

New Jersey Federal Court Provides Clarification/Limitation on the Application of the Continuous Trigger Theory in Construction Defect Cases

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The proper trigger of coverage in construction defect disputes has been addressed on several occasions by New Jersey courts. Most notably, in *Air Master & Cooling, Inc. v. Selective Insurance Company of America*, 452 N.J. Super. 35, 171 A.3d 214 (App. Div. 2017), the New Jersey Appellate Division held that the "last pull" of the continuous trigger in a third-party construction defect claim occurs when the "essential nature and scope of the property damage first becomes known, or when one would have sufficient reason to know of it." *Air Master*, 452 N.J. Super. at 38. But at what point does the continuous trigger theory begin? The U.S. District Court for the District of New Jersey addressed this question in *Travelers Lloyds Insurance Company v. Rigid Global Buildings, LLC*, No. 18-5814, 2020 U.S. Dist. LEXIS 25759* (D. N.J. Feb. 13, 2020).

Rigid Global Buildings arose out of a lawsuit brought by Grand Slam, the owner of an indoor tennis facility, for damages caused by multiple instances of water intrusion between 2009, when the facility was built, and 2012, as well as for damages sustained following a partial roof collapse in 2014. One of the contractors named in the lawsuit was Rigid Global Buildings, a manufacturer of pre-engineered metal buildings. Grand Slam alleged that the pre-manufactured metal building provided by Rigid was not up to code, was missing bolts, had loose rod bracing, and had a deflected and deformed frame.

Following oral argument on motions *in limine* in the underlying construction defect action, the trial court entered an order prohibiting Grand Slam from presenting evidence of any damage due to water intrusion between 2009 and 2011. At trial, the jury found for Grand Slam and a judgment of \$1.6 million was entered against Rigid. The \$1.6 million verdict included damages associated with the 2014 collapse of the facility, including past and future business losses, as well as damages associated with structural repairs required to bring the building up to code.

Travelers insured Rigid under two consecutive occurrence-based commercial general liability policies, effective from March 1, 2009 to March 1, 2011. Travelers filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify Rigid in the underlying construction defect action, and moved for summary judgment on the basis that no property damage occurred during the Travelers policy periods.

The District Court granted Travelers' motion for summary judgment, finding that Rigid was not entitled to coverage for the claims asserted in the underlying construction defect action under either **the traditional** (see *Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co.*, 98 N.J. 18, 27, 483 A.2d 402 (1984) (citing *Muller Fuel Oil Co. v. Ins. Co. of N. Am.*, 95 N.J. Super. 564, 578, 232 A.2d 168 (App. Div. 1967))) ("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 was committed but the time when the complaining party was actually damaged.") or **continuous trigger theories** (see *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 478 650 A.2d 974 (1994) ("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.")) because there was no evidence that any property damage occurred during the Travelers' policy periods.

The District Court clarified that property damage must occur before an insured may invoke the continuous trigger theory. Because Grand Slam had been precluded from presenting evidence of property damage between 2009 and 2011 at trial in the underlying construction defect action, there was no proof that any property damage at issue occurred during the Travelers policies and, thus, the continuous trigger theory could not apply to implicate coverage under the Travelers' policies. The court, in essence, ruled that there cannot be progressive damage during a policy period absent some evidence that there was, in fact, damage.

The court further clarified that, pursuant to *Winding Hills Condominium Association, Inc. v. North American Specialty Insurance Company*, 332 N.J. Super. 85, 752 A.2d 837 (App. Div. 2000), even if Grand Slam's assertions that water leaks started as early as 2009 were accepted as true, those assertions could not constitute an occurrence giving rise to a continuous trigger theory of coverage, as Grand Slam had failed to provide any evidence that those leaks contributed to the later damages allocated to Rigid in the underlying construction defect action, and thus, were too tentative to trigger coverage.

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