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C A S E A L E R T

APPELLATE DIVISION APPLIES “CONTINUOUS TRIGGER” THEORY TO THIRD PARTY CONSTRUCTION CLAIMS

Yesterday the New Jersey Appellate Division ruled in [Air Master & Cooling, Inc. v. Selective Insurance Company of America, et al.](#) that (1) the continuous trigger theory of insurance coverage may be applied to third-party liability claims involving progressive damage to property caused by an insured’s allegedly defective construction work; and (2) the “last pull” of that trigger occurs when the essential nature and scope of the property damage first becomes known or should have been known. The Appellate Division soundly rejected the policyholder’s effort to expand the continuous trigger across all coverage periods prior to receipt of expert opinion or other proof that attributes blame to the insured.

Air Master was hired as a subcontractor to perform HVAC work in a mostly-residential condominium building. Between November 2005 and April 2008, Air Master installed condenser units on the roof and HVAC devices within individual units. Commencing in early 2008, some unit owners began noticing water infiltration and damage in their windows, ceilings, and other areas of their units. Following investigations and remedial measures taken by the general contractor, on April 29, 2010, an expert consultant performed a moisture survey

of the roof for water damage. The May 3, 2010 report identified water damage on the roof and recommended that the damaged areas be removed and replaced. The report noted that it was impossible to determine when the moisture infiltration occurred. The report also raised a potential link between the roof infiltration and the individual units’ water issues on the floors below.

Two unit owners and the condominium association sued the project developer and other defendants for property damage and the cost of remediation. The defendants impleaded Air Master and other subcontractors. In the declaratory action, Air Master sought a defense and indemnity from the various insurers that covered it under a succession of CGL policies. Selective and Harleysville disclaimed coverage because the property damage had already manifested before their respective policy periods began. Penn National, which insured Air Master during the time it performed work on the property, assumed the defense of the third-party complaints subject to a reservation of rights. Harleysville, which issued a policy period commencing long after accrual of the cause of action in June 2012, obtained summary judgment and Air Master did not appeal.

Selective argued that the water damage had manifested before the beginning of its coverage period in June of 2009. The trial court agreed with Selective and granted summary judgment. On appeal, the Appellate Division recognized that no reported decisions in the State specifically address the appropriate manner for identifying the date of manifestation of property damage that progressively advances within a multi-unit building for purposes of third-party liability claims under a CGL policy. Importing approaches enunciated in the environmental law context – most notably [Quincy v. Borough of Bellmawr](#), which was litigated before the Supreme Court by Ric Gallin of M&W, the panel concluded that water infiltration was a progressive injury warranting use of the continuous-trigger approach. With the continuous trigger approach all insurers over the exposure period through the manifestation period would be liable.

However, the manifestation period would end upon the revelation of the “inherent scope and nature” of the injury. It would not extend to a later date on which further evidence demonstrates the possible negligence of the insured.

This case will have widespread impact for insurers which could be held liable for occurrences outside the insured’s policy period. However, as in the environmental context, the involvement of several insurers to address a quantifiable damage claim could make early settlement more attainable, so long as carriers promptly explore the availability of additional coverage in prior and/or subsequent years on the risk.

Feel free to contact partners [Gina Stanziale](#), [Marc Dembling](#) or [Ric Gallin](#) with any questions about this important decision and its impact on your claims.

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