An Overview of the Timing of an Occurrence and When Coverage is Triggered

by Lisa J. Trembly and Christopher J. Dos Santos

Typically, insurance policies, both first and third party, provide coverage for an occurrence. Some policies define the term “occurrence,” while others do not. One common definition of the term, used in commercial general liability policies, is “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” While insurance policies often do not refer to the word “trigger,” that term has been used as “a label for the event or events that under the terms of the insurance policy determines whether a policy must respond to a claim in a given set of circumstances.”

In deciding when coverage is triggered for bodily injuries or property damage, courts have generally relied upon four theories: 1) exposure; 2) manifestation; 3) injury-in-fact; and 4) continuous trigger.

Under the exposure theory, injury or damage occurs at the point when the person or property is first exposed to the injurious condition.

The manifestation theory holds that an occurrence takes place when a reasonable person becomes aware of the property damage or injury (i.e., discovery).

The injury-in-fact theory holds that coverage is triggered when personal injury or property damage first occurs, regardless of whether that injury or damage is ascertainable at the time. In the property damage context, this approach is sometimes referred to as the damage-in-fact trigger, and means that coverage will only be invoked if it is shown that damage to property actually occurred during the policy period, regardless of when it was discovered.

Finally, the continuous trigger theory defines occurrence “to include the entire period from the time of first exposure to the harmful condition to the time that a reasonable person should have become aware of the property damage [or injury].”

New Jersey courts ordinarily follow the manifestation rule, and find that coverage is not triggered by when the negligent or wrongful act occurred, but rather when the party is actually damaged. The New Jersey Supreme Court has previously explained:

Certain things are well settled: As a general rule, the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act is committed but the time when the complaining party is actually damaged.

However, in cases involving progressive losses and injuries, New Jersey courts apply the continuous trigger theory to third-party liability insurance policies, finding the same provides “the greatest ultimate redress.” Yet, with respect to the progressive losses under a first-party policy, New Jersey courts continue to apply the manifestation theory.

Memorial Properties, LLC v. Zurich American Insurance Company

Currently before the New Jersey Supreme Court is the issue of whether the occurrences for which a cemetery and a crematorium seek coverage under their general liability insurance policy took place at the time of the alleged mistreatment of the remains of the decedents, or when their families, who were claimants in the underlying civil litigation, learned of the wrongdoing several years later.

In Memorial Properties, LLC v. Zurich American Insurance Company, the underlying case centered on a cemetery and crematory located in New Jersey, which were sued by the family members of several decedents that were buried or cremated at their facilities. The decedents were subject to an illegal scheme of harvesting body parts or tissue that was uncovered.
by investigations in 2006. The actual harvesting took place in 2002 and 2003, but family members did not learn that their loved ones were involved until three or four years later. Obviously outraged by the mishandling of their loved ones, the family members brought suit against the cemetery and crematory owners for complaints including claims of negligent and intentional infliction of emotional distress, negligent and intentional misrepresentation, and negligence.

In the coverage case, which is presently on appeal to the New Jersey Supreme Court, the cemetery and crematory sought coverage under a Dec. 23, 2002, to Dec. 23, 2003, general liability insurance policy issued by Assurance Company of America. The policy provided coverage for:

1. bodily injury (including mental anguish) or property damage to which this insurance applies arising out of any malpractice, error or mistake committed by your cemetery operations.

2. mental anguish arising out of the performance or non-performance of any contract made in the usual course of your cemetery operations for the care, burial or other disposition of a deceased human body, the conduct of memorial services or the transportation of a deceased human body by another, excluding, however, any specific agreement to pay for such mental anguish.

3. property damage to deceased human bodies, the clothing or other personal effects or cremated remains, or to urns, caskets, cases, crypts, mausoleums or other property used for the care or burial of a deceased human body, owned by others and in your care, custody or control for the purpose of caring for or burying of a deceased human body.[14]

The policy further provided, in relevant part, that it “applies to ‘bodily injury’ and ‘property damage’ only if: (1) [t]he ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’; and (2) [t]he ‘bodily injury’ or ‘property damage’ occurs during the policy period.” The policy also defined the term “occurrence” as meaning “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”[15] The cemetery and crematory requested defense and indemnification in light of the Assurance policy language. Assurance, however, claimed the actions were not covered under its policy because the date of the occurrence of the purportedly insurable events was in or about 2006, after the coverage period, when the family members discovered the allegations of wrongful conduct. The trial court granted summary judgment in favor of Assurance, determining that the occurrence was when the family members learned there had been an adulteration of the remains of their loved ones or, in this case, 2006.[16]

On appeal, the Appellate Division first addressed the Assurance policy’s definition of occurrence as “an accident, including continuous or repeated exposure to substantially the same general conditions.”[17] The Appellate Division cited Hartford Accident & Indemnity Co. v. Aetna Life & Casualty Insurance Co., for the well-established notion that “the time of the ‘occurrence’ of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged.”[18] Stated simply, the important time factor in determining coverage where the underlying claim is based in negligence is the time when the damage has been suffered by the family members finding out that their loved ones’ remains have been desecrated. Therefore, since the occurrence happened in 2006, and the policy only insured from 2002 to 2003, there was no defense or indemnity required under the Assurance policy. Thus, the decision was affirmed.[19]

Conclusion

The cemetery and crematory appealed to the New Jersey Supreme Court, and certification was granted on June 30, 2011. On Jan. 30, 2012, argument was heard before the Court.[20] The Appellate Division’s decision is consistent with what the Supreme Court has previously stated was a well-settled rule of law; namely, that “the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act is committed but the time when the complaining party is actually damaged.”[21]

The decision is also in harmony with the Eastern District of Pennsylvania’s opinion in Nationwide Mut. Ins. Co. v. Garzone, a case similarly and eerily involving a scheme to harvest the organs of deceased individuals, which found that under Pennsylvania law, an occurrence happens when the effects of the act manifest itself in a manner that would place a reasonable person on notice of the injury.[22] In the Garzone case, it was determined that the occurrence took place when the family members in the underlying lawsuits learned of the alleged organ-harvesting scheme.[23]

In summary, New Jersey courts currently adhere to the manifestation theory, except in progressive loss cases. Thus, the timing of the ‘occurrence’ will not be the date of the wrongful act, but rather the date of actual damage. Unless, of course, the Supreme Court decides otherwise in Memorial Properties, LLC v. Zurich American Insurance Company.

( Editor’s Note: After this article was submitted for publication, the New Jersey Supreme Court rendered its decision in
Endnotes

11. Winding Hills Condo Assoc., Inc. v. N.A. Specialty Ins. Co., 332 N.J. Super. 85, 91 (App. Div. 2000) See also Spaulding Composites Co., Inc. v. Aetna Cas. & Surety Co., 176 N.J. 25, 33-34 (2003); Owens-Illinois, Inc., 138 N.J. at 478-79 (“To recapitulate, we hold that when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy. That is the continuous-trigger theory for activating the insurers’ obligation to respond under the policies.”).
12. See, Winding Hills Condo Assoc., 332 N.J. Super. at 90 (“We reject...the thesis that the continuous trigger rule [applicable to liability policies] applies to first-party coverage.”). Other jurisdictions have also found a distinction between first and third price policies. See Prudential-LMI Com. Ins. v. Superior Court, 51 Cal. 3d 674, 274 Cal. Rptr. 387 (1990) (adopting manifestation theory in first-party context) and Montrose Chemical Corp. of Cal. v. Admiral Ins. Co., 913 P.2d 878 (Cal. 1995) (adopting continuous trigger in third-party liability cases).
14. Id. at *2.
15. Id. at *9.
16. Id.
17. Id. at *5.
18. Id. at *9.
19. Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 27, 483 A.2d 402 (1984) (reasoning that the bodily injury did not occur within the policy period and that the negligence was not committed unless and until some damage was done).
20. The Court in Memorial Properties, LLC v. Zurich American Insurance Co. also decided a separate coverage issue based on another policy of insurance issued by Maryland Casualty Company, specifically excluding coverage for claims of the alleged failure to properly bury or cremate a body, or for the alleged improper harvesting or distribution of body parts, finding that the narrow exclusion was sufficiently specific and applicable to the claim so as to preclude coverage. This issue is also before the New Jersey Supreme Court on appeal; however, it is outside the scope of this article.
22. See, supra, note 10.
24. Id. at *84-88.

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