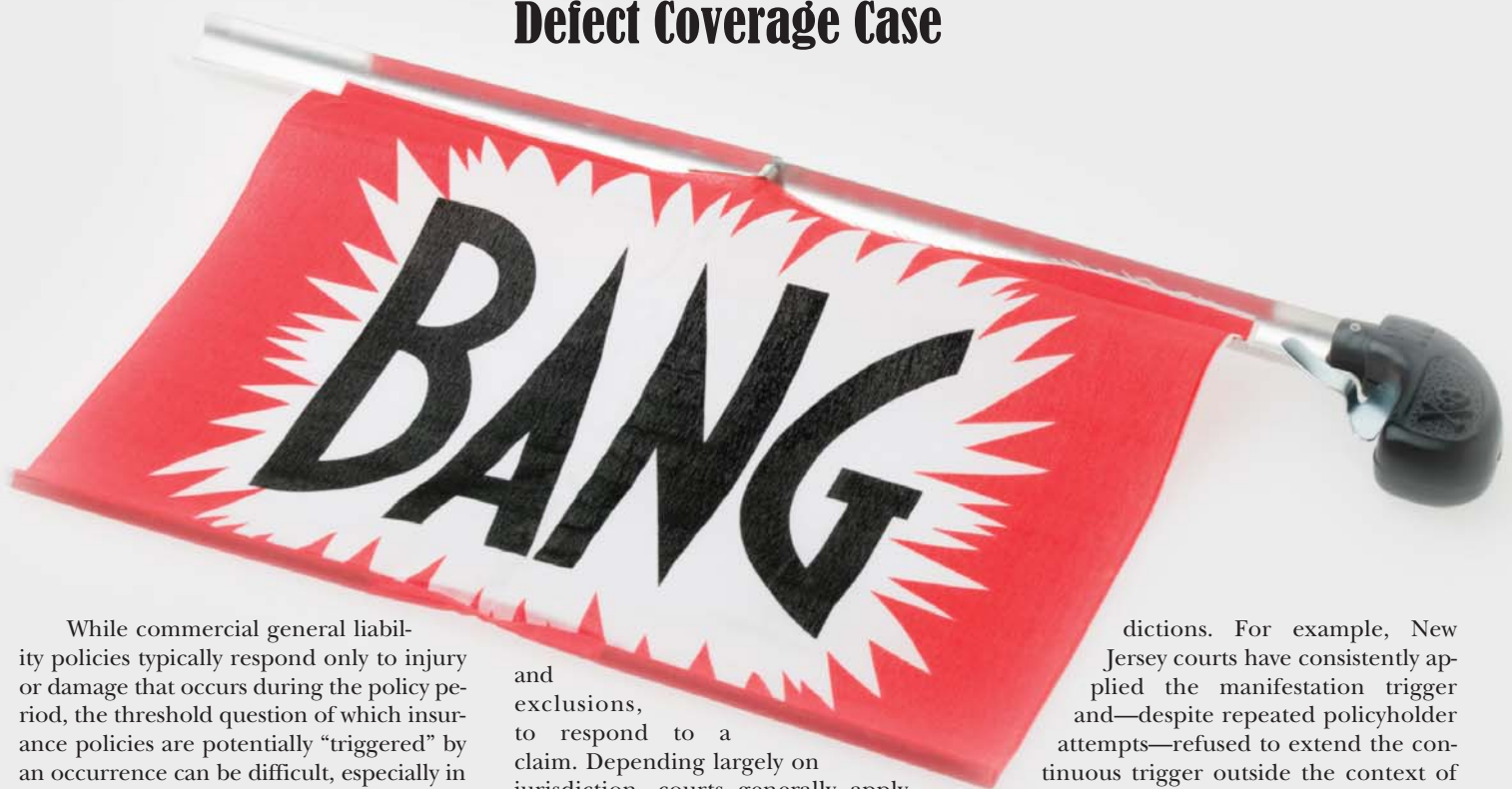


PULLING THE RIGHT TRIGGER:

Identifying the Appropriate Insurance Policy Trigger Approach at the Inception of a Construction Defect Coverage Case

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While commercial general liability policies typically respond only to injury or damage that occurs during the policy period, the threshold question of which insurance policies are potentially “triggered” by an occurrence can be difficult, especially in cases where the damage is alleged to have taken place over an extended period of time. Further complicating this issue in the context of construction defect claims is the fact that there is often significant debate as to when the damage giving rise to liability actually took place. As a result, insurance coverage disputes arising from underlying construction defect litigation often involve considerable uncertainty as to which policies are potentially implicated by such claims. In that regard, the question of which trigger methodology applies is presently one of the most pressing and misunderstood concepts in construction defect coverage law.

KNOW THE TRIGGERS

The concept of “trigger” is a shorthand term to describe the event that determines whether an insurance policy is potentially implicated, subject to its terms, conditions

and exclusions, to respond to a claim. Depending largely on jurisdiction, courts generally apply one of four theories for determining when coverage is triggered under an occurrence-based liability insurance policy. Under the “exposure” trigger, the triggering event is the initial exposure to the harm that ultimately causes damage. Under the “injury-in-fact” trigger, coverage is triggered when the damage first occurs. Under the “manifestation” trigger, coverage is triggered when the owner becomes aware of the property damage. Finally, the “continuous” trigger may implicate multiple policies in effect over a period of time in cases involving continuous, progressive, indivisible property damage.

Courts around the country are sharply divided over which trigger methodology should be applied in the construction defect coverage arena, and existing law is under attack and evolving in several juris-

dictions. For example, New Jersey courts have consistently applied the manifestation trigger and—despite repeated policyholder attempts—refused to extend the continuous trigger outside the context of traditional long-tail (*i.e.*, environmental, asbestos and toxic tort) cases to construction defect coverage claims. Other jurisdictions, such as South Carolina, have applied an injury-in-fact trigger to certain construction defect claims in a manner certain practitioners have characterized as more akin to a continuous trigger approach.

Further confounding many practitioners, courts often state they are applying one trigger methodology but perform an analysis that arguably suggests another approach. As a result, even the highest courts from certain jurisdictions have left room for debate over which trigger methodology should apply in construction defect cases. Thus, it is less important to extract the label of a particular trigger approach from a given case than it is to understand how a jurisdiction has applied the trigger theory under similar facts.

GET THE FACTS

Just as important as identifying which trigger methodology will likely apply in a given jurisdiction, practitioners must discover as early as possible when the alleged damage took place under the applicable trigger approach. Thus, in a jurisdiction that has indisputably adopted the manifestation trigger, it is critical to identify precisely when the damage was discovered to determine which liability policy is on the risk. Where there is room for debate as to which trigger theory a court would apply, experienced practitioners must fully investigate when the “damage” could be deemed to have happened under each potentially applicable trigger methodology. This will enable the parties to intelligently evaluate the pros and cons of each trigger approach being advanced in the case.

PUT IT IN PRACTICE

Imagine a policyholder building an apartment complex in a manner in which an underlying plaintiff later charges in a lawsuit harmed its property. Specifically, the lawsuit charges that the policyholder’s actions or lack thereof resulted in water intrusion, corrosion, dry rot, or some other damage to a third party’s property. The policyholder, in turn, seeks insurance coverage in connection with the claims against it under three separate one-year liability policies. Assuming discovery reveals the construction took place in 2008, the damage actually happened in 2009, and the damage was ultimately discovered in 2010, which of the policyholder’s general liability policies are potentially implicated by the underlying construction defect claim?

The answer, of course, to this critical coverage inquiry depends largely on which of four generally recognized trigger methodologies is applicable in the subject jurisdiction. The exposure trigger methodology, which focuses on the initial exposure to the harm that ultimately causes damage, could potentially implicate the liability coverage in effect as early as when the construction took place in 2008. Conversely, the injury-in-fact trigger, which focuses on the moment actual damage takes place as opposed to the initial exposure, would trigger the liability policy in effect when damage to third party property happened in 2009. The manifestation trigger theory, which triggers coverage when damage is discovered, would implicate the liability policy in effect upon discovery of the damage in 2010. Lastly, the continuous trigger approach, if applied in the context of a construction defect case, would potentially implicate all policies on the risk from the time of initial exposure

when the apartment complex was constructed in 2008, through the period of actual damage in 2009, to its manifestation in 2010. Thus, identifying the applicable trigger approach and timing of damage is instrumental in determining which liability policies are potentially implicated in a given construction defect coverage case.

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FIX THE GUEST LIST

All too often, a construction defect coverage action is filed which includes insurers whose policies could never be triggered under applicable law or, alternatively, fails to include insurers who should be in the case. For at least three reasons, it benefits all parties to “fix the guest list” early by dismissing those defendants who do not belong in the case and joining those that do. First, litigating a case with the wrong parties creates case management nightmares. Judges are often reluctant to meaningfully proceed with significant discovery and/or motion practice until all the right players are in the case. Second, conducting discovery with the wrong parties is a colossal waste of time. This is particularly true where defendant insur-

ers are forced to engage in needless discovery merely to confirm their policies can never be triggered by the occurrence of property damage during the policy period. Finally, having the wrong parties in a case can significantly hinder settlement efforts. Defendants facing no exposure typically take strong no-pay positions and/or file early dispositive motions, which may have the practical effect of delaying or derailing attempts to reach a global resolution among parties belonging in the case.

Once it has been discovered that a party in the case should be dismissed because its liability policy cannot be triggered, that party should be voluntarily dismissed. If the policyholder refuses to dismiss its claim, in many cases an early dispositive motion is appropriate. Similarly, where a party whose liability policy was likely triggered is not initially included in the litigation, judicial standards for adding parties are generally much more lenient early in a case than on the eve of trial.

CONCLUSION

In sum, the entire landscape of a construction defect coverage case is significantly impacted by the particular trigger methodology applied by the court. This single coverage question will determine whether a given policy, subject to its terms, conditions and exclusions, can potentially respond to a construction defect claim. For this reason, it is imperative that practitioners carefully evaluate which trigger methodology will potentially apply to a coverage dispute at the inception of litigation. By doing so, parties may be able to avoid extensive litigation over the myriad of coverage issues typically presented in construction defect cases by focusing on the right trigger of coverage from the start of an action.



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