

Commentary

If A Tree Falls In The Forest And The Insured Doesn't Hear It, Does It Cause 'Property Damage'?

By
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I. Introduction

Events relating to claims under occurrence-based liability insurance policies sometime span several years. Which policies must respond to the claims?¹ Those versed in coverage issues might pose the question a little differently, and ask which policies have been "triggered." It is a simple exercise to stake along a timeline events relevant to the inquiry. The earliest point would be the date when the injured person or property first contacted the damage-causing instrumentality. The latest relevant point should be when the damage became discoverable. In the parlance, the outer bounds are referred to an "exposure" and "manifestation." The significance ascribed to events falling between the endpoints depends on the trigger theory that applies. Some or all of the policies in force between exposure and manifestation may be obligated to respond.

The thesis of this article is that, regardless of the governing trigger theory, no policies incepting after initial manifestation of damage or injury should be held applicable. If there is to be congruity between the treatment of instantaneous damage claims and insidious damage claims, the trigger endpoint should be unaffected by continued progression, or even intensification, of injury after it initially became ap-

parent. Similarly, the coverage cutoff should not be deferred by the insured's ignorance of the damage at the time it initially manifests. Many courts have at least paid lip service to the proposition that the trigger period ends upon manifestation, *i.e.*, when a loss becomes discoverable by a reasonable person. In practice, however, the application of this seemingly straightforward proposition has generated a crazy quilt of results.

Issues relating to trigger are rather difficult to address in the abstract. Following the example of several courts, the article employs a hypothetical fact pattern to provide a context for consideration of legal issues.

On New Years Eve 1994, somewhere in the Sierra Nevada Mountains, Tall Timber Co. is felling giant redwoods near where its property borders a campground dotted with cabins. At noon, the foreman receives a call with some unexpected, happy news: the company is closing early for the holiday and dismissing all employees at 1 pm. In the excitement, one of the crews forgets that before lunch, it had cut 50% of the way through an enormous tree. The crew leaves without taking further action. At the commencement of 1995 operations, mistakenly believing that all work in the area had been completed, Tall Timber assigns the loggers to another part of its expansive property. Because the giant redwood's trunk had been partially severed, it begins to decay but man-

ages to remain upright for 18 months when, on July 30, 1995, it is finally toppled by a twenty-year windstorm. Unfortunately, the falling tree smashes a cabin. The impact alone wreaks considerable damage, but also exposes the interior of the cabin to the elements. Over the ensuing months, further damage is done by water penetration and vermin infestation. Due to the heavy logging activity in the first few years of the 21st century, the campsite is nearly dormant from 1993 to 1995. Had any diehard hikers traversed the trail adjacent to the cabin, the damage would have been obvious. The owner of the cabin, however, doesn't trek up to his wooded retreat until Thanksgiving 1996 and then discovers the damage. Amidst the rubble, he locates a damaged clock that fixes the exact time of the incident. Distraught over the loss of sentimental items and unaware of whether the tree was on his property or Tall Timber's, the owner undertakes no investigation and does not immediately notify Tall Timber. Upon review of his property survey and examination of the tree in the summer of 1997, the owner discovers that it had been on Tall Timber's property and, to boot, was partially cut sometime before it came crashing down. He notifies Tall Timber in the summer of 1997 and institutes suit against the company on October 1, 1998. Tall Timber does not accept liability, mistakenly believing the accident was solely attributable to an Act of God. At trial on November 1, 1999, one of the loggers offers a truthful and apologetic account of the events of December 31, 1994. That day, the jury renders a negligence verdict against Tall Timber. The cabin owner elects to rebuild the cabin and construction is completed by August 1, 2000. Tall Timber maintained occurrence-based liability insurance over the entire relevant period in the form of one year policies with anniversary dates of January 1.

What is the last policy that must respond to the loss? The answer is quite straightforward and most of the information in the hypothetical is extraneous. Regardless of the applicable trigger theory, no policy incepting after July 30, 2005 (the date the tree falls

onto the cabin and causes significant damage).² In analogous circumstances, however, injured parties, policyholders and even insurers have made arguments aimed at widening the swath of coverage beyond the date initial damage became observable. Such arguments have met with surprising success. Within the case law, one may find support for deferring the manifestation point: (1) until the progression of damages ceased;³ (2) until the claimant learned of the damage;⁴ (3) until the insured learned of the initial damage;⁵ (4) until the insured learned of the full extent of damage;⁶ (5) until the insured's legal liability for the damage was adjudicated and quantified;⁷ (6) until the damage was remediated.⁸

Correct legal resolution of trigger issues involves no heavy lifting. In Huntzinger v. Hastings Mutual Ins. Co., 143 F.3d 302, 315 (7th Cir. 1998), the 7th Circuit perfunctorily performed the correct analysis in the context of an environmental pollution claim, and commented on its simplicity, noting that the exposure and manifestation dates are not "terribly difficult to ascertain." At the opposite end of the spectrum is United States Liability Ins. Co. v. Selman, 70 F.3d 688 (1st Cir. 1995). There, the insurer argued that no policy incepting after manifestation of progressive bodily injury attendant to lead poisoning should be triggered. The court mockingly referred to the "post-manifestation doctrine" as having "little in the way of a pedigree." Id. at 689.⁹

There are a number of decisions reaching results in between Huntzinger's matter-of-fact enforcement of the "post-manifestation doctrine" and Selman's disdainful rejection of it. Even more confounding than the divergence among the cases is the internal inconsistency of some decisions.¹⁰ Within a single opinion, some courts have espoused varying positions (i.e., at one point, indicating that manifestation occurs when the claimant discovers the harm, and, at another point, noting that it coincides with the insured's discovery of the damage). Puzzlingly, the need to fix a precise manifestation date appears to be lost on those courts.¹¹

II. The Continued Progression Of Harm Does Not Extend The Trigger Period

In insidious injury cases, many courts have misapprehended the significance of continued progression of damage after initial manifestation. There has been

no such confusion in instantaneous injury cases. As the New Jersey Supreme Court has stated:

. . . [C]onsider the simple case of an automobile accident in 1994 with a definite prognosis that an injured occupant's spine will deteriorate in 1996 resulting eventually in paralysis. The policy in effect in 1994 must indemnify for all damages attributable to the 1994 accident even though the full extent of the damages or the injury will not take place until a future date.¹²

The view that the continuing damage has no bearing on trigger analysis on instantaneous injury claims is nearly universally-held. There is simply no basis for treating insidious damage claims any differently. Insidious progression of harm arguably does inflict injury or damage before the harm becomes observable. There is nothing irrational about construing the phrases "bodily injury" or "property damage" to include the latent harm. The result of course is the triggering of pre-manifestation policies (*i.e.*, looking from the point of manifestation back in time to determine when injury or damage began). The insidious nature of the harm, however, does not in any way justify imposition of liability on post-manifestation insurers. The key distinction between insidious injury cases and instantaneous injury cases is the latency between contact with an injurious substance or agent and manifestation of harm. Once the harm becomes discoverable, the differences cease to exist and the claims should be treated identically.¹³

Sometimes, however, the evolution of damages would be more accurately described as a metamorphosis. For example, in the "Tall Timber" hypothetical, the initial damage was essentially structural. The subsequent damage (water penetration, etc.) differed in kind but it was directly linked to the initial impact. Where such a nexus exists, the date of initial damage should be controlling. The inquiry may be taken one step farther. Referring again to the Tall Timber hypothetical, suppose that, in sifting through the damage, the cabin owner is exposed to toxic mold attributable to the water penetration. On the bodily injury claim, the victim's "exposure" to mold and manifestation of injury postdated expiration of the "impact" policy. The link between the injury and the impact, however, remains direct. Thus, the policy in

force at the time of impact should cover the bodily injury claim.¹⁴

Some courts have concluded that the mere presence of asbestos in buildings represents property damage and suggested that policies in force between the date of installation and the date of abatement would be triggered. The conclusion is open to attack on multiple grounds. First, it suggests that if the costs of required remediation exceed available coverage limits, the policyholder can defer the abatement and purchase additional coverage, plainly an absurd result. Second, it highlights the starkness of the unprincipled disconnect between trigger analysis on instantaneous and insidious harm claims. If the introduction of toxins was attributable to an explosion, then their lingering presence would not trigger multiple policies. The absence of a catastrophic event should not alter the analysis. Third, as recognized by authorities cited above, the worsening of an injury does not extend the trigger period. If the progression of harm is not conceptualized as causing new or separate damage, the continuing presence of an essentially static condition merits the same treatment.¹⁵

III. The Insured's Ignorance Of The Harm Is Irrelevant

Insurers are notorious for their litanies of affirmative defenses to declaratory judgment claims. When of the view that a loss was a *fait accompli* before the relevant policy incepted, insurers are likely to simultaneously argue that their policy was not "triggered" and that coverage is barred by one of the many formulations of the fortuity principle. As a leading commentator has explained:

The known loss/loss-in progress doctrine . . . protects an insurer against having to cover risks known to the insured prior to obtaining insurance and from continuing losses that commenced before the date of the policy. A known loss is present when an insured knows or has reason to know, when it purchases a CGL policy, that there is a substantial probability that it will suffer or has already suffered a loss for which it seeks coverage. Coverage for known losses is denied because once a loss becomes known, the insured's risk of loss ceases to be contingent, and becomes a certainty; and when insur-

ance policies are misused to protect insured against certainties, fraud results.

7A Appleman on Insurance Law and Practice, 1st ed., §4528 (Matthew Bender 2005). Because the trigger and known loss doctrines share a chronographic element, many courts have allowed key distinctions to blur. The geneses and goals of the respective doctrines, however, are completely distinct.

The trigger analysis should be purely temporal.¹⁶ The sole object is to assign losses to the correct policy periods. The inquiry requires no consideration of whether the claim is otherwise within the scope of coverage (*i.e.*, no determination regarding whether the claim falls within the insuring agreement or whether any exclusions or coverage-limiting conditions apply.) Trigger analysis certainly requires no normative considerations or moral evaluation. It is a dispassionate exercise in attempting to place square pegs (insidious injury claims) into round holes (occurrence policies).

Known loss doctrine is a horse of an entirely different color. Known loss doctrine offers insurers a public-policy based defense to fraudulent conduct by insureds. Because scienter is an element of fraud, it is perfectly appropriate that the central consideration be the insured's pre-policy knowledge of the loss. One commentator has offered views regarding the interplay between trigger analysis and known loss doctrine.

. . . the concept of fortuity should be defined in relation to the policy which insures the risk. The continuous trigger can only be conceptualized as violating the fortuity doctrine when the trigger mechanism is misidentified as the manifestation of damage rather than the insured's knowledge of liability. Comprehensive General Liability policies do not insure damage as such; rather they insure a party's potential liability for damage or loss. Thus, defining a known loss in relation to a third party's knowledge of the loss rather than the insured's knowledge of liability divorces the implementation of the policy from its goals and express policy language. Liability insurance may involve three parties, but only the insured and the insurer

are parties to the contract. When property damage occurs over successive policy periods, triggering all policies on the risk through the insured's actual notice of liability is appropriate and does not violate fortuity doctrine.

Note, Triggering Coverage of Progressive Property Loss: Preserving the Distinctions Between First- and Third-Party Insurance Policies, 35 Wm. and Mary L.Rev. 1801 (Summer 1994).

The implicit point of the commentary is that trigger analysis and known loss doctrine should be harmonized so as to achieve consistent results. The dissonance of results, however, is not at all surprising. Distilled to its essence, trigger analysis attempts to define "property damage" and "bodily injury" in the context of progressive harm. Known loss doctrine provides a basis for voiding coverage when the insured attempts to foist upon an insurer liability antedating the effective date of the policy. If the two tests are applied to a given claim, one should expect, and be willing to tolerate, inconsistent outcomes. The Tall Timber hypothetical is illustrative. It is true that, in most cases, proper trigger analysis will render known loss doctrine moot (except in the rare event an insured is chargeable with knowledge of insidious harm before it becomes discoverable, *e.g.*, surreptitious dumping of wastes into an unlined pit, marketing of products with known carcinogenic ingredients). In such cases, coverage likely would be barred on other grounds (*e.g.*, absence of "occurrence", "expected or intended" exclusion). In any event, there is no need to manipulate a temporal matching exercise so it produces results identical to those generated by an anti-fraud test. Logical consistency and predictability of outcomes are worthwhile goals. The objects of the synchronization, however, should not be trigger and known loss doctrines. What should be unified are the criteria under which insidious and instantaneous harm claims are assigned to insurance policy periods.

Another commentator has opined:

Many progressive losses emanating from mass exposure torts are inevitable and potentially knowable. Cracks in the wall may disclose natural aging, defective construction, or earth movement. Offensive odors may suggest a contamination problem. Absenteeism

may precede worker injury. To suggest, however, that the knowledge of some harm deprives the policyholder of the opportunity to insure against loss assigns to the policyholder degrees of omniscience beyond the pale of mere mortals. On the other hand, to impose a subjective test (knew) rather than an objective test (should have known), encourages the policyholder to either be ignorant or believe it was ignorant of the specific and actual perils and risks which the policyholder now wants the carrier to assume. Since a little knowledge may be a dangerous thing — resulting in the loss of coverage because further investigation would have disclosed the loss or near certainty of loss — ignorance is bliss. A principle that rewards ostrich-like behavior on the ground that the goal is to maximize coverage ignores the benefits of loss prevention that would accrue if policyholders were encouraged to abate loss engendering activities because the specific risk is not insurable, at least absent a more complete disclosure to the carrier. Loss prevention is surely as important a goal as loss compensation.

J. Fischer, 45 *Drake L.Rev.* at 684-684. The above commentary, while thoughtful, appears to be premised on the faulty assumption that a rigorous trigger analysis may result in a complete deprivation of coverage. In most situations, however, trigger analysis operates to assign a loss to one or more policies in a temporal block. No matter the outcome, at least one policy will be triggered. For reasonably conscientious policyholders who have maintained uninterrupted coverage, the temporal assignment does not portend an all-or-nothing outcome. If, on the other hand, an insured did choose to “go bare” during certain time periods, there is nothing inequitable about imposing financial consequences attendant to the election.¹⁷

One may tweak the *Owens-Illinois* auto accident hypothetical and posit that 23 months after the accident, defective work by a repair shop is determined to be the cause and, shortly thereafter, the allegedly-negligent garage is notified of the accident. Until the moment of notification, the liability was, from the garage's perspective, fortuitous and certainly not a known loss. No one would even suggest, however, that there has been a triggering of garage policies

incepting after the accident but before the insured garage learned of it. The responding policy is determined by the date of when damage took place. The date when the insured learned of the incident is utterly irrelevant. To even argue otherwise would be pure folly. Why should the insured's ignorance be of any moment in the context of an insidious injury claim? The answer is that it should not.

IV. Enforcing The Bargain Embodied By Occurrence Policies

The now-prevalent “claims made” form of liability policies reflects an entirely different allocation of risk than contemplated by occurrence policies.¹⁸ As the name implies, claims made policies provide coverage of claims first made against the insured during the policy period. Issuers of such policies assume coverage of damage that antedated policy inception (provided the damage occurred after a specified retroactive date). Underwriters of occurrence policies do not assume such risks. Occurrence policies make clear that, to be covered, the “property damage” or “bodily injury” must take place during the policy period.¹⁹

Like modern claims-made policies, some historical first-party policies, particularly those insuring maritime risks, assumed liability for damages predating the issuance date. In assessing trigger issues relating to occurrence policies, some courts have mistakenly relied on decisions based on the first-party policies.

A couple of courts have made the following observation: “Considerable precedent supports the notion that a loss which has already occurred may be insured against at the time the insurance contract is entered into.”²⁰ The statement is traceable to some 19th century United States Supreme Court decisions that, upon close examination, plainly have no application to modern liability coverage analysis. As authority for its observation, the Sixth Circuit cited *United States v. Patryas*, 303 U.S. 341 (1938). The relevant *Patryas* passage states:

No legal obstacle prevents parties, if they so desire, from entering contracts of insurance to protect against loss that may possibly have already occurred. Marine insurance and antedated fire insurance policies frequently afford protection against risks which, unknown to the parties, have already attached.²¹

Patryas cited a handful of cases, including General Interest Ins. Co. v. Ruggles, 25 U.S. 408 (1827). In Ruggles, a marine insurance policy covering “the sloop Harriet” was issued on February 9, 1824, but it provided coverage retroactive to January 12, 1824. The ship was wrecked on January 19, 1824 (approximately three weeks before the policy was issued, but one week after the effective date). The court held that the coverage existed provided that the policyholder was unaware of the loss at the time the insurance contract was issued. The backdating of the effective date reflects a bargained-for allocation of risk of losses predating the issuance date. Companies issuing modern occurrence policies assume no such risks. To the contrary, all standard occurrence policies unambiguously state that the property damage or bodily injury must take place during the policy period.

In Ruggles, the loss was not gradual and did not straddle multiple policy periods. Essentially, the only issue was whether the loss was known at the time the policy was issued. A more apt analogy, in keeping with the maritime theme, would be a ship running aground and springing a leak hours before expiration of a policy and sinking on the effective date of a successive policy. If the shipping company had procured occurrence-based coverage and were sued for damage to cargo, all of the loss should be borne by the initial carrier because the initial damage predated inception of the second policy.

V. The Key Question Is When The Injury Or Damage Became Reasonably Discoverable

A large number of courts have embraced the proposition that manifestation occurs when the harm for which recovery is eventually sought becomes reasonably observable.²² Far fewer, however, have heeded and applied it.

In third-party liability insurance disputes, defining the relevant “loss” or insured event is crucial to determining the outcome of the litigation. Is the “loss” that must be known to preclude coverage the imposition of a judgment of liability, the notification by an administrative agency of potential responsibility, the fact that pollutants have migrated and caused damage to another’s property, or simply the underlying release of pollutants on the insured’s property?

Note, The Cost of Knowledge: Making Sense of “Nonfortuity” Defenses in Environmental Liability Insurance Coverage Disputes, 84 Va.L.Rev. 107 (Feb. 1998).

If insidious injury trigger analysis is to be faithful to instantaneous injury analysis, the potential viability of factual or legal liability defenses should be immaterial. To again tinker with the Owens-Illinois automobile hypothetical, assume the existence of a factual dispute regarding whether the graver injuries were caused by the accident or some other condition or events. Such wrangling would have no bearing on which of the driver’s policies would respond. Nor would a dispute over whether legal liability exists. The insured driver, for example, may resist liability and attempt to shift blame to the claimant or to another defendant. That, too, would be of no moment in the coverage analysis. Sorting out the factual and legal disputes may take some time but that pendency of such issues clearly does not affect temporal assignment of coverage. The same should hold true on insidious injury claims.²³

VI. Conclusion

The case law offers no compelling justifications for the pervasive inconsistency between trigger analysis in insidious injury cases and instantaneous injury cases. Absent a legitimate basis for differential treatment, the temporal assignment of both categories of claims should be guided by similar considerations. Factors like continued progression of harm and the insured’s unawareness of the harm have no bearing on coverage of instantaneous injury claims. For that reason, the factors should not weigh in trigger analysis in insidious damage claims. Implicit in the formulation of trigger analysis is an effort at coverage maximization.²⁴ For reasons beyond the scope of this article, it is quite remarkable that, for a single loss, a policyholder may have access to coverage exceeding the maximum annual limits of any policy it purchased.^{25 26} Different jurisdictions have cited varying justifications and taken differing routes to derive that result. The outcomes clearly signify the placement of the proverbial judicial thumb on the insured’s side of the scales. Result-orientedness should not tip the balance any further in favor of the policyholders through gratuitous injection into the trigger analysis of considerations that serve to unjustifiably manufacture coverage of an antecedent loss.

Endnotes

1. The typical general liability provides coverage of certain claims for "property damage" or "bodily injury" resulting from an "occurrence" which is defined as an "accident, including repeated or continuous exposure to substantially the same general harmful conditions." The policy only applies to "property damage" or "bodily injury" that takes place "during the policy period." In the vast majority of claims, there is near contemporaneity of exposure to a harm-causing agent (e.g., a negligently-driven automobile, an exploding boiler, etc.) and the manifestation of harm. For ease of reference, the article describes such claims as "instantaneous injury" claims. In the context of such claims, it is easy to identify the applicable occurrence-based insurance policy, as numerous cases have so observed.

On some claims, however, there is considerable delay between exposure to the damaging agent and the suffering of injury. The most oft-cited examples are asbestos-related bodily injury and leaching of hazardous substances into the environment. Exposure to such toxins is generally regarding as causing immediate but imperceptible insult to person or property and setting in motion an insidious injury process. There is, however, typically a considerable delay between exposure to the toxin and manifestation of harm. The article describes such claims as "insidious injury" claims.
2. The 1995 policy is probably the only one that would be actuated. Though the events evolved slowly, there was no contact between the cabin and the decaying tree until the moment of impact. Thus, there was no true exposure period. Armotek-Industries, Inc. v. Employers Ins. Co. of Wausau, 952 F.2d 756, 763 (3d Cir. 1991) ("[B]oth 'exposure' and 'manifestation' occurred at the time of the spill, before the policies took effect."); Prolerized Schiabo Neu Co. v. Hartford Accident & Indemnity Co., 990 F.Supp. 356 (D.N.J. 1997); Wellbrock v. Assurance Co. of America, 951 P.2d 367 (Wash.App.) review denied, 966 P.2d 902 (Wash. 1998). In some situations, it is possible that, despite an absence of pre-policy contact with the harm-causing instrumentality, coverage could be barred by the loss-in-progress doctrine. See text *infra* note 17. The most oft-cited example is a homeowner's policy incepting as rising floodwaters threaten the covered property.
3. See, e.g., Stonehenge Engineering Corp. v. Employers Ins. Co. of Wausau, 201 F.3d 296, 304 (4th Cir. 2000) (interpreting South Carolina case law as not even "suggesting that the trigger period for coverage under a commercial general liability policy ends upon discovery of the property damage, rather than continuing as long as the progressive damage continues to occur").
4. See, e.g., Benjamin Moore & Co. v. Aetna Casualty & Surety Co., 179 N.J. 87, 98 n.5 (2004) ("[M]anifestation" is "the point at which the disease shows itself."); Quincy Mutual Ins. Co. v. Borough of Bellmawr, 172 N.J. 409, 417 (2002) ("[M]anifestation" is "when the injury becomes reasonably apparent or known to the claimant."); J.H. France Refractories v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993); Textron v. Aetna Cas. & Surety Co., 723 A.2d 1138 (R.I. 1999).
5. See, e.g., Stonewall Ins. Co. v. Asbestos Claims Mgt. Corp., 73 F.3d 1178, 1215 (2d Cir. 1995), modified on other grounds, 85 F.3d 49 (2d Cir. 1996); Jackson v. State Farm Fire & Casualty Co., 835 P.2d 786 (Nev. 1992) ("Manifestation of loss is defined as that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered.").
6. See, e.g., American Family Mutual Ins. Co. v. American Girl, Inc., 673 N.W.2d 65, 86 (Wisc. 2004).
7. See, e.g., Montrose Chemical Corp. v. Admiral Ins. Co., 913 P.2d 878 (Cal. 1995).
8. See, e.g., Lac D'Amante du Quebec v. American Home Assurance Co., 613 F.Supp. 1549 (D.N.J. 1985); Mayor and City Council of Baltimore v. Utica Mutual Ins. Co., 802 A.2d 1070, 1099 (Md. App. 2002) ("Because we conclude that the damage resulting from the presence of [asbestos-containing building materials] may persist until removal, we disagree with the insurer's denial of coverage based on the argument that no policy on the risk after manifestation is obligated to indemnify.").
9. In Selman, there was a significant twist. After initial manifestation of cognitive problems, the plaintiff continued to ingest lead. Thus, there was an overlap

between exposure and manifestation. That factor appears to distinguish the case from many progressive injury cases and may explain the court's harsh comments. In cases involving overlap between exposure and manifestation, the tidy single timeline model would not apply. To achieve equitable coverage result, there would need to be some parsing of the liability award or settlement, and perhaps contrived efforts to define multiple manifestations of what otherwise would be regarded as a single injury.

10. Montrose is among the decisions sending mixed messages. The court appeared to embrace "the settled rule that an insurer on the risk when continuous or progressively deteriorating injury or damage first manifests itself remains obligated to indemnify the insured for the entirety of the ensuing damage or injury." 913 P.2d at 901. Though not expressed in so many words, the implication is that post-manifestation insurers should be absolved of liability. Later, however, under the rubric of the "loss-progress rule," the court declared: "Where, as here, there is uncertainty about the imposition of liability and no "legal obligation to pay yet established, there is an insurable risk for which coverage may be sought under a third party policy." Id.
11. In Owens-Illinois, the court fully grasped the significance of fixing a manifestation date but expressly refrained from establishing one. The Owens-Illinois declaratory action arose out of asbestos bodily injury claims. The court applied a continuous trigger, deeming implicated all policies in effect from exposure to manifestation. The court ruled that the claim gave rise to "an occurrence" in each policy year. The conclusion is somewhat difficult to reconcile with the "cause" theory which the court has adopted to determine the number of occurrences. Under that theory, multiple claims spawned by a single cause are regarded as one occurrence. The positing of "an" occurrence in each affected year has an artificial ring to it. One could defend the characterization of all claims as a single occurrence or each claim constituting a separate occurrence but it is difficult to discern a basis for the in-between view adopted by the court. It did serve as the foundation for the decision in Benjamin Moore & Co. v. Aetna Casualty & Surety Co., 179 N.J. 87 (2004). The court held that, on a long-tail claim implicating many policies,
- the court must exhaust the deductible under each triggered policy, without pro-ration.
12. Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 466; 650 A.2d 974, 988-89 (1994); The relevance of the "definite prognosis" is unclear. The touchstone is the directness of the causal relationship between the accident and the injuries, regardless of whether they were predictable in 1994. See also, Keene Corp. v. Insurance Co. of N. America, 667 F.2d 1034, 1046 (D.C. Cir. 1981) (embracing "the principle that when it becomes known that an occurrence has set in motion a process that has a significant probability of resulting in a covered loss, the insurer on the risk at that time is liable for the full loss. It does not matter whether the insurer learns of a progressing loss through direct observation . . . or through statistical inference, as in asbestos-injury cases."); Great Lakes Dredge & Dock Co. v. City of Chicago, 260 F.3d 789, 802 (7th Cir. 2001) (Cudahy, J. dissenting); Bostick v. ITT Hartford Gp., 56 F.Supp.2d 580, 585 (E.D. Pa. 2004); St. Leger v. American Fire & Casualty Ins. Co., 870 F.Supp. 641, 642 (E.D.Pa. 1994) ("Occurrence policies do not cover injuries which manifest themselves before the inception of the policy.") aff'd 61 F.3d 896 (3d Cir. 1995) (citing Appalachian Ins. Co. v. Liberty Mutual Ins. Co., 676 F.2d 56 (3d Cir. 1982)); U.S. Fidelity & Guaranty Co. v. American Ins. Co., 345 N.E.2d 267 (Ind. App. 1976); In re. Silicone Implant Insurance Coverage Litigation, 667 N.W.2d 405, 421 (Minn. 2003); ("[W]hen there is a continuing injury that 'arises from discrete and identifiable events, then the actual-injury trigger theory allows those policies on the risk at the point of initial contamination to pay for all property damage that follows.'") (citations omitted); Gaston County Dying Machine Co. v. Northfield Ins. Co., 524 S.E.2d 558, 565 (N.C. 2000) ("In this case, the rupture of the pressure vessel caused all of the ensuing property damage, even though the damage continued over time, contaminating multiple dye lots and extending over two policy periods. Therefore, when, as in this case, the accident that caused an injury-in-fact occurs on a date certain and all subsequent damages flowing from the single event, there is but a single occurrence and only policies on the risk of the date of the injury-causing event are triggered."); Westfield Ins. Co. v. Milwaukee Ins. Co., 2005 Ohio App. LEXIS 4255 (Sept. 12, 2005)("[I]n a situation where damage

- manifests itself immediately and continues unabated into a successive carrier's coverage period, all insurers subsequent to the date the damage becomes known are absolved of any liability."); (citing Cleveland Bd. of Educ. v. R.J. Stickle Intl., 602 N.E.2d 353 (Ohio 1991)); J.Fischer, Insurance Coverage for Mass Exposure Tort Claims: The Debate Over the Appropriate Trigger Rule, 45 Drake L.Rev. 625, 626, n.3 (1997) (discussing the "process of nature rule", stating "if rabies developed from a dog bite or gangrene from a wound, the injury and complications would be deemed to have occurred, for insurance coverage purposes, at the same time the bite or the wound was inflicted on the claimant. In such case, the carrier would be responsible, up to policy limits, for the full claim, including the aggravated injuries."); Note, Insurance Triggers as Judicial Gatekeepers in Toxic Mold Litigation, 57 Vand. L. Rev. 241, 264 (Jan. 2004) ("Under the manifestation rule, a claim that is discoverable or becomes apparent during a policy period will trigger that policy. Because injury or damage can only be discovered once, only the insurance policy in force at that time will provide coverage. In the case of disease resulting from exposure to a substance such as asbestos or toxic mold, the date of manifestation that triggers the policy coverage is determined when the claimant has knowledge, actual or constructive, of the disease, or when the disease is diagnosed, whichever happens first. In the context of a property damage claim, the manifestation theory is often referred to as a 'first discovery' rule.") (citations omitted). A. Windt, Insurance Claims and Disputes, 4th ed. §11:4 (West 2001).
13. J.Fischer, 45 Drake L.Rev. at 667 ("Liability carriers provide coverage in temporal increments. Once a policy is triggered, it is responsible for the loss. There is a correlation that must be recognized: when a loss occurs within a policy period, the whole loss should be attributed to the carrier whose policy covers the period when the loss was first sustained. Indeed, it is rather inexplicable that a system of loss allocation that has been recognized as workable and fair in the field of Remedies has been devalued without explanation, much less justification, when an insurance policy is called upon to respond to the damages awarded under the Law of Remedies. Rather than a mismatch of remedy and accompanying insurance coverage, one would expect a match, or at least a reasoned explanation for the nonmatch.").
14. In Chemstar, Inc. v. Liberty Mutual Ins. Co., 41 F.3d 429 (9th Cir. 1994), a pre-Montrose declaratory action applying California law and arising from a construction defect claim involving plaster pitting at 28 homes, the court found "there was one occurrence and that the insurer on the risk at the time of the first manifestation of pitting damage was liable for pitting at all 28 homes." From the decision, it is not clear whether manifestation of harm at the first home might have predated the installation of plaster at other homes; see also Appalachian Ins. Co., 676 F.2d at 62-63; Lennar Corp. v. Great American Ins. Co., 2005 Tex.App. LEXIS 4214 (June 2, 2005) (holding that EIFS damage on various homes constituted separate occurrences and that, if insured received EIFS complaint regarding a particular home before policy inception, coverage of corresponding homeowner's claim is barred by known loss or loss in progress doctrine); Sunoco, Inc. v. Illinois National Ins. Co., 2005 U.S. Dist. LEXIS 18407 (E.D.Pa. July 27, 2005) (adopting "cause" theory for determining number of occurrences but "effect" theory for identifying when occurrence took place.).
15. This is particularly true if the damages sought are for the cost of remediation. If so, then any deterioration of the asbestos over time would not augment the damage award and, thus, should not affect coverage determination. Riley v. United Services Auto Ass'n, 871 A.2d 599, 608 (Md. App. 2005) ("For our hypothetical, assume, arguendo, that the injuries complained of involved only one child, and further, that the injury was the loss of a limb for which [the insured] was held liable. Obviously, despite the continuing, permanent nature of the injury (the limb remains lost during subsequent policy periods), the only policy triggered would be the one in force at the moment of the injury; subsequent insurance policies would not be triggered.").
16. Quincy Mutual, 172 N.J. at 416 ("[T]he trigger concept is not designed to determine coverage; rather, it acts as a gatekeeper, matching particular claims with particular periods of time and hence particular insurance policies.").
17. Owens-Illinois, 138 N.J. at 473 ("To send the correct signals to the economic system, a judge must

- appreciate the consequences of legal decisions on future behavior. Future actors [should] know that if they do not transfer to insurance companies the risk of their activities that cause continuous and progressive injury, they may bear that untransferred risk.”) (citation omitted).
18. Montrose, 913 P.3d at 903. (“Claims made policies were specifically developed to limit an insurer’s risk by restricting coverage to the single policy in effect at the time a claim was asserted against the insured, without regard to the timing of damage or injury, thus permitting the carrier to establish reserves without regard to possibilities of inflation, upward-spiraling jury awards or enlargements of tort liability after the policy period.”).
 19. In 1999, the Insurance Services Office, Inc. (“ISO”) responded to Montrose and other decisions. C.Stanovich, Known Injury or Damage (I.R.M.I. Oct. 2003). ISO promulgated a “known injury or damage” endorsement to be added to the 1998 version of the CGL form by endorsement. The 2001 version of the CGL form incorporates the substance of the endorsement. The import of the policy redrafting is that “not only must bodily injury or property damage be caused by an occurrence and take place during the policy period, certain insureds must not know, prior to the policy period, the injury or damage has occurred or is occurring. Such knowledge will eliminate all coverage under the CGL for injury or damage that continues into or resumes during the policy period.” Id.
 20. In Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co., 997 F.2d 172, 176 (6th Cir. 1993), and Great Southwest Fire Ins. Co. v. Watt Industries, Inc., 229 Cal.App.3d 594, 599 (4th Dist. 1991), the respective courts expressed the view verbatim. Curiously, despite employing the same language, neither Inland Waters nor Great Southwest cited to the other decision.
 21. Id. at 345. The facts of Patryas are obviously distinguishable. The court found that a disability insurer was obliged to provide coverage to an injured war veteran even though his injuries predated his purchase of the policy. The court made clear that the outcome was dictated by a statute that was enacted for the benefit of service people.
 22. No party need have actual knowledge of the harm; constructive knowledge should suffice. See American Home Assurance Co. v. Unitramp, Ltd. 146 F.3d 311, 314 (5th Cir. 1998) (noting that, under Texas law, “the time of the occurrence is when ‘the property damage manifests itself or becomes apparent’ and stating “[a]pparent’ like ‘manifest’, means ‘capable of easy perception.’ . . . But it is important to understand that ‘apparent’ does not mean ‘discovered’; just because something is unknown to an individual does not render it, in an objective sense, unapparent. If the plaintiffs . . . purchased a home that was missing a roof — but through sheer indolence failed to discover the defect for a year — we would not say that the defect became ‘apparent’ on that later date.”); Eagle-Picher Industries, Inc. v. Liberty Mutual Ins. Co., 682 F.2d 12 (1st Cir. 1982), cert. denied 460 U.S. 1028 (1983); Dow Chemical Co. v. Associated Indemnity Corp., 724 F.Supp. 474, 481 (E.D. Mich. 1989) (“[T]he policy language does not even hint that property damage must be known to anyone to trigger coverage. Likewise, nothing in the policy language indicates that property damage doesn’t exist until someone knows about it.”) Many cases hold that exposure to a harmful substance triggers coverage even if the insured or claimant is not aware that the exposure is causing harm. To link manifestation to any party’s subjective knowledge would, at minimum, create an obvious asymmetry in the analysis.
 23. American & Foreign Ins. Co. v. Sequatchie Concrete Services, Inc., No. 04-6524 (6th Cir. Feb. 10, 2006) (citing Aetna Casualty & Surety Co. v. Dow Chemical Co., 10 F.Supp.2d 771 (E.D.Mich. 1998) for the proposition that “in the third-party insurance context . . . the alleged property damage that the insured is held responsible for [is] the relevant loss, not the insured’s legal liability arising therefrom.”); Township of Gloucester v. Maryland Casualty Co., 668 F.Supp. 394 (D.N.J. 1987); St. Paul Fire & Marine Ins. Co. v. St. Paul Mercury Ins. Co., 694 N.E.2d 1049 (Ill.App. 1998) (receipt of PRP-type letter cuts off subsequent coverage per known loss doctrine) (citing Outboard Marine Corp. v. Liberty Mutual Ins. Co., 607 N.E.2d 1204 (Ill. 1992); SCA Services, Inc. v. Transportation Insurance Co., 646 N.E.2d 394 (Mass. 1995); Essex Ins. Co. v. Mastercrafters Corp., Civil action no. M-05-315

- (S.D.Tex. Jan. 17, 2006); Overton v. Consolidated Ins. Co., 38 P.3d 322, 326 (Wash. 2002) (“ . . . [T]he issue is whether [the insured] knew of the loss prior to purchasing the insurance . . . [F]or purposes of determining whether property damage is expected by the insured, the insured merely must be put on notice.”).
24. Quincy Mutual, 172 N.J. at 434 (“[W]e adopted the continuous trigger theory . . . in large part to maximize coverage.”).
25. See e.g., Sybron Transition Corp. v. Security Ins. of Hartford, 258 F.3d 595, 602 (7th Cir. 2001) (citing absence of justification for “treating one loss as more than one occurrence and requiring insurers individually (or in the aggregate) to pay more than the occurrence limit of their policies.”).
26. Benjamin Moore, 179 N.J. at 110 (“Justice does not guarantee insurance coverage in every case. It guarantees that the insurance bargain will be honored and that there will be an impartial resolution of conflicting claims based, not on whim or emotion, but on established legal principles.”); Owens-Illinois, 138 N.J. at 452 (“A rule of law premised on nothing more than the result-oriented goal of maximizing coverage has been described as ‘judicial legislation.’ A more consistent principle is required.”) (citations omitted). ■