

PENNSYLVANIA

A CASE FOR WHY THE FIRST MANIFESTATION RULE SHOULD BE APPLIED IN CONSTRUCTION DEFECT CASES

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An occurrence-based insurance policy applies to bodily injury and property damage that occurs “during” the policy period. Consequently, one of the initial steps in determining if a given policy provides coverage is to determine if the injury or damage occurred during the policy period. This is sometimes referred to as the “trigger of coverage” analysis.

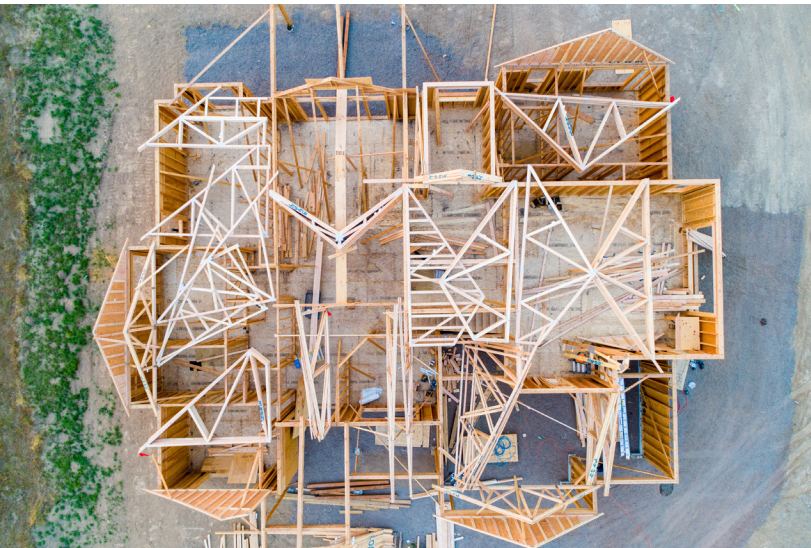
Historically, it was understood that only one liability policy (with any attendant excess coverage) was triggered by an occurrence, and that the insured’s coverage was determined under that singular policy. Emerging from this historical understanding was the first manifestation rule, which holds that coverage is triggered at the time that bodily injury or property damage becomes known or should reasonably be known to the party making the claim. Such a rule, certainly on its face, appeals to those time honored principles in the law, logic, simplicity and predictability.

they become known to the insured. The first manifestation rule from a practical standpoint is also useful because it enables consumers of insurance (which is most everyone), underwriters and risk control analysts to accurately identify and thus predict an insured’s risk profile and covered exposure year to year. It is also consistent with the notion that insurance exists to cover fortuitous losses. The first manifestation rule is also straightforward to apply and given the plain language of the insuring provisions of ISO policies and similar forms customarily used in the industry, application of the rule results in a straightforward application consistent with the reasonable expectations of both the insured and the insurer. Unlike the “actual injury” or the “injury-in-fact” triggers, which require the often impossible task of identifying when, in the past, the injury or damage first came about; the focus of the first manifestation rule is on recent events and links coverage for the loss to the readily identifiable point in time when the injury or damage first manifests.

However, starting in the 1970s and 1980s, with the advent of widespread asbestos and environmental pollution litigation, several other rules were created for determining if a policy was triggered. Perhaps the one most inconsistent with the plain language of most liability policies and thus, the reasonable expectations of the parties, is the “continuous,” “multiple” or “triple” trigger of coverage. Under this construct, coverage may be triggered many times (or throughout) the relevant period or even successive policy periods, beginning from first exposure to the injurious condition, up to and even after the first manifestation of the bodily injury or property damage. The result is that each respective policy period and all insurance policies in effect along this time continuum are triggered, and must provide coverage for what nonetheless remains bodily injury or property damage arising out of a single occurrence. At least initially, the rationale behind this rule was that each phase of a latent disease, such as mesothelioma, or undiscovered environmental pollution, triggers the insurer’s obligation to indemnify because all phases independently satisfy the policy definition of “bodily injury” or “property damage.”

Initially, the first manifestation rule is consistent with the plain language of most liability policies which on balance, provide that the “bodily injury” and “property damage” for which coverage is provided are deemed to occur in the policy period during which

Generally, Pennsylvania applies the first manifestation as the



rule for determining if an insurance policy was triggered. The only recognized exceptions are for cases involving asbestos and arguably, environmental pollution, which are governed by the continuous trigger rule. Recently, there has been a significant push by national home builders, general contractors, and policy holder counsel (collectively, "General Contractors") to expand the continuous trigger rule to situations where property damage has more recently been discovered, allegedly because of faulty workmanship many years ago. This effort is particularly notable in situations involving residential dwellings and developments built, sometimes, more than a decade ago. Over the ensuing years, because of defective construction for which the General Contractor itself was ultimately responsible, the premises sustains damage most frequently because of water intrusion resulting in direct and consequential damages to the homeowner.

However, application of the continuous trigger rule in this context is problematic and unfair. Initially, the party generally advocating for expansive coverage across multiple successive policy terms, unlike the asbestosis plaintiff, is the very same party who both received payment and was responsible for, the work that leads to the claim. It seems unjust for such a party to rely upon the "public policy" that underlies application of the multiple trigger theory in the context of asbestosis plaintiffs to escape personal responsibility for the claims of its customers based, ultimately, upon the homebuilder's contract with them.

Moreover, as a practical matter, application of the continuous trigger rule in this context operates to transform the insurer's policy into a construction bond. Shoddy workmanship and resulting damages infrequently manifest shortly after the construction of a home is completed. If indeed construction defects arise close in time to the construction, then resort can be made to the contractor's construction bond. However, all such bonds are eventually released. Not the case with the contractor's liability coverage in effect from the time of construction until expiration of the applicable Statute of Repose if the continuous trigger of coverage is applied. Rather, such policy obtained by the builder remains potentially on the hook, in essence guaranteeing the workmanship of the builder. There simply is no way to adequately identify or account for the risk if the continuous trigger is applied to these claims.

It is understandable why builders would want to employ the continuous trigger of coverage, so as to essentially aggregate multiple policies over the actionable life-span of their work. Of course contractors large and small, and in particular, the goliaths of the construction world want to avoid exposing their profits to uninsured liability if it can be accomplished. Who can blame them?

However, to equate the public policy rationale for applying the continuous trigger theory in asbestosis cases to claims against general contractors arising from their own defective construction misapplies a well-intended public policy to a class of claims which are fundamentally different in every respect. Application of the continuous trigger of coverage theory to homebuilders and other general contractors actually incentivizes shoddy construction practices. In short, if there is insurance coverage over the life

of the risk, there is no reason for the contractor to go the extra mile to assure that its products and workmanship comply with all applicable specifications and standards because there will be insurance coverage waiting for the contractor when its non-compliant work begins to break down. In this scenario, the risk of loss is transferred to the insurer, who is unable to identify, protect against or in many scenarios, receive a premium for the risk that has been foisted upon it. These outcomes may be unintended consequences born of a desire to protect homeowners and other purchasers of new construction, but the detriment created by application of the continuous trigger of coverage outweighs any benefits created by an increased pool of insurance coverage for shoddy construction claims. Viewed in this light, it is clear that the first manifestation rule is better suited to achieve the macro and micro public policy objectives that must be evaluated in determining when coverage is triggered for a construction defect claim.



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