

New Jersey Appellate Division Holds That A Continuous-Trigger Theory Applies To Claims For Third-Party Progressive Property Damage In Construction Defect Cases And Manifestation Of Progressive Property Damage For Third-Party Liability Claims Under A CGL Policy Occurs When The Inherent Nature And Scope Of The Injury Is Revealed

The New Jersey Appellate Division's published decision in *Air Master & Cooling, Inc. v. Selective Insurance Co. of America*, A-5415-15T3 (App. Div. Oct. 10, 2017), made two significant holdings regarding the application of commercial general liability ("CGL") coverage in construction defect cases involving progressive property damage caused by an insured's allegedly defective construction work. First, the Appellate Division held that a "continuous trigger" theory of insurance coverage "may be applied in this State to third-party liability claims involving progressive damage to property caused by an insured's allegedly defective construction work." Second, it held "that the 'last pull' of that trigger – for purpose of ascertaining the temporal point of a covered occurrence – happens 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, a subcontractor in the construction of a seven-story, one hundred-one-unit, condominium building, was insured by Penn National Insurance Company from June 22, 2004, through June 22, 2009; by Selective from June 22, 2009, through June 22, 2012; and by Harleysville Insurance Company from June 22, 2012, through June 22, 2015. Selective disclaimed coverage, arguing that the property damage had already manifested before its first policy incepted. The motion judge held the continuous trigger of coverage applied, but granted Selective summary judgment because the damage to the building had manifested before the initial Selective policy period began in June 2009. On appeal, *Air Master* argued that the Appellate Division should recognize that the continuous-trigger principles apply in construction defect cases and that the continuous-trigger principles extend coverage to all policies in effect from the time of the insured's work on the construction project through the time by which there was sufficient reason to know that the property damage was attributable to the insured's work.

The Appellate Division held that the continuous-trigger coverage principles do apply in a construction defect case. The continuous-trigger doctrine "was fashioned to address the difficulties of establishing with scientific certainty when the harmful effects of a progressive disease or injury have occurred" and construction defects that involve water infiltration or mold are the types of damage that support the application of the continuous-trigger doctrine. The Appellate Division rejected *Air Master's* argument that manifestation does not occur until the damage is attributable to the conduct of a specific insured. It adopted the holding of *Winding Hills Condominium Association, Inc. v. North American Specialty Insurance Co.*, 332 N.J. Super. 85 (App. Div. 2000), that a 1991 report "delineating the 'essential' nature of the harm – and not its initial discovery that preceded it in 1989-90 – was the appropriate trigger date to use for coverage analysis." Because *Winding Hills* did not define the word "essential," the Appellate Division held that "we regard the term to connote the revelation of the inherent nature and scope of that injury." Because of the "sparse record" before it, the Appellate Division determined there was insufficient information to resolve the manifestation question and remanded for further proceedings.

Notably absent from the decision is any discussion by the Appellate Division as to what constitutes "exposure" in the context of a construction defect case and what constitutes the "continuous trigger" period. When the "continuous-trigger" coverage period begins and when it ends will likely be a fact-sensitive determination in construction defect cases.

Should you have any questions, please feel free to contact Kevin E. Wolff, Esq., or Vincent E. Reilly, Esq.



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