

Trigger Theories and the CGL

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Things are just not that simple. But maybe they are not that complicated, either. In any case, focusing on the fundamentals usually helps—particularly when attempting to understand how insurance coverage works.

by **Craig F. Stanovich**
Austin & Stanovich Risk Managers, LLC

Take, for example, what seems to be a fairly straightforward question—when is an Insurance Services Office, Inc. (ISO), post-1985 commercial general liability (CGL) "occurrence" policy triggered? Presuming "Who cares?" is not your response, look at the CGL and you will see it is *when the bodily injury or property damage occurs*. In other words, if bodily injury or property damage (or both) *does not occur* during the CGL policy period, the CGL insurer has no obligation to respond as the coverage is not "triggered." For more on coverage implications, see [The Hazards of Products and Completed Operations: Understanding the Fundamentals](#) (October 2006).

Trigger of Coverage—A Fundamental Concept

In most cases, determining *when* either bodily injury or property damage has occurred is simple. For instance, a couple of years after I built you a staircase, you were carrying Grandmother's antique vase down the stairs when the railing gave way. You fell and broke your arm, and Grandmother's vase was shattered.

When did the bodily injury and property damage occur? That's obvious: when you fell. There is no need to introduce "trigger theories" to determine that fact. If I am found to have negligently built the railing, and that was the cause of your fall, then I would likely be found liable for your injuries and the damage to the vase. The CGL policy that I have in effect *when you fell* is triggered—the CGL that was in effect 2 years earlier *when I built the railing* is not triggered.

Cumulative Injury or Progressive or Damage

Of course, some types of injury or damage do not happen as described in the above example. In particular, bodily injury caused by toxic substances can happen over time, such as persons who have suffered injury from inhaling asbestos fibers. Property damage also can be progressive or deteriorating, such as damage by pollutants to soil or groundwater. Construction defects often involve water intrusion that gradually causes damage in the form of rot to buildings or other structures. In many of these instances, the injury or damage may not become known for months or even years after it has begun.

Determining when the bodily injury or property damage occurred is anything but simple. Enter the "trigger of coverage theories."

Trigger of Coverage Theories

Courts have reverted to the so-called trigger theories when they cannot pinpoint the date or dates the injury or damage actually took place. The descriptions that follow are not intended as complete descriptions or a legal analysis of the theories¹, but are intended to provide only a basis upon which to raise an overriding question. Do these "trigger theories" change or nullify the fundamental requirement that bodily injury or property damage must occur during the CGL policy period to activate insurers' obligations?

Exposure Theory—All CGL policies are triggered if they are in effect during *exposure* to injurious or harmful conditions. Primarily used in asbestos cases, this theory considers bodily injury to begin when a person was first exposed to asbestos, usually at the first inhalation of asbestos fibers.

Manifestation Theory—The CGL policy is triggered when the injury or damage is discovered or *manifests* itself (or in some cases is capable of being discovered) during the policy period. That the injury or damage may be been occurring prior to discovery may not be taken into account in this theory.

Injury-in-Fact Theory—All CGL policies are triggered if they are in effect during the time the injury or damage is shown to have *actually taken place*, even if the injury or damage continues over time.

Continuous Trigger Theory—All CGL policies are triggered if they are in effect during any of the following times: *exposure* to harmful conditions; *actual* injury or damage; and upon *manifestation* of the injury or damage.

It is very important to recognize that different states follow different theories, and in many occasions, the same state follows a different theory, depending on the type of injury or damage that is being alleged. For example, some courts will follow one trigger theory to determine when bodily injury took place but will follow another trigger theory to determine when property damage took place. In short, it is indeed difficult to state with certainty as to the trigger theory a court will follow in a given situation.

Don's Building Supply, Inc.

The Supreme Court of Texas recently ruled in *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 2008 WL 3991197 (Tex 2008), when property damage was deemed to have occurred in the context of a CGL policy. Don's Building Supply was a seller and distributor of synthetic stucco, exterior insulation finish systems (EIFS), that was installed on various homes over several years. Don's Building Supply was insured by a CGL policy assigned to OneBeacon Insurance² for the years 1993 to 1996.

From 2003 to 2005, the homeowners filed suit against Don's Building, alleging that the EIFS was defective, allowing moisture to seep into wall cavities behind the siding, causing wood rot and other damage. The allegations by the homeowners also stated the moisture intrusion began within 6 months to a year after application of the EIFS and that the damage was hidden from view by the siding and could not have been discovered until well after the OneBeacon policy period had ended.

The trial court found OneBeacon's policy did not apply as the property damage did not occur until it became identifiable; even though the damage was occurring during the OneBeacon policy period, the damage was not *identifiable* until after the OneBeacon policies had expired. Thus, the trial court followed the manifestation trigger theory, relieving OneBeacon of any obligations under its CGL policies as the trial court found no property damage had occurred during the OneBeacon CGL policies.

Don's Building appealed to the U.S. Court of Appeals for the Fifth Circuit, which in turn certified the following question to the Supreme Court of Texas:

When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for the purpose of an occurrence-based commercial general liability policy?

At this point, it is absolutely critical to note that the Fifth Circuit asked *when* the property damage took place, not *if* the CGL policy covers property damage that does occur during the policy period.

The court recited in its ruling the policy provisions of a standard ISO CGL policy and concluded that the CGL policy is meant to be interpreted under the injury-in-fact trigger theory:

Considering these provisions together and reading them for their plain meaning, *we hold that property damage under this policy occurred when actual physical damage to the property occurred. The policy says as much, defining property damage as "[p]hysical injury to tangible property," and explicitly stating that coverage is **available if and only if** "property damage occurs during the policy period."* So in this case, property damage occurred when a home that is the subject of an underlying suit suffered wood rot or other physical damage. *The date that the physical damage is or could have been discovered is irrelevant under the policy.* Many courts agree with the analysis *we adopt today, sometimes called the "actual injury" or "injury-in-fact" approach* [Emphasis added.]

Additionally, the court commented on the manifestation and on the exposure theories in light of the CGL policy wording:

As for the manifestation rule, the rule urged by OneBeacon and followed by most Texas cases to date, *the policy before us simply makes no provision for it. The policy in straightforward wording provides coverage if the property damage "occurs during the policy period," and further provides that property damage means "[p]hysical injury to tangible property."*

Whatever practical advantages a manifestation rule would offer to the insured or the insurer, the controlling policy language does not provide that the insurer's duty is triggered only when the injury manifests itself during the policy term, or that coverage is limited to claims where the damage was discovered or discoverable during the policy period. [Emphasis added.]

Similarly, the *policy's language* does not support adoption of an *exposure rule*, at least not where there is "physical injury to tangible property" as alleged in this case. *Again, the policy provides coverage if the "'property damage' occurs during the policy period." The policy does not state that coverage is available if property is, during the policy period, exposed to a process, event, or substance that later results in bodily injury or physical injury to tangible property.* [Emphasis added.]

The court then explained the challenge of deciding how the coverage is to apply when the exact date of property damage may not be precisely determined:

Pinpointing the moment of injury retrospectively is sometimes difficult, but we cannot exalt ease of proof or administrative convenience over faithfulness to the policy language; our confined task is to review the contract, not revise it. *The policy asks when damage happened, not whether it was manifest, patent, visible, apparent, obvious, perceptible, discovered, discoverable, capable of detection, or anything similar. Occurred means when damage occurred, not when discovery occurred.* In this case, property damage occurred when the home in question suffered wood rot or some other form of physical damage. [Emphasis added.]

Implications of Injury-in-Fact

The trigger theories are no more than a determination of when the bodily injury or property damage occurred; the theories should be applied only when it is not obvious when the bodily injury or property damage actually took place.

Nonetheless, some insurance professionals conclude that the adoption of an injury-in-fact rule somehow changes the basic nature of the CGL trigger. For example, some believe that injury-in-fact theory changes the CGL so that, using the *Don's Building* case, the CGL policies in effect *when the EIFS was installed* (and *before* the water intrusion began), would somehow be triggered. The injury-in-fact theory clearly does not stand for such a proposition. The Supreme Court of Texas in *Don's Building* made the following commentary on other cases reviewed by the court:

Instead, these cases merely hold that the *time of the injury or damage*, as opposed to the time of the alleged negligent conduct that caused the injury, *is the triggering event under the policy*. [Emphasis added.]

Also consider the case of *Travelers Ins. Co. v. Eljer Mfg. Inc.*, 757 N.E. 2d 481 (Ill. 2001), in which the court held:

... under CGL policies covering "physical injury to tangible property," that claims against insured that it manufactured defective plumbing system were covered if the buildings in issue *suffered water damage due to leaks during the policy period, regardless of when the plumbing systems were installed*, because plain language of policies state "that the *insurable event* which gives rise to the insurers' obligation to provide coverage is the *physical damage to tangible property*." [Emphasis added.]

Similarly, in the case of *Millers Mut. Fire Ins. Co. of Tex. v. Ed Bailey, Inc.*, 647 P.2d 1249, 1250, 1253 (Idaho 1982), the Idaho Supreme Court held:

... that where the insured *installed foam in a building during the term of a CGL policy*, and a fire allegedly caused by the foam *occurred after the policy expired*, the property damage claim *was not covered* because the policy defined property damage as "physical injury to or destruction of tangible property which occurs during the policy period" and "*no actual physical damage to the structure in this case occurred within the policy period.*" [Emphasis added.]

In short, there is simply nothing in the "injury-in-fact" theory that would even remotely suggest that the work (the installation of the siding or plumbing) or the negligent act and not the resulting property damage triggers the CGL policy.

Implications of Continuous Trigger

As with injury-in-fact, some insurance professionals have concluded that the continuous trigger theory changes the CGL requirement that the bodily injury or property damage must occur during the policy period. Similar to injury-in-fact theory, such proponents believe that the CGL in effect is triggered when the *negligent act* takes place rather than when the bodily injury or property damage resulting from the negligent act takes place.

In *Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995), which found that a continuous trigger applied (after a lengthy analysis of the trigger theories), Admiral Insurance argued that the policy was triggered by an "occurrence" and not the result of the "occurrence"—the bodily injury and property damage—as in the case at issue, the occurrence took place before Admiral's CGL policy:

Admiral submits that "all damage was caused by a *single occurrence outside (i.e., prior to commencement of) Admiral's policy period,*" and urges that any determination that continuous or progressive damage or injury occurring during its ensuing policy periods can itself trigger coverage, "ignore[s] the policy language and *confuse[s] the consequences of the occurrence with the occurrence itself, i.e., the event that 'resulted' in damage.*" [Emphasis added.]

The court reviewed the CGL policy wording, including the assertion that the term "occurrence" was ambiguous, and concluded:

We find no ambiguity in this language; it clearly and explicitly provides that *the occurrence of bodily injury or property damage during the policy period is the operative event that triggers coverage.* [Emphasis added.]

There is no discernable basis for concluding that continuous trigger theories change the CGL—the policy is triggered *only* when either bodily injury or property damage occur during the policy period. The California Supreme Court in *Montrose Chemical* clearly concludes the "operative event that triggers coverage" is the *occurrence of the bodily injury or property damage during the policy period.*

Conclusion

Back to the overriding question: Do the various trigger theories change or nullify the fundamental requirement that bodily injury or property damage must occur during the policy period to activate insurers' obligations under a CGL policy? After examining the fundamentals of the coverage issues, the answer is clearly "No." While undoubtedly the trigger theories have the potential to broaden or restrict *when* the bodily injury or property damage is determined to have occurred, such theories do not suggest in any way that coverage applies when no bodily injury or property damage has occurred during

¹ See [Coverage Trigger: Getting It Right for the Right Reason](#) by Steven Rawls and Rebecca C. Appelbaum (October 2008), Butler, Pappas, Weihmuller, Katz and Craig, LLP, for an analysis for the "trigger theories."

² OneBeacon Insurance Company was an assignee of the CGL policies issued by Potomac Insurance Company of Illinois.

Craig F. Stanovich is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based "rent-a-risk manager" outsourcing, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at cstanovich@austinstanovich.com. Website www.austinstanovich.com.

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