

New Jersey Court: Continuous Trigger Ends When Nature of Damage Is Known

Last week, the New Jersey Appellate Division issued a decision that may have a significant impact on insurance coverage for progressive property damage claims in the state. In *Air Master & Cooling, Inc. v. Selective Ins. Co. of Am.*, No. A-5415-15T3, 2017 WL 4507547 (N.J. Super. Ct. App. Div. Oct. 10, 2017), the court first confirmed that a “continuous trigger” applies to third-party construction defect claims. A continuous trigger requires multiple successive insurers on the risk from the date of exposure through manifestation to cover a loss. Previously, New Jersey appellate courts had applied “continuous trigger” to analogous cases, such as property damage and bodily injury claims arising from the installation of asbestos products, environmental contamination, and toxic torts. At least one trial court had applied a continuous trigger to “delay manifestation property damage claims.” See *Cypress Point Condominium Ass'n v. Selective Way Ins. Co.*, HUD-L-936-14, 2015 WL 1515944 (Law Div. Mar. 30, 2015). The *Air Master* decision confirms that a continuous trigger theory will be applied to allegations of continuing property damage over a period of time in the construction defect context.

The insured in this case, Air Master, had performed HVAC work at a condominium building in Montclair, New Jersey between November 2005 and April 2008. The condominium association brought a lawsuit against certain contractors after water infiltration and resulting damage was discovered. Air Master was named as one of several third-party defendant sub-contractors. Selective issued a series of policies to Air Master from June 2009 through June 2012 and denied coverage to Air Master, arguing that the property damage had already manifested before the June 2009 policy inception. Selective pointed to a November 2010 local news story that had reported that residents began noticing water infiltration starting in early 2008. Air Master argued that the water damage was not discovered until the condominium association’s expert consultant issued a report in May 2010.

After confirming that continuous trigger was the appropriate legal framework for progressive property damage caused by construction defect(s), the issue before the court was to determine the endpoint for a covered occurrence — or the last “pull of the trigger.” The court concluded that coverage ends when the “essential nature and scope of the property damage first becomes known, or when one would have sufficient reason to know of it.” Air Master argued that this should be further narrowed to when there is expert or other proof that links the injury to the particular conduct of the insured. This was akin to the equitable tolling doctrine developed in the statute of limitations context, whereby an injured plaintiff has additional time to file suit until they have reason to know they have been injured and to attribute that injury to the fault of a particular defendant. The court rejected this theory, stating that the “policy considerations that justify the equitable tolling of statutes of limitations for **plaintiffs** do not pertain to insured **defendants** who have potentially caused a progressive injury.” (emphasis in original). The court instead held that the end date for coverage is the date of initial damage manifestation common to all defendants, without attribution to the particular insured.

This decision clarifies the law in New Jersey as to the appropriate coverage period for continuous property damage claims caused by construction defects. However, determining the manifestation date that effectively ends coverage may prove to be a fact-intensive inquiry. The court found that the manifestation cannot be “merely tentative,” but need not be “definitive or comprehensive.” Rather, there must be awareness of an “essential” manifestation, which falls somewhere between tentative and definitive. In *Air Master*, the court refused to accept Selective’s argument that the news report of resident complaints in 2008 was adequate to prove manifestation and remanded the case for further discovery on the issue. An expert or transition report detailing the nature and extent of property damage is likely sufficient to prove manifestation. However, there is the



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possibility that the date could be earlier if there was sufficient evidence of earlier knowledge.

To discuss any questions you may have regarding the issues discussed in this Alert, or how they may apply to your particular circumstances, please contact Melissa Brill at mbrill@cozen.com or (212) 908-1257 or Laura Dowgin at ldowgin@cozen.com or (212) 453-3775.