

NEW JERSEY'S MANIFESTATION DESTINY: APPELLATE DIVISION APPLIES CONTINUOUS TRIGGER TO CLAIMS FOR PROGRESSIVE THIRD- PARTY PROPERTY DAMAGE AND HIGHLIGHTS FACT-SENSITIVE NATURE OF MANIFESTATION DATE

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U.S. Insurance Coverage Alert

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The New Jersey Appellate Division (the "Appellate Division") recently issued a ruling in *Air Master & Cooling Inc., v. Selective Insurance Co. of America* ("*Air Master*") [1] applying the "continuous trigger" theory to third-party construction defect liability claims in which property damage progressively advances. The court also held that the "last pull" for purposes of determining the endpoint of coverage occurs when "the essential nature and scope of the property damage first becomes known, or when one would have sufficient reason to know of it," [2] which is a fact-sensitive inquiry. [3] In doing so, the court declined to adopt the rule that "the last pull of the trigger does not occur until there is some expert or other proof that 'attributes' the property damage to faulty conduct by the insured." [4]

Air Master involved property damage from progressive water infiltration in a multi-unit condominium in Montclair, New Jersey. [5] Air Master & Cooling Inc. ("AMC"), an HVAC subcontractor, was named as a third-party defendant in the construction defect claim [6] ; Plaintiff alleged construction defects caused by the faulty workmanship of AMC and other contractors resulting in property damage. AMC sought defense and indemnity from Selective Insurance Company of America ("Selective"), one of several insurers that had issued commercial general liability policies to AMC over successive policy periods. [7] Selective's policy provided coverage for damage during the policy period of June 22, 2009 through June 22, 2012. [8]

According to a November 4, 2010 news article, some residents began noticing damage as early as 2008. [9] A subsequent comprehensive moisture survey was performed on April 29, 2010, which revealed identified moisture damage on the roof and linked the damage to water infiltration. [11] Selective disclaimed coverage, asserting that it was not responsible for damage that manifested before the beginning of the policy period in 2009. The trial court applied the continuous trigger but agreed with Selective that the property damage manifested before its policy incepted and granted summary judgment in favor of Selective. AMC appealed the ruling. [12]

AMC argued on appeal that "continuous trigger principles should govern third-party liability coverage analysis in construction defect cases that involve progressive property damage." [13] Further, AMC argued that continuous trigger principles "extend coverage to all insurance policies in effect from the time of the insured's work on the

construction project through the time by which it was known, or there was sufficient reason to know, that the manifested property damage was attributable to the insured's work." [14] Accordingly, AMC argued the manifestation date occurred when the 2010 expert study was issued, attributing the property damage to AMC's work. [15]

Selective argued that property damage to the building had already manifested before its policy period commenced. It urged the court to find that the point of manifestation was in 2008, when certain residents reported water infiltration that prompted remedial investigations. [16]

The court first considered whether it should apply the continuous trigger theory, commonly applied in insurance claims that arise from the installation of asbestos-related products. [17] The doctrine holds "all the insurers over that period [from the date of exposure to manifestation are] liable for the continuous development of the [harm]." [18] The result of the theory is that coverage aggregates from the date of first exposure until the "manifestation date" [19] subject to insurance coverage having been available to the policyholder [20] and potential allocation or apportionment between carriers. [21] In holding that the "continuous trigger" theory should apply, the court noted that since the decision in *Owens-Illinois*, an asbestos-related bodily injury and property damage coverage case, [22] case law has extended the continuous trigger theory "beyond the asbestos context to other progressive forms of third-party injuries," [23] including a Supreme Court case that "implicitly approved the use of continuous trigger in a construction defect context." [24] The court further noted that public policy favors applying a continuous trigger approach because many construction defects are not immediately obvious. [25]

The court also considered when "the 'last pull' of that trigger for purposes of ascertaining the temporal end point of a covered occurrence happens" [26] In establishing the "end point" or "last pull" of coverage under a "continuous trigger" theory, the court rejected AMC's "'novel' argument that the end date should be delayed until it first appears that the damage is 'attributable' to the conduct of the specified insured." [27] Moreover, the court stated it was "unwise" because of the difficulty in applying the doctrine in practice due to its fact-dependent nature in requiring a "defendant-specific determination of when each defendant reasonably could have been deemed to be at fault in contributing to the progressive harm." [28] Thus, the court rejected AMC's argument and opted to use a "date of initial manifestation that is common to all parties." [29]

Finally, the Appellate Division addressed the task of identifying the appropriate "last pull" date. [30] The court held the "last pull" occurred when "the essential nature and scope of the property damage first becomes known, or when one would have sufficient reason to know of it." [31] The court defined "essential" as connoting "the revelation of the inherent scope of [the] injury." [32] The court determined that neither the 2010 news article nor the 2010 expert report was dispositive of the manifestation question. [33] Because of the "sparse record" and lack of evidence regarding "persons who have knowledge of what information was known at what times about the building's construction defects," the court remanded the case for further proceedings. [34]

In *Air Master*, the Appellate Division has provided significant guidance to insureds with policies governed by New Jersey law by formally extending the continuous trigger doctrine to claims involving progressive property damage, particularly construction defect claims. Moreover, although the court rejected an analysis determining when the damage became "attributable" to a particular insured, it affirmed the test regarding the "last pull" date common to all parties as a fact-sensitive inquiry into when the essential nature and scope of the property damage becomes known.

[1] ___ N.J. Super ___, Docket No. A-5415-15T3, 2017 WL 4507547 at * 1 (Oct. 10, 2017).

[2] *Id.*

[3] *Id.* at * 10.

[4] *Id.* at * 10.

[5] *Id.* at 1–2.

[6] *Id.*

[7] *Id.* at 2.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 3.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 1.

[17] *Id.* at 3.

[18] *Id.* at 4.

[19] Point in time when an injury or disease first presents or manifests itself.

[20] Under *Owens-Illinois, Inc. v. United Insurance Co.*, 138 N.J. 437 (1994), once insurance for the risk at issue was no longer reasonably available, the end date of the coverage block is the date when coverage became unavailable.

[21] *Air Master*, 2017 WL 4507547 at * 5.

[22] *Owens-Illinois*, 138 N.J. at 454–56.

[23] *Air Master*, 2017 WL 4507547 at * 5.

[24] *Id.* at 6 (citing *Potomac Ins. Co. v. PMA Ins. Co.*, 215 N.J. 409, 422 (2013)).

[25] *Id.* at 6.

[26] *Id.* at 1.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 8.

[31] *Id.* at 1.

[32] *Id.* at 9.

[33] *Id.* at 10.

[34] *Id.*

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