



*... the difference is in black & white*

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## **ATTACHED ARE CASES INVOLVING INSURANCE POLICIES WITH MANIFESTATION CLAUSES**

How have the courts sided in these cases? Do the plaintiffs (the insureds) receive coverage if the property damage “manifests” (appears, becomes known) itself after the policy period? The answer is, “No”.

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## Manifestation Trigger

When the manifestation trigger of coverage is applied, the policy in effect at the time the property damage manifests itself provides coverage. In construction defect cases, the manifestation trigger is often applied to distinguish the time of occurrence from the date of installation as the date that the property damage actually takes place.

A line of relevant Texas cases illustrates this principle. In *Dorchester Dev. Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex. App. 1987, *no writ*), the insured contractor was sued by the owner for alleged defective workmanship on an apartment project. During the course of the litigation, the insured contractor had failed to respond to a request for admission and was held to have judicially admitted that no property damage had "manifested" itself during the applicable policy period.

Therefore, the court held that there had been no occurrence during the policy period. The court described that issue before it as follows.

The question becomes whether there is coverage for property damage resulting from workmanship performed during the policy period when the property damage is not manifested until *after* the policy period.

The court went on to conclude:

[N]o liability exists on the part of the insurer unless the property damage manifests itself, or becomes apparent, during the policy period. Since Dorchester [the contractor] has admitted (by failing to answer the request for admission) that such damages were *not* manifested during the period policy, there was no "occurrence" during the policy period.

Obviously, this is not the strongest statement of the manifestation trigger, although this case is the genesis of the proposition that Texas follows that trigger of coverage. Other language in the opinion appears to indicate that the court was merely stating the rule that it is the actual injury—not the time of the negligence giving rise to the injury—that must take place during a policy period to trigger coverage. In that connection, the court also stated as follows.

[C]overage is not afforded unless an identifiable damage or injury, other than merely causative negligence, took place during the policy period.

This aspect of the *Dorchester* opinion indicates that it may do nothing more than state the traditional "effect" test, i.e., that an occurrence occurs at the time of the property damage—the "effect"—and not the act giving rise to the property damage.(Footnote 1)

The manifestation aspect of the *Dorchester* opinion was followed by the court in *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 18 F. Supp. 2d 638 (N.D. Tex. 1998), *rev'd on other grounds*, 197 F.3d 720 (5th Cir. 1999). In that case, Grapevine, the insured excavation subcontractor, installed select fill for a parking lot from November 1994 through February 1995. Over that period, there were two CGL insurance policies in effect: a policy issued by Federated Mutual covering the period of January 1, 1994, to January 1, 1995, and a policy issued by Maryland covering the period from January 1, 1995, to January 1, 1996.

It was alleged that the select fill was defective and caused portions of the parking lot to subside. The subsidence was discovered by the owner in August 1995.

In arguing that it owed no obligation to defend an action brought by the general contractor against Grapevine for installation of the allegedly defective select fill, Federated Mutual contended that under a manifestation trigger, no property damage occurred until August 1995, which was outside

its policy period.

In response, Grapevine argued that property damage, i.e., subsidence, occurred to the parking lot upon installation of the allegedly defective select fill. This meant that both the Federated Mutual policy, in effect at the time of installation of the defective select fill, and the Maryland policy, in effect at the time of manifestation, were triggered to provide coverage.

In finding no occurrence during Federated Mutual's policy, the court applied *Dorchester*, discussed above, as well as *Snug Harbor, Ltd. v. Zurich Ins.*, 968 F.2d 538 (5th Cir. 1992), for the proposition that Texas courts have concluded that the time of occurrence is when a claimant sustains actual damage—not necessarily when the act or omission causing that damage is committed.

The court also rejected Grapevine's argument that property damage in the form of diminution in value of the parking lot caused by the installation of the allegedly defective work constituted immediate property damage. Finally, the court refused to consider a continuous trigger argument based on asbestos and environmental coverage cases, considering itself bound to the manifestation analysis under Texas law.

It should be noted that a manifestation trigger is sometimes applied to trigger coverage under multiple policies in situations involving continued and repeated exposure to conditions. For example, in *Cullen/Frost Bank v. Commonwealth Lloyds*, *supra*, an action was brought against a bank by condominium owners for misrepresentation, breach of warranty, and negligence in connection with the sale of condominium units that were defectively constructed.

The allegations of the homeowners in the underlying action included numerous construction defects, such as drainage problems in the garage floor, excessive floor displacement, warped and swollen windows and doors, rotten woodwork, leaking in the roof, warped and uneven floors, and continual breakdown of the elevators.

The insurers argued that there was no coverage under policies issued after the spring of 1986 when an inspection revealed the complained-of defects. The court rejected this argument, holding that the underlying lawsuits alleged continuing and multiple occurrences, as well as continuous or repeated manifestations of property damage beginning in the spring of 1986.

The court stated that under the standard definition of "occurrence," there could be a new occurrence each time the complaining party suffered damage, thus supporting a multiple occurrence theory. Therefore, the insurers were obligated to defend under all policies, rather than just one policy in effect in the spring of 1986.

In cases such as *Cullen/Frost Bank*, courts appear to temper the strict effect of a manifestation trigger, especially where the caselaw, such as *Dorchester v. Safeco*, appears to constitute a common statement of the "effect" test for the time of occurrence, rather than a wholehearted endorsement of the manifestation trigger. *Dorchester v. Safeco* itself can be read to endorse an actual injury trigger rather than a pure manifestation trigger, the court having only chosen to use the unfortunate term "manifestation" in describing the time of injury in that case.

Other states, including Florida, have similarly struggled with the application of a manifestation trigger. In *Prieto v. Reserve Ins. Co.*, 340 So. 2d 1282 (Fla. App. 1977), the insured allegedly performed negligent repairs in 1971 that eventually caused the collapse of a building. The CGL policy commenced on July 8, 1969, and terminated on July 8, 1974. The building collapsed on August 8, 1974. The insured argued that the fact that the collapse occurred subsequent to the date of the termination of the policy did not change the fact that it stemmed from an occurrence that took place during the policy, and thus was covered by it. The court rejected the insured's argument finding that there was no coverage under the policy, and that the contractor's CGL policy that

provided coverage for an occurrence was not triggered by a collapse of the building a month after the policy term ended.

The *Prieto* decision was followed in *Travelers Ins. Co. v. C.J. Gayfers & Co., Inc.*, 366 So. 2d 1199 (Fla. App. 1979). In that case, Travelers issued a CGL policy to a plumbing contractor. While the policy was in effect, the contractor incorrectly installed a roof drainage system in the attic of a store. After the policy expired, the drainage system failed, resulting in a discharge of rainwater into the store. The court found that there was no coverage under the policy, and explained:

[The insured] argues that ... an insured could reasonably claim coverage for liability on account of a loss of use when the only "occurrence during the policy period" was the insured's negligent act. We find, to the contrary, that the phrase "caused by an occurrence" informs the insured that an identifiable event other than the causative negligence must take place during the policy period. The term "occurrence" is commonly understood to mean the event in which negligence manifests itself in property damage or bodily injury, and it is used in that sense here.

Moreover, the court specifically held that even though the policy in effect during construction included completed operations coverage, that coverage did not extend beyond the period of the policy to the date on which the drainage system in the store failed.

Similarly, in *Aetna Ins. Co. v. State Farm Fire & Cas. Co.*, 457 So. 2d 512 (Fla. App. 1984), Aetna issued a CGL policy to a building contractor, and while the policy was in effect, the contractor built a house including a fireplace and chimney. After the policy expired, the house was destroyed by a fire allegedly caused by the contractor's negligent installation of the fireplace and chimney. The court found that where the definition of "property damage" specifically required that the occurrence take place during the policy period, there was no coverage under the policy for a loss that occurred after the expiration date of the policy.

These cases are generally regarded as espousing the "manifestation" trigger under Florida law. Note that none of the three cases set out above specifically addresses the issue in terms of a manifestation trigger, but nevertheless, they clearly stand for the proposition that the policy that is triggered by a construction defect claim is the one that is in effect on the date the property damage manifests itself, as opposed to the date the defective construction operations were performed. In each of those cases, the loss was relatively easy to pinpoint to a specific date.

Nevertheless, other courts have rejected attempts by Florida insureds to argue that a manifestation trigger should not be adopted. Those insureds have argued that the property damage may have occurred during other policy periods in effect prior to the date the property damage was discovered or manifested. In *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, *supra*, the insured, Sun, entered into contracts for the installation of underground galvanized piping system for conveying acetone at a boat manufacturing facility. The contract was completed in 1984. It was determined in February 1991 that the pipe system leaked acetone and contaminated the property. The court found that Sun's CGL coverage was triggered in February 1991, holding:

Florida courts follow the general rule that the time of occurrence within the meaning of an occurrence policy is the time at which the injury first manifests itself.... Accordingly, this court finds that the trigger for coverage for the CGL policies is when the damage occurs and if damage is continuously occurring, the trigger is the time the damage manifests itself or is discovered.

The insured argued for a continuous trigger, contending that the leak commenced prior to February 21, 1991, the date it was discovered, and that after the discovery of the leak, damage continued to occur because the acetone in the ground was spreading. The court rejected the continuous trigger, ruling that "the trigger for coverage was when the leaking pipe was discovered."

Courts of other states have applied the manifestation trigger as well. For example, in *Cleveland Bd. of Ed. v. R.J. Stickle Int'l*, 602 N.E.2d 353 (Ohio App. 1991), *appeal denied*, 544 N.E.2d 743 (Ohio 1992), the insured roofer constructed a roof on a high school, which was completed in 1974. The roof started to leak in 1975, and damage continued through 1988.

The owner filed suit against the general contractor, who filed a third-party complaint against the insured for negligent design, installation, and construction of the roof. The case settled, and the insured sought coverage from its insurers for its settlement contribution.

The roofer was insured by five separate CGL insurers between 1975 and 1988. The trial court apportioned the settlement amount over the entire 13 years, requiring contribution from all 5 insurers based on time on the risk. On account of the amount of the settlement, excess coverage in any policy year was never reached.

The appellate court rejected this approach, relying primarily on *U.S. Fid. & Guar. Ins. Co. v. Bonitz Insulation Co.*, 424 So. 2d 569 (Ala. 1982), for support. That case also involved a leaking roof. There, the Alabama Supreme Court held that an occurrence took place when the property damage caused by the roof leaks began. Therefore, damage that resulted from the continuing leak was not unusual, unexpected, or unforeseen, and was not considered an accident. (Footnote 2)

Based on *U.S. Fid. & Guar. Ins. Co. v. Bonitz*, the court in *Cleveland Bd. of Ed. v. Stickle* held that there could be no accident during the period of 1976 to 1988, therefore, the occurrence took place when the roof began to leak. Reaching this conclusion, the court also relied on *Home Ins. Co. v. Landmark Ins. Co.*, 206 Cal. App. 3d 1388, 253 Cal. Rptr. 277 (1988), a case that held that where two insurers were on the risk, the one with coverage on the date of the first manifestation was required to bear the responsibility for the entire loss. Ultimately, the court held as follows.

We, therefore, hold that in a situation where the damage manifests itself immediately and continues unabated into a successive carrier's coverage period, there is no occurrence under the stipulated definition because the continuous damage is no longer unusual, unexpected, or unforeseen and, therefore, not an accident. Alternatively, in situations where the resulting damage does not manifest itself until a period of time has passed and a new carrier is on the risk, the insurer on the risk when the first visible or discoverable manifestations of damage occur must pay the entire claim.

Other similar cases include the following.

- *Jackson v. Welco Mfg. of Tex.*, 612 So. 2d 743 (La. App. 1992). The purchasers of homes sued a builder and its insurer for discoloration of a wall allegedly caused by the use of a defective joint compound. Since the discoloration did not become apparent until after the builder's insurance coverage had expired, there was no occurrence resulting in physical injury or destruction of property occurring during the policy period, even though the allegedly defective materials were installed during a period when insurance was in force. Thus, there was no coverage. For other Louisiana cases applying the manifestation trigger, see *Oxner v. Montgomery*, 794 So. 2d 86 (La. App. 2001); *St. Paul Fire & Marine Ins. v. Valentine*, 665 So. 2d 43 (La. App. 1995).
- *CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 688 A.2d 647 (R.I. 1985). This case involved the cleanup of chemicals from a contaminated water supply. The Rhode Island Supreme Court held that an occurrence takes place when the property damage manifests itself or is discovered, or in the exercise of reasonable diligence, is discoverable. In reaching that conclusion, the court relied on *American Home Assur. Co. v. Libbey-Owens-Ford Co.*, 786 F.2d 22 (1st Cir. 1986), a case involving defective windows, which held that property damage occurs when a reasonable person would be aware that a defect exists that may give rise to a cause of action.
- *Aetna Cas. & Sur. Co. v. PPG Ind., Inc.*, 554 F. Supp. 290 (Ariz. 1983). This case has been

cited in numerous jurisdictions to support the proposition that the occurrence trigger for property damage in Arizona is a manifestation trigger, i.e., the date the property damage is discovered. However, that case addressed the time of an occurrence under a CGL policy as the date of the occurrence of the damage, as opposed the date of the acts of the insured that caused the property damage. In describing the date on which property damage occurs, the court referred to it as the date on which the damage was "discovered." In contrast, in *University Mech. Contractors of Ariz., Inc. v. Puritan Ins. Co.*, 723 P.2d 648 (Ariz. 1986), the court held that although leaks from defective O-rings did not manifest themselves until after the policy period, the insurer had a duty to defend because property damage actually took place when the defective components were installed, which was during the policy period. This holding supports an "actual injury trigger."

As pointed out previously, the manifestation trigger has some appeal. However, it has been the subject of criticism, largely for its apparent departure from the language of the definitions of "occurrence" and "property damage," and the insuring agreement in favor of certainty in the evaluation of claims.

In *Armstrong World Ind., Inc. v. Aetna Cas. & Sur.*, *supra*, the court rejected the manifestation trigger for asbestos-related property damage for that very reason. The major shortcoming of the application of a manifestation trigger in the construction defect context is that it fails to take into account that certain defects occur continuously and progressively over time once defective work is installed. Thus, it is subject to much the same criticism as in asbestos property damage or even bodily injury contexts.

This is why the manifestation trigger has been rejected in California, and lower appellate court decisions applying the manifestation trigger in Michigan have been reversed in favor of the injury-in-fact trigger, discussed later in this chapter.(Footnote 3) Even in states in which some courts have apparently espoused the manifestation trigger, many claims are often evaluated or settled under other trigger theories. This illustrates the fluid nature of any trigger theory when it is applied to specific facts...

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## Footnotes

1. See the discussion of the "effect" test earlier in this Chapter.
2. See the discussion of *U.S. Fid. & Guar. Ins. Co. v. Bonitz* in Chapter 3 in connection with the discussion of fortuity and the occurrence requirement.
3. See *Gelman Sciences, Inc. v. Fidelity & Cas. Co. of N.Y.*, 572 N.W.2d 617 (Mich. 1998).

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## **Manifestation Occurs When Damage Is Readily Apparent/Identifiable (5th Cir 120)**

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***American Home Assurance Company v Unitramp Ltd., 146 F3d 311 (5th Cir 1998)***

### **TRIGGER OF COVERAGE**

Unitramp purchased 450 metric tons of fuel from Enjet Refining, a fuel broker insured by American Home Assurance Company. On June 9, 1993, Enjet loaded the fuel on a cargo vessel chartered by Unitramp at Enjet's Ingleside facility in Texas. At the time of loading, Unitramp sent a sample of the fuel to a distant laboratory for testing.

Five days later, on June 14, when the vessel hauling the fuel was at sea bound for Casablanca, the testing laboratory communicated that the fuel contained excessive water. The ship then detoured to Tampa to exchange the fuel.

Unitramp sued Enjet for the associated delay, settling that suit for \$210,000. American then sued Unitramp, seeking a declaratory judgment that no coverage existed for the claim against Enjet because the Ingleside facility was not a scheduled location when the fuel was loaded on June 9.

American's policy renewed on June 12—two days before Unitramp learned that the fuel was watered—at which time Ingleside was added as a scheduled location. American argued that the damage occurred on June 9 when the fuel was loaded, while Unitramp contended the date of the "occurrence" for coverage purposes was June 14, when the harm became manifest.

Under applicable Texas law, a party "sustains actual damage when it sustains damage that is readily apparent," a principle known as the "manifestation rule." The question thus became when Unitramp's damage manifested itself or when was it identifiable.

American contended that Unitramp could have discovered the watered fuel within just a few hours had it used a local laboratory to conduct the test. Thus, the damage was identifiable on June 9. This argument carried the day in the district court [945 F Supp 1061 (SD Tex 1996)].

The appellate court flatly rejected any suggestion that "identifiable" when used in connection with the manifestation trigger means "capable of being known by testing," reasoning that such a rule would burden insureds and claimants with an "unprecedented duty to conduct limitless tests and inspection for hidden defects."

Rather, the court held that "identifiable" should be read as synonymous with "manifest" and "apparent," both of which mean "capable of easy perception." Thus, under the Texas manifestation rule, the date of an occurrence is "when the damage is capable of being easily perceived, recognized, and understood" [*Cullen/Frost Bank v Commonwealth Lloyd's Ins. Co.*, 852 SW2d 252 (Tex App 1993), see summary at 105].

The court held that Unitramp's damage was not apparent at the time the fuel was loaded. The fact that the fuel was watered was not visible to the naked eye, instead requiring off-site testing to discover the problem.

Although Unitramp could have discovered the problem more promptly at relatively minimal cost and effort, the effort and cost were not so minimal as to render the defect apparent or manifest. While there may be instances in which a test or inspection poses such an insignificant burden that the

defect, though hidden, might be characterized as apparent, this was not such a case.