoria A. Graffeo for a unanimous Court (Judges Susan Phillips Read and Theodore T. Jones Jr. taking no part), the Court found that the incidents of asbestos exposure underlying personal injury actions against GE were not a "single unfortunate event," but instead constituted multiple occurrences. The Court stated that its ruling would not necessarily bar the grouping of multiple plaintiffs' claims into a single occurrence in all mass tort contexts.

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GE was a defendant and/or third-party defendant in numerous personal injury actions by persons who, between 1966 and 1986, were exposed to asbestos from insulation in custom steam turbines that GE had designed, manufactured, and installed. The number of claims made against GE was large – as of 2002, over 400,000 such claims had been filed, but because GE often was only one of many defendants, its share of any individual settlement or judgment generally was small – $1,500, on average.

Throughout the relevant time period, GE's excess insurance coverage was triggered when the $5 million per-occurrence limit on the company's primary policy with EMLICO was exceeded. Notably, EMLICO was partially owned by the insured and its employees, and GE's premium payments were based largely upon the prior year's losses, similar to a self-insurance retention. Prior to 1992, EMLICO had treated each personal injury claim as a separate occurrence. When GE objected to that practice as the number of claims against it increased, however, the parties entered into a "Claims Handling Agreement," pursuant to which EMLICO treated all asbestos-related claims from turbines as a single occurrence for purposes of determining when the $5 million annual limit was reached. Not surprisingly, the excess carriers objected to this change in EMLICO's practice, and litigation ensued.

The key issue thus was whether, because the asbestos claims against GE could be traced to the company's failure to warn, the claims constituted a single occurrence, or whether the workers' injuries constituted multiple occurrences.

In Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. Am., 7 N.Y. 222 (1959), the Court had described three approaches used by courts to determine whether a set of circumstances is a single "occurrence" (or "accident," the term generally used in insurance policies at that time): the sole-proximate-cause approach; the one-accident-per-person approach; or the unfortunate-event approach. It endorsed the latter approach.

In Appalachian Insurance, the Court explained that the relevant factors for this test are, "whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors." GE focused on the common causation of the incidents, specifically its failure to warn, which it characterized as a single act of negligence. But, the Court explained, the "fulcrum of our analysis" is the incident itself, which should not be conflated with causation. Only after the incident is defined does the question of causation come into play.

Here, the Court found, each plaintiff's exposure to asbestos was a separate incident. That there were multiple incidents was not dispositive of the dispute, however, because multiple incidents can still constitute a single unfortunate event if they are part of an "undisrupted continuum" and the temporal and spatial relationships among them are sufficiently close. Ultimately, the Court held that, even if it were to accept GE's argument that all plaintiffs' exposures had a common cause, due to the differences among the incidents (including where and when they had occurred), each incident must be viewed as a separate

unfortunate event or occurrence.

The Court observed that parties are free to draft insurance contracts as they see fit, and that these sophisticated parties could have agreed to a definition of "occurrence" that would have permitted the grouping of incidents sharing the same proximate cause. The relevant insurance policies did contain a definition of the term ("an accident, event, happening or continuous or repeated exposure to conditions which unintentionally results in injury or damage during the policy period"), but the Court determined that nothing in that language evinced an intention to define "occurrence" as anything other than an "accident," or to depart from the unfortunate-event standard of Arthur A. Johnson.

Finally, the Court envisions that, even under the Arthur A. Johnson approach, there may be circumstances in which the mass tort claims of multiple plaintiffs may be grouped to satisfy a per-occurrence limit, for example in the event of the release of a hazardous substance. "Each mass tort scenario must be examined separately under the Johnson rule."

Class Actions/Treble Damages

In Sperry v. Crompton Corp., a unanimous Court, in an opinion by Judge Victoria A. Graffeo (Judge Theodore T. Jones Jr. taking no part), held, inter alia, that a class action seeking treble damages under the Donnelly Act (Gen. Bus. L. §§ 340, et seq.) did not lie because the claim sought to enforce a penalty, and that Act does not authorize class actions for penalties. The case, which affirmed the order of the Appellate Division, Second Department, attracted significant interest, including that of then-Attorney General Eliot L. Spitzer, who sought reversal based upon the remedial nature of the Donnelly Act's treble damages provision, the fact that any recovery would be based upon actual damages suffered by a wronged plaintiff and not upon a statutorily fixed penalty, and consistency with federal antitrust law.

Crompton and its co-defendants produced and sold rubber-processing chemicals that improved rubber products. Sperry brought a purported class action under CPLR 901, alleging that the defendants had engaged in a price-fixing conspiracy, and overcharged users of their products resulting in increased costs to consumers, such as plaintiff, as indirect purchasers. Sperry sought to allege, in addition to his antitrust claim under the Donnelly Act, a cause of action for unjust enrichment.[1] Although the Court agreed that privity between Sperry and the defendants was not required for an unjust enrichment claim, it nonetheless dismissed the claim as "too attenuated." That claim also appears to have been seen by the Court as a pleading tactic to avoid the shortcomings of the Donnelly Act cause of action at the heart of the case.

The Court proceeded to make a comprehensive analysis of the legislative history of CPLR Article 9, which created the statutory scheme for class actions in New York as we see it today, the legislative changes in the Donnelly Act to provide for treble damages, the jurisprudence in New York to define what is a "penalty" and, finally, the inapplicability of teaching found in federal antitrust law as to whether treble damages are remedial in nature, or a

constitute penalty.

What appears to be pivotal to the Court's ultimate resolution of the matter is the legislative history of the limitation found in CPLR 901(b), which precludes a class action based upon a statute imposing a "penalty" or minimum recovery, unless the statute specifically permits such a class action. As the opinion points out, Article 9 became law on June 17, 1975. Only 14 days later, the Donnelly Act was amended to provide for recovery of treble damages, as well as costs and attorneys' fees. Prior to this amendment, the Act had provided only for the recovery of actual damages. Critical to the Court's analysis was that the Donnelly Act amendment did not authorize antitrust cases seeking treble damages to be maintained as class actions.

While the Court acknowledged that the term "penalty" is ambiguous and requires consideration of the context in which it is used, it concluded that the treble damages recovery permitted by the Donnelly Act, at least as it relates to class actions, is a penalty. It declined to follow federal antitrust precedent characterizing treble damages as remedial, on the ground that the case presented a State law issue. (Because plaintiff had not previously attempted to waive treble damages, the Court did not reach the question of whether such a waiver would permit an action under Donnelly Act seeking actual damages to be maintained only as a class action.)

Again, the Court was persuaded by the chronology of the relevant legislative enactments. It made the plausible assumption that the Legislature was aware of the requirements of CPLR 901(b) when it amended the Donnelly Act to allow treble damages without including authorization to pursue such damages in class actions. The Court deferred to the Legislature to consider the matter again, should it choose to do so. It is fair to assume that Eliot Spitzer, as Governor, will seek such consideration.

Notice of Photo ID

In People v. Joseph Grajales, the Court interpreted CPL 710.30, which governs pre-trial notice to a defendant of the prosecution's intention to offer eyewitness identification evidence, and mandates preclusion of such evidence if timely notice is not provided. In a 4-2 decision (Judge Theodore T. Jones Jr. taking no part), the Court held that the statute did not require notice of a photo-array identification of the defendant by a witness who testified at trial about a subsequent out-of-court identification and made an in-court identification, because the prosecution had not intend to offer evidence of the photo-array identification during its case-in-chief.

The victim in Grajales had been robbed by two men. Later that day, the police showed him two photo arrays, one of which included the defendant, whom the victim identified. One week later, the victim saw the defendant on the street, called the police, and pointed out the defendant when the officers arrived. The People served notice of their intention to introduce at trial the on-the-street point-out of the defendant, but failed to mention the photo arrays shown to the victim. Defense counsel nevertheless learned of the photo identification,

and moved to suppress any out-of-court or in-court identification testimony, on the basis that the People had not complied with the notice requirements of CPL 710.30. The motion was denied.

The Court affirmed the conviction in a memorandum decision. It both noted that the People had acknowledged that the "customary and better practice" is to provide the defendant with notice of all police-arranged identifications by a witness from whom they intend to elicit an in-court identification, and agreed with the dissent that there are "sound policy reasons" to support notice of all photo arrays. It held, however, that the statutory requirement to specify pretrial identification evidence "intended to be offered at trial" does not extend to pretrial photographic identifications, because such evidence is inadmissible during the People's case-in-chief and thus the People cannot "intend" to offer it. The Court was unwilling to read CPL 710.30 more expansively than written, particularly because the statutory remedy is preclusion of relevant evidence.

Judge Carmen Beauchamp Ciparick authored a dissent, in which Chief Judge Judith S. Kaye joined. The dissent placed emphasis on the purpose of the statute, which is to avoid miscarriages of justice as a result of potentially suggestive identification procedures. Judge Ciparick characterized the import of the majority opinion – that any identification procedure need not be disclosed as long as the People do not intend to introduce it at trial – as a "stunning result," at odds with the "common understanding" of the People's obligations, and contrary to the "spirit and purpose" of CPL 710.30. The dissent asserted that the Court should not place too much emphasis on the literal language of a statute when to do so would render a result contrary to the policy of the legislation.

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[1] Sperry had also alleged a violation of General Business Law § 349, which prohibits deceptive practices, but abandoned that claim on appeal.