

New Jersey Appellate Division Modifies Manifestation Analysis

By: Steven D. Cantarutti and James F. Layman

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On October 12, 2017, the New Jersey Appellate Division in *Air Master & Cooling, Inc. v. Selective Ins. Co.*, et al, No. A-5415-15T3 (App. Div. 2017) made a significant coverage ruling with respect to the application of the “continuous trigger theory” and manifestation inquiry in the context of construction defect claims. The Appellate Division held that: 1) the “continuous trigger theory” of coverage may be applied to third-party liability claims involving progressive damage to property caused by an insured’s alleged defective work; and 2) the “last pull” of that trigger occurs when the “essential” nature and scope of property damage first becomes known, or when there is sufficient reason to know of it. The Appellate Division rejected the insured’s “novel” argument that the “last pull” of trigger occurs when there is expert or other proof that specifically “attributes” the property damage to fault conducted by the insured. The Appellate Division’s decision is the first time it addressed both allocation and manifestation in the context of third-party construction defect claims.

Air Master arose from lawsuits brought by a condominium association and unit owners to remediate construction defects within a residential building, in which the insured HVAC subcontractor was named as a third-party defendant. Between 2005 and 2008, the insured installed condenser and HVAC units as part of the construction of a condominium. In 2008, tenants first began noticing water damage in their apartments. In response, a consultant was hired to discover the cause. In May 2010, the consultant issued a report, determining that the source of the damage implicated the insured’s work. The property owners brought suit against the developer, who brought a third party complaint against the insured. In relevant part, the insured sought coverage from Selective Insurance Company (“Selective”) which issued an occurrence-based CGL policy that inceptioned in June 2009.

Selective moved for summary judgment on the basis that it was not responsible for water damage that had materialized or manifested in 2008, prior to the start of its June 2009 policy period. The insured countered that under a continuous trigger theory, coverage continues until the “last pull” of the trigger of an injury occurs (here, the May 2010 report). The trial court, however, ultimately rejected the insured’s argument that the coverage period ought to continue until the damage *attributable to the insured* had been discovered. Instead, the court favored a “general manifestation” date for each potentially liable insured.

The insured appealed, contending that continuous trigger principles should extend coverage to all insurance policies in effect from the time the insured performed work on the construction project through the time by which it was known or there was sufficient reason to know that the manifested property damage was attributable to the *insured’s* work.

As an initial matter, the Appellate Division held that the continuous trigger theory applies to claims involving third-party progressive property damage in construction defect cases. Next, the Appellate Division considered whether the “last pull” for a continuous trigger ought to extend until the damage can be attributed to the conduct of a specific insured. The Appellate Division rejected this argument, finding

that a delay of a trigger until there is a known link between the damage and a specific insured's fault would create an extremely fact-sensitive determination. While party-specific inquiries could cause cumbersome collateral litigation, a date of initial manifestation *common to all parties* would promote efficiency and certainty.

Finally, the Appellate Division adopted a "manifestation analysis" under which a court must determine when the "essential" nature of the harm occurred (i.e., the revelation of the inherent nature and scope of the injury). As the Appellate Division explained, the manifestation cannot be tentative (i.e., original observations of the problems) nor must it be definitive or comprehensive (i.e., expert or other specific proof). As the factual record provided insufficient information to resolve the manifestation question, the matter was remanded.

Despite its goal of avoiding fact sensitive inquiries and costly litigation, the Appellate Division's use of the "essential" nature inquiry to determine the appropriate manifestation raises more questions than answers. This standard, even as explained by the Appellate Division, is somewhat vague and will still require a fact sensitive determination. As such, parties are well advised to sufficiently develop a record that will meet the "new" manifestation inquiry. Moreover, this decision may have a significant impact on the duty to defend, as policies in effect from the alleged time of the insured's work until the manifestation of the property damage may be triggered to provide a defense.