

## NEW JERSEY APPELLATE DIVISION LEAVES THE DOOR OPEN FOR CONTINUOUS TRIGGER IN CONSTRUCTION DEFECT CASES

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Over the past decade, courts across the country have delivered countless number of decisions on the scope of liability coverage for underlying construction defect claims. Most of these decisions focus on whether claims of faulty workmanship constitute an occurrence, and if so, whether the business risk exclusions apply to preclude coverage. Just as important, but often overlooked, is the issue of trigger.

Consider, for example, a scenario in which a homeowners' association files suit against a builder based on large-scale water intrusion problems throughout a 100-unit luxury home residential development. The homes are built in year one, leaks begin behind the walls in year two, the homeowners discover the leaks in year three when water finally penetrates the interior of the homes, and leaks occur in years four and five during unsuccessful remedial efforts. The homeowners file suit in year six. The builder tenders the suit to multiple insurers, all of which issued CGL coverage to the builder at some point during the six-year period. Which policy or policies are triggered under this all-too-common scenario? The jurisdictions that have considered this issue have produced widely divergent results (which can be the subject of a separate presentation, at the reader's request).

The latest to weigh in is the New Jersey Superior Court, Appellate Division. In *Selective Way Ins. Co. v. Arthur J. Ogren, Inc.*, No. Civ. A-3491-09T1, 2010 N.J. Super. Unpub. LEXIS 2979 (App. Div. Dec. 13, 2010), Selective Way Insurance Co. (Selective) sought a declaration that it did not owe coverage to a contractor in connection with a faulty workmanship claim because the damages manifested prior to Selective's policy period. Specifically, Cumberland County hired the insured to expand and renovate its courthouse in 1995. Shortly after completion of the project in 1995, courthouse

officials observed water intrusion, mold and cracking in the renovated building. Cumberland County filed a lawsuit, and the insured tendered the claim to Selective, which had issued CGL coverage that commenced in 1997. The underlying complaint did not specify the year in which Cumberland County first noticed damage, so Selective initially defended the insured under a reservation of rights. During discovery in the underlying claim, Cumberland County admitted that it first noticed damage in 1995, so Selective subsequently denied coverage and initiated a declaratory judgment action.

Selective moved for summary judgment, arguing that the damages first manifested prior to its policy period and, therefore, the loss did not trigger the Selective policy. At oral argument, the County argued that each rain event – including rain events during Selective's policy period – exacerbated the damages and should be considered a new occurrence. The trial court denied the motion, but on slightly different grounds, finding that the policy was triggered under a continuous trigger theory adopted by the New Jersey Supreme Court in *Owens Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994). In *Owens Illinois*, the court applied a continuous trigger to claims for property damage caused by the presence of asbestos in buildings. Under that theory, "claims of asbestos-related property damage from installation through discovery or remediation (the injurious process) trigger the policies on the risk throughout that period." *Owens Illinois*, 650 A.2d at 984.

In *Ogren*, the Appellate Division reversed the trial court's ruling and found that Selective had no duty to defend or indemnify the contractors. The court expressed hesitation over the trial court's application of the continuous trigger theory but found that even under such an analysis,

Selective's policy was not triggered. The court observed that under *Owens Illinois* and other cases applying the continuous trigger theory, "the last pull of the trigger" was the manifestation of disease. Accordingly, because the damage to the courthouse manifested two years prior to the Selective policy period, Selective was not obligated to provide coverage.

Only a few jurisdictions have expanded use of the continuous trigger theory to the construction defect context. The continuous trigger rule is traditionally limited to claims involving mass toxic torts and environmental contamination. Thus, the trial court's decision to apply a continuous trigger to progressive property damage resulting from faulty workmanship is a particularly alarming development for

insurers. The Appellate Division's decision is equally alarming because it "punted" on the issue of whether a continuous trigger is appropriate in the construction defect context, and instead ruled that the trigger cuts off at manifestation. While that ruling produced a fine result for Selective in this case, it may prove to be a tougher issue in cases where the delay between the alleged faulty construction and eventual manifestation of damage spans numerous policy periods.

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