

WHO PULLED THE TRIGGER?

**APPLYING MANIFESTATION OR INJURY-IN-FACT
TRIGGERS TO FIRST-PARTY PROPERTY CLAIMS**

ABA Insurance Coverage Litigation Committee CLE Seminar

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Trigger – mechanism for determining when a policy is activated and which policies are activated.

Typically used where progressive, continuous injury or damage over several policy periods.

- Typical Fact Pattern: Property damage and realization of such damage occur simultaneously.

Wind storm; damage to structure apparent right away.

- Coverage analyzed under policy that's in effect when property damage occurs.
- **But** which policy covers progressive property damage occurring for a number of years, but is undiscovered?

Sentinel – continuous, undiscovered water damage over several policy periods for policies issued by different carriers.

- - 1) The policy in effect at the time the damage began?
 - 2) The policy in effect at the time the damage manifested itself?
 - 3) Or, should damages be allocated among all policies in effect while continuous damage was occurring during several policy periods?
- Compare: CGL Coverage for Progressive Injury – Courts have developed several triggers to determine which policy(s) may be required to respond:
 - Exposure Theory – where exposure to latent defect causes immediate damage (although not immediately detectable), coverage is triggered each time property is exposed to damage during the policy period. *TBG, Inc. v. Commercial Union Ins. Co.*, 806 F. Supp. 1444, 1452 (N.D. Cal. 1990).
 - Manifestation Theory – property damage occurs when latent defect manifests itself. Insurer on the risk at the time of first manifestation is solely responsible for the entire loss (assuming coverage otherwise exists), even if property damage continues after policy expires. *Prudential-LMI Commercial Ins. v. Superior Ct.*, 51 Cal.3d 674 (1990).

Theory developed in asbestos cases.

- Injury-in-Fact Theory – coverage triggered by occurrence of injury-in-fact during the policy period. Injury occurs whether detectable or not; in other words, an injury need not manifest itself during the policy period if its existence during the policy period can be proven in retrospect. *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119 (D.C. Cir. 1986).
- Injury-in-fact trigger diverges from manifestation and exposure theories when the injury in fact is not simultaneous with manifestation or exposure.
- Continuous Injury Theory – progressive property damage deemed to have occurred continuously throughout the trigger period. Every insurer on the risk at any time during the trigger period is jointly and severally liable up to policy limits (assuming coverage otherwise exists). *TBG, Inc.*, 806 F.Supp. at 1452.
 - Property Coverage for Progressive Injury – courts have used either manifestation or injury-in-fact triggers for continuous property damage.
 - Property Cases Adopting Manifestation Trigger.
 - *Home Ins. Co. v. Landmark Ins. Co.*, 205 Cal.App.3d 1388 (1988).
 - Hotel construction completed 2/73.
 - Beginning 12/80, exterior concrete and balconies start to spall (crack and chip). Spalling continues, becoming progressively worse until 12/83, when repairs are completed.
 - Hotel insured by Home Insurance from 9/1/80 to 10/1/81; thereafter, insured by Landmark Insurance.
 - Court holds the insurer on the risk when manifestation of property damage first occurs must pay the entire claim.
 - Manifestation trigger consistent with “loss in progress rule”:
 - No coverage where property damage occurs before the policy period.
 - Manifestation trigger also promotes certainty and allows insurers to gauge premiums with greater accuracy.
 - *Prudential-LMI*, 51 Cal.3d 674 (1990).
 - Insureds built apartment house in 1970-1971; four successive insurers from 1971 to 1986.

- Prudential's policy period was 10/27/77 to 10/27/80.
- 11/85, homeowners discovered extensive cracks in the foundation and floor slab. Insured notified Prudential and other insurers 12/85.
- Prudential denied coverage because when carpet installed (two years before Prudential's coverage ended), no crack observed.
- Court follows *Home v. Landmark* – when loss occurs over successive policy periods and is not discovered for several years, manifestation rule applies.
- Prior to the manifestation of damage, the loss is still a contingency and the insured has not suffered a compensable loss.
- *Jackson v. State Farm Fire and Cas. Co.*, 835 P.2d 786 (Nev. 1992)
- 1977 – Insureds purchased home and homeowner's policy from State Farm, which renewed for ten years.
 - 1987 – Insureds hired structural engineer who found structural damage to home.
 - State Farm denied coverage based on negligent construction exclusion in last policy issued before damage was discovered.
- Insureds sued, claiming home suffered progressive property damage due to negligent construction.
- Insureds argued that first State Farm policy, which did not exclude loss based on negligent construction, applies.
- Follows *Prudential-LMI* and adopts manifestation rule.
- Cases Adopting Injury-in-Fact Trigger.
- *Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28 (N.D. 1995).
 - 1985 - insured built grain storage bin.
 - Storage bin damaged after first use in 1988. Thereafter, each time grain loaded or unloaded, damage magnified.

- Damage not discovered until 1992, however, after policy period.
- Series of policies issued from 7/84 to 8/91 agreed to “cover loss or damage ... commencing during policy period.”

Is there coverage for damage that occurred in 1988, but not discovered until 1992, after policy period has expired?

- Insurer relied on *Prudential-LMI Ins.* and manifestation trigger.
 - But, North Dakota Court holds must examine language of policy and nature of loss or damage to determine appropriate trigger.
 - Policy language did not require property damage be known to someone to trigger coverage.
 - Therefore, a real but undiscovered loss or damage which commenced during policy period triggered coverage, irrespective of when loss or damage became manifest.
- *Ellis Court Apts. Ltd. P'ship v. State Farm Fire & Cas. Co.*, 72 P.3d 1086 (Wash. App. 2003).
 - Water damage occurred in condominium sometime after 1993, but not discovered until May 2000.
 - State Farm policies covered from 1993 to September 1999. Coverage denied because date of loss was when insured became aware of loss was after the policy period.
 - State Farm policies covered “loss commencing during policy period.”
 - “Commence” referred to when damage first began, not to when it was discovered.

So injury-in-fact trigger adopted.

- *Seamann v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 47039 (W.D. Wash. June 28, 2007).
 - State Farm insured apartment building from 1998 to 2001.

- During policy period, apartment building suffered physical damage from rot and decay, but undiscovered until 2004.
- Here, policy covered “accidental direct physical loss to buildings at the premises.”
- Therefore, loss accrues to policyholder as soon as physical damage occurs.

Federal District Court follows *Ellis Court*.

- *KAAPA Ethanol, L.L.C. v. Affiliated FM Ins.*, 2008 U.S. Dist. LEXIS 61515 (D. Neb. July 29, 2008), *recommended decision adopted in part*, 2008 U.S. Dist. LEXIS 88089 (D. Neb. Oct. 30, 2008).
- Coverage denied for continuous damage to storage tank due to settling which discovered after policy period.
- Policy did not define “occurrence,” but required legal action be commenced within two years after “direct physical damage first occurred.”
 - Language implied “occurrence” happens upon commencement of physical damage, not its manifestation.
- Further, property damage progressing over time occurs when damage commenced, not merely when it was discovered.
- Court predicts Nebraska would follow *Ellis Court* and *Kief*, and adopt injury-in-fact trigger for first party property cases.