“First Look” is committed to providing you with timely, relevant insurance-related information through in-depth analysis of current issues and summaries of recent court decisions.

In this edition, we will be taking an in-depth look at coverage trigger theories and policy allocation in six states. There is also a chart summarizing the relevant law of those jurisdictions.

We hope you find this issue of First Look entertaining and informative and we welcome your thoughts on suggested topics.

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Coverage Trigger Theories in Kentucky - “Circus”

By: Jeffrey K. Phillips

Many Comprehensive General Liability (CGL) insurance policies are “occurrence policies” which provide coverage for losses resulting from an occurrence during the policy period. Occasionally, an incident causing the loss is a one-time event and it is clear whether or not the event occurred while the policy was in effect. However, many cases involve issues such as environmental contamination or latent diseases, in which the harm takes place over a period of time, but the actual damage does not manifest until later. In situations where harm occurs over time, the court must determine what specific event triggers an insurance policy’s coverage.

The Sixth Circuit explained there are four common “trigger theories” that a court may use to simplify this analysis:

1. a traditional “manifestation” trigger, applying those policies in effect at the time the injury manifested;
2. an “exposure” trigger, applying those policies in effect at the time of the exposure to the offending product;
3. a “continuing injury” trigger, applying those policies in effect at any time from exposure through manifestation; and
4. an “injury-in-fact” trigger, in which the applicable policies were those in effect at any time actual injury occurred.


In Stillwell, the plaintiffs sued the defendant for negligently re-roofing their home. Id. at 202. The defendant had a CGL policy in effect from February 23, 1987, to August 10, 1987. Id. at 203. During that time, the plaintiffs hired the defendant to re-roof their home, and the defendant performed this project from March 24, 1987, until the end of May 1987. Id. at 204. After the defendant completed the project, his CGL policy terminated on August 10, 1987. Id. at 203. However, it was not until two months after the policy had expired, in October 1987, that the plaintiffs turned on their furnace for the first time since the re-roofing and incurred damages from the defendant’s work. Id. at 204.

The Southern District of Indiana applied Kentucky law to determine whether the insurer’s obligations under the CGL policy were triggered. Id. at 206. The policy stated:

We will pay those sums that the insured becomes legally obliged to pay as damages because of “bodily injury” or “property damage” to which this insurance applies.…. This insurance applies only to “bodily injury” and “property damage” which occurs during the policy period. The “bodily injury” or “property damage” must be caused by an “occurrence.”

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Id. at 203-04 (emphasis in original). The court explained that, based on the terms of the policy and the dates that it was in effect, the insurer was only obligated to defend and indemnify the defendant against suits for damages from accidents that occurred between February 23, 1987, and August 10, 1987. Id. at 202-03. Furthermore, it was undisputed that the CGL policy only covered occurrences that transpired within the policy period. Id. at 205. Therefore, the court had to determine whether the term occurrence in the policy referred to “the time the wrongful act was committed, or to the time the injury was actually sustained.” Id.

The court looked at decisions from other jurisdictions and noted that all but one jurisdiction that had confronted this issue held the “time an accident ‘occurs’ is the time when the complaining party is actually injured, not the time when the wrongful act was committed.” Id. The court determined that Kentucky courts would likely follow the majority approach and adopt this rule. Id. at 205-06. The court held that since the CGL policy “only covers ‘occurrences’ that occur within the policy period, and the plaintiffs did not sustain injury within that period,” the insurer’s liability was not triggered. Id. at 205.

Several years later, the Sixth Circuit applied Kentucky law and followed the same approach as the Stillwell court. Monticello Ins. Co. v. Ky. River Cmty. Care, Inc., 173 F.3d 855, *4 (6th Cir. 1999). In Monticello, the plaintiff claimed the defendant was negligent in hiring and overseeing one of its employees who allegedly molested the plaintiff. Id. at *1. The Sixth Circuit noted the Eastern District of Kentucky “found the term ‘occurrence’ in the policy, which triggers coverage, means the time when the claimant is injured.” Id. at *4. The Sixth Circuit agreed with the district court’s holdings that, under the defendant’s CGL policy, an occurrence triggered the policy’s coverage, and the timing of an occurrence is when the claimant suffers injury. Id.

In Monticello, the defendant argued that all of its alleged negligent acts, spanning from April 1988, to December 1990, should trigger its insurer’s obligations under a CGL policy that was in effect from June 1987, to June 1988. Id. at *1-4. However, the Sixth Circuit disagreed and affirmed the district court’s holding that the time of the occurrence of the accident was when the plaintiff was actually damaged, and, in this case, actual damage did not occur until June 1990, long after the CGL policy had expired. Id. at *1-4.

In a factually similar case, the Kentucky Supreme Court agreed with the federal courts’ analysis in Stillwell and Monticello. Asbury Coll v. Ohio Cas. Ins. Co., No. 2004-CA-001044, 2005 WL 1252331, at *2 (Ky. Ct. App. May 27, 2005). In Asbury, the Kentucky Supreme Court acknowledged that Kentucky courts had not specifically addressed the issue of whether the “occurrence” trigger was the time the claimant was injured, or “the time when the negligence leading up to the injury occurred.” Id. at *2. The Court followed the rule in Stillwell and held “the time of the occurrence of an accident is when the complaining party was actually damaged or injured and not the time when the wrongful act was committed.” Id. The court explained that this rule was consistent with the theory that negligence is not committed “unless and until some damage is done.” Id. (citing Stillwell, 736 F.Supp. at 205).

Although Kentucky courts have not expressly adopted a standard theory to determine when a CGL policy applies, the foregoing cases indicate that some form of actual property damage or bodily injury must occur while a policy is in effect or else the policy is not triggered. Therefore, Kentucky courts are not likely to follow either an “exposure” or “continuing injury” trigger theory, which hold that mere exposure to an offending product triggers insurance coverage. When courts have applied Kentucky law on this issue, they have used an analysis similar to the “manifestation” and “injury-in-fact” theories, and held the plaintiff must incur actual injury while the policy is in effect.

1 Thanks to Candace B. Smith for assisting in the research and drafting of this article.
Coverage Trigger Theories in Ohio - “You Drive Me Crazy”
By: Lyle B. Brown

There are several coverage trigger theories:

To begin, there are several theories for determining when coverage under an occurrence-based liability insurance policy is “triggered.” If coverage is triggered when property damage becomes known to the owner, the trigger-theory of coverage is often referred to as the “manifestation trigger.” If coverage is triggered when the damage first occurs, the trigger is known as the “injury-in-fact” trigger. The “exposure trigger” theory is used if coverage is triggered when the first injury-causing conditions occur. If the coverage of multiple policies in effect over a period of time is triggered, the term “continuous trigger” or “continuous injury trigger”, or “tripple trigger theory” is often used.


The Supreme Court of Ohio has adopted an “all sums” approach to allocating losses in long-term environmental exposure cases. “Allocation deals with the apportionment of a covered loss across multiple triggered insurance policies.” Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512, 514-15, 2002-Ohio-2842, at ¶5. The Goodyear Court held that “[w]hen a continuous occurrence of environmental pollution triggers claims under multiple primary insurance policies, the insured is entitled to secure coverage from a single policy of its choice that covers ‘all sums’ incurred as damages ‘during the policy period,’ subject to that policy’s limit of coverage.” Id., at ¶1 of syllabus; see id., at ¶11. In choosing the “all sums” approach as opposed to a pro rata allocation, the Court noted that the applicable insurance policies expressly required the insurers to pay “all sums” which the insured would be legally obligated to pay as damages for property damage occurring during the policy period. Id., at ¶7. The policies did not contain language limiting the insurer’s exposure; rather, “[t]he plain language is inclusive of all damages resulting from a qualifying occurrence.” Id., at ¶9. However, failure to comply with a policy’s notice provisions (a condition precedent) may relieve an insurer from agreeing to cover a claim. Id., at ¶14. The “all sums” approach allows the insured to make a claim against one of its triggered primary policies, and if that chosen policy is thereafter exhausted, the insured may look to other primary or excess policies to cover the remainder of the claim. Id., at ¶12. The Court further stated that “the insurers bear the burden of obtaining contribution from other applicable primary insurance policies as they deem necessary.” Id., at ¶11.

The Court subsequently reaffirmed its “all sums” approach and clarified the obligations of both insured and insurer in the contribution process. First, “[w]hen loss or damage occurs over time and involves multiple insurance-policy periods and multiple insurers, a claim may be made by the targeted insurer against a nontargeted insurer with applicable insurance policies for contribution.” Pennsylvania Gen. Ins. Co. v. Park-Ohio Indus. (2010), 126 Ohio St.3d 98, 2010-Ohio-2745, at ¶1 of syllabus. Second, the insured has a duty to cooperate with the targeted insurer to identify claims made by that insurer and present those claims to the nontargeted insurer. Id., at ¶2 of syllabus. Third, “[l]ack of notification to a nontargeted insurer will bar the targeted insurer’s claim for contribution against that nontargeted insurer only if the failure to notify resulted in prejudice to the nontargeted insurer.” Id., at ¶3 of the syllabus.

Additional guidance from the Supreme Court of Ohio is needed to clarify the role of the manifestation trigger in relation to other types of triggers for coverage. See, e.g., Plum, 2006-Ohio-452, at ¶17 (“The Ohio Supreme Court has not ruled on the issue of whether Ohio courts should always follow the manifestation trigger, and the law is far from clear.”).

Coverage Trigger Theories in Maryland - “Oops...I Did It Again”
By: Bridget M. Cohee

In Maryland, the trigger question may be factually straight forward, as when a car accident causes a broken hip, however, there are times when the question may be more difficult to answer. Courts have given guidance by developing trigger theories to resolve the more difficult situations when the cause of the injury cannot be pinpointed to a specific event.

Maryland combines an injury-in-fact and continuous trigger theory, and also incorporates a discovery or manifestation of injury theory to extend coverage, but not to limit coverage. These theories are not mutually exclusive; rather, they are interpreted by the Court to be complimentary to one another. The injury-in-fact is the initial triggering event, even where the damage is continuing in nature. Thus, the trigger is when the harm occurred, or when the harm is manifested or discovered, and thereafter if the damage resulting from the exposure is continuing in nature. It is possible in Maryland that multiple policies for a number of policy periods may be triggered, using Maryland’s hybrid approach, particularly in environmental exposure cases.

Thus, when the initial injury is knowable, the trigger is the date of the injury-in-fact. However, when there is an injury that is continuing in nature, such as in a case in which there is an environmental contamination, exposure to a hazard, leakage from a landfill contaminating groundwater, or lead-based poisoning injuries, continuing for several years with continuous exposure, the Maryland courts have determined that the injury-in-fact and continuous injury theory trigger insurance coverage for all applicable policy periods. Where there is proof of repeated exposure and injuries, the continuous trigger theory trumps the manifestation trigger. See generally, Maryland Casualty Company v. Phillip Hanson et al, 169 Md. App. 484 (2006).

The Fourth Circuit weighed in on the issue adding to the general rule that an injury-in-fact was the initial triggering event for insurance coverage, essentially a discovery rule, triggering coverage when the injuries manifest themselves or are discovered. Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986).
This rule allows coverage when the situation is such that the existence of or the scope of the damage is concealed or uncertain for a period of time, such as leakage of hazardous waste or a latent disease case. The manifestation theory was rejected by the Maryland Court as a basis for limiting coverage in asbestos litigation. The Court instead adopted the analysis combining the injury-in-fact or continuous trigger to allow coverage under successive policies. Stacking of policies is not precluded in Maryland in continuous exposure and injury cases. A pro rata allocation determined by “time on the risk” is employed where there are multiple insurers responsible for long-term damages of a continuing nature. See Maryland Casualty, supra.

Thus, the manifestation or discovery of the injury is not the sole trigger of coverage, and coverage may be triggered earlier than the discovery or manifestation of damage. The injury-in-fact/continuous trigger is applied for long-term and continuing damage, thus, the manifestation theory will not be interpreted to narrow coverage to a policy period if the case involves damages claimed for continuing exposure. In Maryland, the courts will not limit the trigger of coverage to the manifestation or discovery of the damage. The three trigger theories will be used together to extend coverage.

**Coverage Trigger Theories in Pennsylvania - “Anticipating”**

By: Tracey B. Eberling

Litigation over the coverage trigger issue exploded in the 1980’s and 1990’s with the deluge of asbestosis and silicosis claims. In Pennsylvania, the issue finally made its way to its Supreme Court in *J.H. France Refractories Co. v. Allstate Insurance Co.*, et al, 534 Pa. 29, 626 A.2d 502 (1993). In that case, the court broadly interpreted the term “bodily injury” as used in the insuring agreement of commercial general liability policies to extend coverage under all of the possible triggers – exposure, continuing exposure (or “exposure in residence”) and manifestation. The *J.H. France* case involved a dispute over which of the six carriers that insured the manufacturer of asbestos-containing products over a seventeen year period would be responsible for providing a defense and indemnification for the personal injury claims arising out of exposure to the company’s products. The Pennsylvania Supreme Court reviewed in detail expert testimony that explained the disease process from initial exposure through the development of asbestosis and silicosis. The court then considered other jurisdictions’ varying interpretations of the term “bodily injury” as used in the insuring agreement. Ultimately, it agreed with the lower court’s conclusion that in addition to exposure, “bodily injury” “also encompasses the progression of the disease throughout and after the period of exposure until, ultimately, the manifestation of recognizable incapacitation ...” *Id.* at 10, 626 A.2d at 506.

The *J.H. France* court took a similarly sweeping approach in its ruling on the allocation of coverage, finding that each of the carriers was “a primary insurer.” The pro rata allocation approach taken by the lower court was rejected as a “legal fiction,” while the suggestion of allocation on a temporal basis was held to be unsupported by medical evidence. The insured, therefore, was held to be entitled to choose the policy or policies under which it would be indemnified. When that policy's limits are exhausted, insured can choose the next one. Per the court: “[a]ny policy in effect during the period of exposure through manifestation must indemnify the insured until its coverage is exhausted.” *Id.* at 19, 626 A.2d at 509.

The multiple trigger theory was also employed in *Babcock & Wilson Co. v. American Nuclear Insurers*, 51 Pa. D&C, 4th 353 (2001), aff’d, 823 A.2d 1020 (2002), a declaratory judgment case considering the amount of coverage owed for claims arising from cancer-causing exposure to radiation. In that case, a single insurer insured two nuclear fuel processing facilities over a twenty-one year period and the coverage limits increasing over the years from $3,000,000 to $160,000,000. The limits were not cumulative and the policies did not have a term. The insured argued that “manifestation” was a triggering event (the theory that would provide coverage during the period disease was diagnosed) while the carrier asserted that the exposure that actually caused the disease was the critical triggering event and urged its position that the multiple trigger theory only applied when liability has to be allocated among different insurers under single year policies. Like the court in *J.H. France*, expert testimony as to the disease process was analyzed in detail: the insurer’s expert opined that radiation exposure does not always result in cancer and that the latency period can exceed 25 years. The *Babcock & Wilson* court rejected the carrier’s argument that its policy was a “causation” and not an occurrence-based policy as the policy language was nearly identical to that used in GCL policies. Accordingly, manifestation of injury was held to be one of the triggers for coverage.

Pennsylvania courts have declined to apply the multiple trigger approach in cases other than those involving toxic torts. In *Consulting Engineers, Inc. v. Insurance Co. of North America*, 710 A.2d 82 (Pa. Super. 1998), the Pennsylvania Superior Court rejected the “multiple trigger” argument advanced by the policyholders seeking defense and indemnification in a declaratory judgment action filed by two carriers disclaiming coverage and a defense for a claim for malicious prosecution. The insureds claimed that there was ongoing harm from the date they filed suit until the date it was terminated. Instead, the “manifestation” theory was found to apply because there was no “latent” injury like that found in toxic tort cases. The Superior Court held that its approach was consistent with the analysis in prior Pennsylvania case law: “[u]r courts have held that “[a]n occurrence [for purposes of determining insurance coverage] happens when the injurious effects of the negligent act first manifest themselves in a way that would put a reasonable person on notice of injury.” (citing *D'Auria v. Zurich Insurance Co.*, 352 Pa.Super. 231, 237-39, 507 A.2d 857, 861 (1986) (emphasis in original)). The *Consulting Engineers* court stressed that the other jurisdictions considering the same question all had held that the filing of the lawsuit was the operative “trigger” in evaluating coverage for malicious prosecution claims. The court further noted that while the statute of limitations on the underlying tort begins to run when the suit is concluded, this fact was not conclusive as to coverage. Because neither of the carriers had a policy in place when the suit was filed by the insureds, it was held they had no obligation to the insured to provide coverage or a defense.

Coverage triggers were also at issue in a bad faith case arising out of the denial of coverage for the arguably ongoing failure of a business’ roof trusses that eventually resulted in collapse. See *Zimmerman v. Harleysville Mutual Insurance Co.*, 860 A.2d 167 (Pa. Super. 2004). The insured bowling alley changed carriers in late June 1993, just days after it experienced falling roof tiles. Two weeks later, a contractor inspected the property and identified a problem with three of the sixteen roof trusses which he believed had been caused by heavy snow and ice accumulation the previous winter. He recommended that an engineer be hired. The insured reported the loss to its first carrier who called in an engineer who reported the impending failure of eight of the trusses. A contractor was hired by the insured and the repairs were set to begin once the inspector finalized his report. Three days later, the roof collapsed under high winds. Claims were made with both carriers. The first carrier issued a check for the estimated cost of the pre-collapse repair of the eight trusses. The second carrier denied coverage for the collapse, asserting that the other carrier was responsible. In a declaratory judgment action, the trial court ruled that insured was owed coverage by the second carrier for the loss, except for the small portion covered by the first carrier. The bad faith case followed and a verdict was returned against the second carrier that included an award of punitive damages.

Affirming the bad faith trial verdict against the carrier, the appellate court in *Zimmerman* found that the insurer did not have a reasonable basis to deny coverage. The insured claimed and the trial court found that the effects of the prior winter and the windstorm were two distinct occurrences of which both had caused the roof collapse. The carrier defended its denial of coverage under the “loss in progress” theory – i.e., the on the basis that the insured could not seek coverage for a loss that was occurring at the time coverage was secured. The appellate court ruled that the second carrier was responsible for coverage for the loss because its policy was in place at the time of the “injurious effects” of the occurrence. The insurer’s reliance on the “loss in progress” theory was found to be misplaced and the punitive damages award was also upheld. Interestingly, the court relied on the *D’Auria* case as precedent supporting the “cause and effect” test for coverage, but apparently overlooked...
In 2008, the Texas Supreme Court issued Don’s Bldg. Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20 (Tex. 2008), which defined what “triggers” a Commercial General Liability (CGL) policy’s coverage. The Court held that insurance policies must be construed in accordance with how they are written. Id. at 23. The policy at issue in Don’s Bldg. Supply was a standard policy that provided that bodily injury and property damage must occur during the policy period and defined “occurrence” as an “accident” under the policy. It reversed, however, on the issue of the number of occurrences, finding that there had been only a single occurrence. The court adopted the “cause” approach and under that analysis found the injuries had been proximately caused by one event, the parents’ negligence rather than the multiple actions of their tortfeasor son.

The issue of whether the “multiple trigger” approach applies to continuous progressive property damage is currently under consideration by the Pennsylvania Supreme Court in the case of Pennsylvania National Mutual Casualty Insurance Company v. St. John, et al. The case was argued on May 7, 2013 and the decision remains pending. Under the facts of the case, a family of dairy farmers hired the insured plumbing business to run water lines to their new barn in 2002. The work was performed negligently, resulting in contamination of the cows’ drinking water. The herd took up residence in the new facility on July 1, 2003, after which milk production fell, and the cows developed a variety of health problems. The contamination was discovered in March of 2006. Litigation against the insured resulted in a $3,500,000 verdict. The insured was covered by a series of policies issued by a single carrier, including an umbrella policy for only the last year. A declaratory judgment action was filed and the trial court found that coverage was available only under the 2003-2004 because there had been only a single occurrence that took place during that policy period. The dairy farmers advanced two arguments: the first, that the damage did not manifest itself until they discovered the insured’s negligence. The court noted that its second claim was inconsistent with that position: that coverage should be available under all of the policies, as the multiple trigger theory applied because there at least one occurrence took place during each of the policy periods. Citing the dissent in Zimmerman, the court noted that “...in a property insurance context, coverage is triggered when the property damage first manifests itself – presumably in a manner ‘that would put a reasonable person on notice of the [damage].’” 860 A.2d at 176. While the farmers acknowledged that they were aware of the effects on their herd, they considered them to generally occurring problems. The trial and Superior Court both summarily declared noted that J.H. France applied to only toxic tort cases. An aside by the trial court did note that “from the cows’ point of view, this case does, indeed, involve a toxic tort.” The court distinguished the trigger that starts the statute of limitations in a tort case from that which triggers coverage. The court also considered the impact of the Baumhammers decision and cited it in support of its conclusion that negligence of the insured was the single cause of the damage to the dairy herd.

In accepting the case for consideration, the Pennsylvania Supreme Court brought the focus back on the consideration of the definition “property damage” and seemingly ignored the interpretation of term “occurrence” employed by the two lower courts. The three issues as accepted on appeal, as stated by the Petitioner, are:

a. Did “manifestation” of the “property damage” to the St. John’s dairy herd take place in late March 2006 when the cows were concurrently observed thrashing their heads about in their water bowls, refusing to drink, and giving dramatically less milk; rather than, as held by the trial court, in April 2004 based on a mere economic downturn from a decrease in milk production?

b. Does “manifestation” of “property damage” for purposes of triggering a commercial general liability insurance policy take place only after the injured party has the ability to ascertain the source of injury or damage is traceable to something out of the ordinary and usual course of events for which another may bear responsibility?

c. Does the “multiple trigger” theory of liability insurance coverage adopted by the Pennsylvania Supreme Court in J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 507 (Pa. 1993), apply to cases presenting continuous, progressive “property damage,” so that all policies on the risk from exposure to the harmful condition through “manifestation” of the injury are triggered?

The Insurance Federation of Pennsylvania, Inc. and the Pennsylvania Defense Institute filed amicus briefs in support of lower courts’ rulings and urged the limitation of the multiple trigger theory to cases in which the record as to the progression of damage or disease supports its application. The ultimate decision is likely to have a significant impact on insurance coverage in the Keystone State.

Coverage Trigger Theories in Texas - “How I Roll”

By: Christina Denmark

In 2008, the Texas Supreme Court issued Don’s Bldg. Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20 (Tex. 2008), which defined what “triggers” a Commercial General Liability (CGL) policy’s coverage. The Court held that insurance policies must be construed in accordance with how they are written. Id. at 23. The policy at issue in Don’s Bldg. Supply was a standard policy that provided that bodily injury and property damage must occur during the policy period and defined “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Id. at 24.

Based on the policy’s plain meaning, the Court adopted the “actual injury”/“injury-in-fact” theory that the policy is triggered when actual physical damage to the property occurred, not when damage could have been discovered. Id. at 24. Historically, Texas courts utilized other theories, primarily the manifestation theory, that would trigger coverage only when damage is discovered. See, e.g., Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co., 202 S.W.3d 823, 827 (Tex. App. – Dallas 2006, pet. denied)(applying the manifestation theory); State Farm Fire & Cas. Co. v. Rodriguez, 88 S.W.3d 313, 322-23 (Tex. App. – San Antonio 2002, pet. denied)(applying the manifestation theory); Pilgrim Enters., Inc. v. Md. Cas. Co., 24 S.W.3d 488, 497-99 (Tex. App. – Houston [1st Dist.] 2000, no pet.)(applying the exposure theory). After surveying Texas jurisprudence on the issue, the Court strictly interpreted the policy finding the “policy links coverage to damage, not damage detection.” Don’s Bldg. Supply, 267 S.W.3d at 29. The Court chose to use a similar approach as it had taken in Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007), wherein the Court simply gave effect to the literal meaning of the policy by finding that coverage was required for damages caused by an occurrence during the policy period. Although the actual injury/injury-in-fact theory can be harder to apply and can trigger multiple policies, the Court refused to allow “ease of proof or administrative convenience to be exalted over faithfulness to the policy language.” Id. at 29.

In Texas, an insured has a duty to defend based on the policy’s terms and the plaintiff’s allegations pursuant to the “eight corners” rule of insurance law. Id. at 31. Assuming there is coverage for any portion of the suit, an insurer has a duty to defend the entire action and only later can the insurer determine what proportionate
Share to pay of the defense. The duty to defend is very broad in Texas. In determining a duty to defend, a court will use the "eight corners" rule by examining the insurance policy and the pleadings and will require defense of the entire suit if the complaint potentially includes a covered claim, whether or not the allegations are groundless, false, or fraudulent. Zurich Am. Ins. Co. v. Nubia, Inc., 268 S.W.3d 487, 491 (Tex. 2008). For example, in Don’s Bldg. Supply, the Plaintiff pled that the damage occurred unseen during the policy period, which was deemed sufficient by the Court to trigger the policy. Therefore, a plaintiff's broad allegations of damages occurring over several years can trigger a defense obligation from multiple insurers over multiple years.

On a positive note, the opinion of Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842 (Tex. 1994) is favorable for insurers, as it gives some control to the insurers and limits coverage amounts. It provides Texas does not allow stacking of policies so that coverage can be multiplied for a single claim involving indivisible injury. Id. at 853. In other words, where multiple policies are triggered, only one limit applies and each insurer contributes based on this limit. Even if an injury is indivisible in that it triggers more than one policy covering different policy periods, then different limits may have to be applied at different times. Id. at 855. "In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was the highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage." Id. Excess insurance policies are also to be considered by the insurer in determining which policy should be applied. Id. "Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights." Id.

In determining allocation, the applicable insurance policies will be examined. If two insurers are liable to pay for an entire loss and one insurer pays the whole loss, the one paying has a right of action against the co-insurers for a ratable proportion of the amount paid by him. Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 772 (Tex. 2007). The court, however, will examine the "other insurance" clause contained in all of the insurers' policies and give the words their ordinary meaning. CNA Lloyds of Tex. v. St. Paul Ins. Co., 902 S.W.2d 657, 659 (Tex. App. – Austin 1995, rehearing denied). The insurance policies may limit coverage to a pro rata amount. Specifically, contribution may be limited by a "pro rata" clause, which operates to ensure each insurer is not liable for any greater proportion of the loss than the coverage amount in its policy bears to the entire amount of insurance coverage available. Mid-Continent Ins. Co., 236 S.W.3d at 772. The pro rata clause precludes a direct claim for contribution among insurers because the clause makes the contracts several and independent of each other; however, if an insurer is not fully indemnified, it may enforce the contractual obligation to recover the multiple insurers' shares to cover the loss. Id.

If contribution is not available, the insurer may look to contractual or equitable subrogation. Contractual subrogation is created by an agreement or contract that grants the right to pursue from a third party in exchange for a payment of a loss, while equitable subrogation does not depend on a contract but arises when one person, not acting voluntarily, has paid a debt for another who was primarily liable. Id. at 774. A contractual indemnity claim may arise if multiple policies are in play because the insurance policy typically provides the insurer is only liable for its own legal liability. An equitable subrogation right arises where one insurer is forced to pay the debt of another insurer who was primarily liable. However, a Stowers duty, wherein an insurer owes the insured a duty to protect by accepting a reasonable settlement offer, will not trigger an equitable subrogation claim. Id. at 776.

In summary, one needs to look to the policy language and the pleadings to determine if a policy has been triggered and whether there is a duty to defend in Texas. If multiple policies are triggered and there is coverage for a portion of the suit under the triggered policies, then each insured must defend the entire suit and only later can the insured determine what proportionate share to pay of the defense. If multiple policies are at play, the insurer may have a contribution or subrogation claim against the other insurers, which is dependent on the insurance policy language.

See G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W. 2d 544 (Tex. 1929). Under Stowers, an insurer has a duty to consider a plaintiff’s offer to settle with a defendant within policy limits. Assuming the settlement demand is reasonable and within policy limits, the insurance company may be liable for a full verdict, even if higher than the policy limits, if they refuse to settle.

Coverage Trigger Theories in West Virginia - “...Baby One More Time”

By: Lauren M. Palmer

Generally, for an insurer’s duty to defend or indemnify to arise under an “occurrence” liability policy, the claimed injury must occur during the policy period. Some injuries present no issues as to whether they occurred within or outside of the policy period. However, for claims without clear cut “triggers,” such as a disease with a latency period or an exposure to undetectable toxic chemicals, it may prove more difficult to determine when coverage under a liability policy triggers. Courts have taken several approaches when applying insurance policy provisions to undetectable, latent, or other temporally delayed claims. The various theories of coverage triggers, including the "exposure theory," the "manifestation of loss theory," the "injury-in-fact theory," and the "continuous trigger theory," determine the point at which coverage exists under a liability policy. As West Virginia law has not yet settled on one particular theory, the following summarizes the available legal options.


Alternatively, the "manifestation of loss theory" states that an injury that could potentially be discovered or actually is discovered during the policy period triggers coverage. See, e.g., Lee D’Amiantite Du Quebec, Ltee. v. Am. Home Assurance Co., 613 F. Supp. 1549, 1556 (D.N.J. 1985) (citing Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028–29 (1983))). For personal injury claims, manifestation occurs when a sick individual has either actual or constructive knowledge of her condition, or when the individual is diagnosed, whichever comes first. See, e.g., Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1216 (6th Cir. 1980). For property damage claims, manifestation occurs when the reasonable person would be conscious of the existence of an actionable defect. See, e.g., Am. Home Assurance Co. v. Libbey-Owens-Ford Co., 786 F.2d 22, 23 (1st Cir. 1986).

Under the "injury-in-fact theory," coverage is triggered when the injury or damage actually occurs. See Am. Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760, 765 (2nd Cir. 1984). Most courts have disfavored this approach due to its limited benefit to the insured.

Finally, the "continuous trigger theory" represents a melding of the various aforementioned theories. Under this theory, coverage is triggered at exposure to the source of injury during the policy period and continues to be triggered throughout the injury’s manifestation of loss. See Keene Corp. v. Ins. Co. of North Am., 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 445 U.S. 1007 (1982). The continuous trigger theory thus potentially expands the period of coverage for a significant period of time after the expiration of the policy, and has received criticism for this outcome.
The Supreme Court of Appeals of West Virginia has not yet addressed the issue of trigger of coverage, though several West Virginia Circuit Courts have issued opinions on the matter. In *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, the Circuit Court discussed the various trigger of coverage theories as applied to delayed manifestation claims in other jurisdictions. See 2003 WL 23652106, at *14–17 (W. Va. Cir. Ct., Oct. 18, 2003). The Circuit Court applied the continuous trigger theory to determine coverage under the Plaintiff's commercial general liability policies. See *id.* Specifically, the Circuit Court found it persuasive that the manifestation of loss approach would permit the insurer to terminate coverage prior to "the onset of a recognizable disease" and thus deprive the insured of benefits. *Id.* Comparatively, the Court found favor with the continuous trigger approach as it preserved benefits for the insured.

Notably, the Court did not make any findings as to whether coverage was in fact triggered under any of the relevant policies, as the Plaintiff did not establish a sufficient basis for finding that an occurrence, as defined by the various policies, actually occurred. See *id.* However, the Court did state, that in the event coverage was triggered under one or more policies, liability for the alleged property damage was properly analyzed under a joint and several approach. See *id.* As such, the insured may collect the total liability under any triggered policy provided the total amount collected did not exceed the policy limit. See *id.* If multiple policies were triggered, the insured would select which of the several triggered policies would respond. See *id.* The selected insurer must then seek contribution from the other insurers who issued triggered policies. See *id.* (citing *Keene Corp.*, 667 F.2d at 1043 (other internal citations omitted)).

Additionally, in *U.S. Silica Co. v. Ace Fire Underwriters Ins. Co.*, a West Virginia Circuit Court chose to apply the continuous trigger theory. See Civil Action No. 06-C-2 (Morgan Cnty. Cir. Ct. 2013.). In *U.S. Sicilia*, numerous claims were brought against U.S. Silica for bodily injury due to exposure from silica or products containing silica. See *id.* U.S. Sicilia Co. was insured under three primary accident-based comprehensive general liability policies. See *id.* The Circuit Court applied the continuous trigger theory to the silica bodily injury claims, finding that coverage existed from the first exposure until a claim was brought, or until the claimant died. See *id.* Op. at 20.

While few West Virginia decisions have addressed trigger of coverage issues, it appears the Circuit Courts have favored the application of the continuous trigger theory. Certainly, however, without a controlling Supreme Court of Appeals of West Virginia opinion on the issue, the field remains open to other persuasive arguments.

### Trigger/Allocation - State by State Chart

<table>
<thead>
<tr>
<th></th>
<th>Manifestation</th>
<th>Injury-in-Fact</th>
<th>Exposure</th>
<th>Continuous Trigger</th>
<th>Unknown</th>
<th>Pending</th>
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<td>X (leaning toward manifestation or injury-in-fact)</td>
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Pending: Multiple triggers for progressive property
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