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Appellate Division Further Refines 'Continuous Trigger' in Progressive Injury Claims

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In the seminal case of *Owens-Illinois v. United Ins. Co.,* 138 N.J. 437 (1994), the Supreme Court of New Jersey adopted the continuous trigger theory for determining insurance coverage in cases involving progressive environmental injury. Generally speaking, this theory triggers all insurance policies on the risk from the time of "exposure" until an injury becomes "manifest." Since the issuance of *Owens-Illinois* in 1994, lower courts have grappled with when and how to apply the "continuous trigger" approach. Last month the Appellate Division, in *Air Master & Cooling v. Selective Insurance Company of America,* 2017 WL 4507547 (October 10, 2017), applied the continuous trigger formula to questions of liability coverage in a third-party construction defect case, further defining when the trigger ends.

In the 1970s and 1980s courts were called upon to address novel insurance questions arising out of a time lapse between when a party was exposed to an injury-producing situation and when that person felt the effects of the exposure. This was driven, in part, by product liability cases over the administration to pregnant women of the drug diethylstilbestrol (DES), as well as the emergence of asbestos litigation.

Traditionally it was easy to pinpoint when an accident caused an injury; when two cars collided or a person slipped and fell, the "occurrence" under the liability policy was the event of injury. This traditional analysis did not work with DES, whose adverse effects surfaced in women whose mothers who had ingested the drug many years earlier. *See Hadden v. Eli Lilly and Co.,* 208 N.J. Super. 716 (App. Div. 1986).

Similarly, with asbestos, workers became sick years, and sometimes decades, after they were exposed. In order to address these issues, courts were required to come up with new theories to determine which insurance policies had to respond to the claims.

Courts first addressing this issue started working with two different theories. The first was the "exposure" theory, which placed coverage on the insurance carrier insuring the defendant when the plaintiff was exposed to the substance. The second was the "mani-

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festation" theory, which placed coverage on the insurer when the plaintiff manifested disease. Ultimately, these were combined into the "continuous trigger" theory.

In *Owens-Illinois*, the New Jersey Supreme Court adopted its version of the continuous trigger theory. *Owens-Illinois* was an asbestos case. The court held that all policies from exposure until manifestation would be deemed "triggered." An allocation formula was created where an insurance company's share of the claim would be based on "risk assumed." This was a function of both time on the risk as well as policy limits. The result is that an insurance carrier's allocated share is based on the percentage its total applicable insurance coverage bears to all the triggered coverage. The court specifically noted that it did not expect its decision to be the last word on the continuous trigger. *See Owens-Illinois*, 138 N.J. at 478.

Since *Owens-Illinois*, there have been several decisions which have refined how the continuous trigger should be applied in New Jersey. In *Carter-Wallace v. Admiral Ins. Co*., 154 N.J. 312 (1998), the court applied the formula to environmental contamination cases and addressed the impact of excess coverage. In *Quincy Mutual Fire Insurance Company v. Borough of Bellmawr*, 172 N.J. 409 (2002), the court addressed the first pull of the trigger and held that "time on the risk" would be equated with "days on the risk," as opposed to "years on the risk."

In *Quincy Mutual* a dispute arose between two insurers for the Borough of Bellmawr based on the borough's involvement at the infamous Helen Kramer Landfill. During the period in question, Century Indemnity Company provided coverage until June 18, 1978, when coverage was switched to Quincy Mutual Fire Insurance Company. The borough began dumping waste at the landfill in May of 1978, and the waste eventually reached groundwater. The lower courts ruled that exposure did not incur until the waste leached into the groundwater. This would have been after Century's policy ended.

The Supreme Court agreed with Quincy Mutual that the "exposure" began when the waste was initially dumped into the landfill. 172 N.J. at 434. The court adopted a bright-line test considering the extreme difficulty in determining when the precise contamination began. Since the "first pull" occurred when the borough first began dumping at the landfill, the Century policy was implicated.

While *Quincy Mutual* helpfully defined the first pull of the trigger, there has been less clarity when it comes to the last pull of the trigger. The Appellate Division in *Polarome Int'l. v. Greenwich Ins. Co.,* 404 N.J. Super. 241 (App. Div. 2008), addressed the issue in a personal injury context. The issue was whether plaintiffs became sick before the defendant's insurance policy incepted. Claimants had been exposed to toxic chemicals at work. They became sick years later. The court ruled that the trigger period ended when the claimant's illness became manifest. Manifestation occurred not merely when they started showing symptoms, but when a biopsy culminated in a diagnosis.

The Appellate Division revisited the "last pull of the trigger" recently in *Air Master & Cooling v. Selective Insurance Company of America*, 20176 WL 4507547 (Oct. 10, 2017). The case involved water infiltration in a recently constructed seven-story residential building. Residents of upper floors noticed water entering their apartments. They filed suit against the general contractor, who in turn third-partied various subcontractors, including Air Master & Cooling. Air Master had been a subcontractor in the building between November 2005 and April 2008.

Discovery revealed that unit owners began to notice the water infiltration in 2008. In 2010, a consultant performed a moisture survey which confirmed water infiltration.

Selective was one of a series of insurers which had issued Commercial General Liability policies to Air Master & Cooling over successive policy periods. Selective argued that the property damage had already become manifest before its policy incepted. Air Master responded that under a continuous-trigger theory the last pull of the trigger occurred in May 2010, when the consultant issued the roof moisture report. It was at that point that Air Master's work became identified as a potential cause of the problems.

As a preliminary matter, the Appellate Division held that continuous-trigger principles would apply to third-party liability claims in construction defect cases that involve progressive property damage. This is distinguishable from first-party property damage claims. The Appellate Division had previously held that the continuous trigger does not apply to a first-party claim. Rather, a first-party claim would involve a manifestation theory and only one first-party policy would be triggered. *Winding Hills Condominium Association v. North American Specialty Insurance Co*., 332 N.J. Super. 85 (App. Div. 2000).

As to third-party claims like those at issue in *Air Master*, the court noted that "property damage within a building can be latent and undetected, behind walls and above ceiling tiles, and can gradually worsen and advance over time. The progressively worsening nature of a variety of construction defects, such as water infiltration or mold, logically support the application of the continuous-trigger doctrine." *See Air Master & Cooling*, 20176 WL 4507547, at *6.

The court rejected Air Master's argument that manifestation should be determined on a defendant-by-defendant basis depending on the date that evidence arose potentially implicating that defendant. The court felt that such an approach would be unwieldy by inviting multiple manifestation dates depending on the contractor involved.

To reach a universal definition of the "last pull of the trigger" the court cited the holding in *Winding Hills*, notwithstanding the inapplicability of the continuous trigger to that first-party dispute.

In *Winding Hills,* tenants of a multi-unit condominium experienced the effects of construction defects over time. In November 1989, the condominium association retained a consultant to evaluate the structures. During that inspection, the consultant discovered structural deficiencies within two of the buildings, which it reported to the association. The report was produced in January 1991, delineating how the deficiencies in the project's on-site drainage system had led to structural failures in the building's foundation. The court held that the date of manifestation for insurance coverage purposes was January 1991, when the expert report was issued.

In *Air Master* the court grappled with the question of whether manifestation occurred when the residents started noticing the water infiltration in 2008, as Selective asserted, or in 2010 when the consultant's report was issued. It was not until the consultant's report that Air Master's work on the roof became implicated.

The Appellate Division reversed the trial court decision in favor of Selective, but also held that it did not have sufficient facts to make a definitive ruling. The matter was remanded for additional fact finding. The court noted that there may have been multiple reasons for the water to have entered the apartments, and that complaints by tenants in 2008 were not definitive in establishing when manifestation actually occurred. In this regard, *Polarome* can be instructive because the mere report of symptoms may not be sufficient to establish diagnosis. Manifestation can be equated with diagnosis, and not merely a report of symptoms. Thus, like in *Winding Hills*, the consultant report actually diagnosing the "disease" could be determinative, but the Appellate Division in *Air Master* could not make that ruling as a matter of law.

The decision in *Air Master* represents another important step forward in New Jersey courts' allocation of risk among successive insurance policies where injury occurs over an extended period of time between a policyholder's first act or omission and the manifestation of injury.■