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Exposure, Manifestation of Loss, Injury-in-Fact, Continuous Trigger: The Insurance Coverage Quagmire

Nicolas R. Andrea

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I. INTRODUCTION

Suppose that twenty years ago, "A," a chemical corporation, buried substantial amounts of contaminants on its property. Furthermore, assume the following facts:

1. In Year One, A, while insured by Insurer One, ineffectively disposed of certain toxic chemicals.[1]
2. In Year Two, while A was insured by Insurer Two, the chemicals continued to slowly leak and the contamination progressively worsened.[2]
3. In Year Three, while A was insured by Insurer Three, property damage on the surrounding properties became apparent.[3]

The surrounding property owners sue A, and all three insurers deny coverage.[4] Typically, Insurer One and Insurer Two would argue for the

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1. Scenarios such as this are quite common. For example, a majority of the water supply in Boston is contaminated by toxic chemicals which pose a particular risk to people who drink from private wells. *Health Risks from Boston Wells Reported*, WASH. POST, Jan. 10, 1993, at A16.

2. *See, e.g.*, Harman v. American Casualty Co., 155 F. Supp. 612, 613 (C.D. Cal. 1957) (finding that damage from land slippage was "substantial and continuous"); California Union Ins. Co. v. Landmark Ins. Co., 193 Cal. Rptr. 461, 467 (Ct. App. 1983) (finding property damage caused by pool leakage was "accumulating and becoming progressively more severe"). In the oil industry, leakage of contaminants is so common that oil producers' policies generally exclude "bodily injury or property damage arising out of discharge, dispersal, release or escape of oil." Mitchell L. Lathrop, *What is the Role of Insurance in Toxic Tort Cases?, in* TOXIC TORTS PRACTICE GUIDE § 32.07 (2d ed. 1992).

3. Property damage from toxic contamination can come from a variety of sources. Los Angeles County will spend over $700,000 testing soil and water at an abandoned landfill, possibly contaminated by toxic chemicals originating from illegal drug labs shut down nearly two decades ago. Amy Pyle, *Costs Mount in Tests for Toxic Contamination at Pitchess Jail*, L.A. TIMES, Jan. 6, 1993, at B3.

4. *See, e.g.*, Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1043 (D.C. Cir.), *cert. denied*, 455 U.S. 1007 (1981) (insurers denying all coverage or accepting

court to adopt the "manifestation of loss" theory of triggering coverage,[5] under which liability would attach to Insurer Three.[6] Insurer Three, however, would argue the "exposure trigger" theory,[7] under which liability would attach to Insurer One and Insurer Two. Finally, the insured would argue for the "continuous trigger" theory,[8] which would warrant coverage by all three insurers. The court is thus confronted with a clear dilemma over how and to whom liability should attach, and must base its decision on manifestation of loss, exposure trigger, continuous trigger, or possibly another coverage theory.

Unfortunately, this hypothetical does not represent a unique situation. Lawsuits involving toxic and asbestos contamination are filed with increasing frequency.[9] Often the claimants seek liability for contamination or injuries that occurred over a substantial period of time.[10] The defendants in such cases invariably turn to their insurers for defense and indemnification against such lawsuits.[11] As a result, coverage dis-

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only partial responsibility).

5. For a discussion of the manifestation-of-loss theory, see *infra* notes 138-70 and accompanying text.

6. *See, e.g.*, United States Fidelity and Guar. Co. v. American Ins. Co., 345 N.E.2d 267, 271 (Ind. Ct. App. 1976) (holding that in a case involving defective bricks all damage accrued during the policy when the "spalling first became apparent"). In the present hypothetical, Insurer One and Insurer Two would lobby the court to interpret the trigger question similar to the district court's reasoning in Schering Corp. v. Home Ins. Co., 544 F. Supp. 613, 619 (E.D.N.Y. 1982), *rev'd on other grounds*, 712 F.2d 4 (2d Cir. 1983) (holding that coverage "is predicated not on the act . . . but upon the result").

7. For discussion regarding the exposure theory, see *infra* notes 102-37 and accompanying text.

8. For discussion regarding the continuous trigger theory, see *infra* notes 182-223 and accompanying text.

9. For example, one commentator estimated that more than 15,000 claimants have filed suit against manufacturers of asbestos products. Rebecca C. Earnest, *Recent Development: Insurance Law and Asbestosis—When is Coverage of a Progressive Disease Triggered?*, 58 WASH. L. REV. 63, 63 (1982). Furthermore, some experts predict that these contaminants may ultimately result in nearly 5.6 million deaths in the United States. *Id.* at 63 n.3.

10. At least one court has recognized "the unique character" of discerning policy coverage of diseases with long latency periods. ACandS, Inc. v. Aetna Casualty & Sur. Co., 764 F.2d 968, 971, 973 (3d Cir. 1985) (holding exposure to contaminant, continuing exposure, and manifestation of asbestosis triggered coverage of three different policies).

11. Generally, an insurer's duty to defend is independent and broader than the duty to indemnify. *See, e.g.*, Trizec Properties, Inc. v. Biltmore Const. Co., 767 F.2d 810, 811-12 (11th Cir. 1985) (holding insurer's duty to defend is independent and broader than its duty to indemnify since an insurer may be forced to defend a suit where it is later determined that coverage does not apply). An insurer, however, "has no duty to defend a suit brought by a third party against the insured where the petition or complaint in such suit upon its face alleges a state of facts that fails to bring

putes have "erupted, fed by the fires of the liability explosion" in the areas of toxic and asbestos contamination.[12]

In particular, a dispute often arises between an insurer whose policy is in effect when the damage is discovered and the insurer whose policy was in effect when the damage occurred.[13] The dispute is intensified by the fact that certain types of damage or injury-causing occurrences, like toxic contamination or construction defects, are often undetectable until significant damage has been suffered.[14] Similarly, certain diseases possess extended latency periods, where there is a prolonged amount of time between manifestation of the injury and the event causing the injury.[15] Courts have traditionally forced only the insurer whose policy was in effect at the "triggering period," the time of discovery of the injury, to provide indemnification or to defend the insured.[16]

This situation poses a difficult dilemma for the courts. To impose a duty to defend on the insurer covering the latter period is to ignore the fact that all or most of the damage occurred during the earlier policy period.[17] To impose a duty to defend on the earlier insurer potentially

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the case within the coverage of the policy." 14 MARK S. RHODE, COUCH ON INSURANCE 2d, § 51:45 (Rev. ed. 1982). *See also* 7C J. APPLEMAN, INSURANCE LAW AND PRACTICE, § 4682 at 25 (Berdal ed. 1979).

12. John P. Arness & Randall D. Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 VA. L. REV. 943, 943 (1986).

13. *See, e.g.*, Acme Galvanizing Co. v. Fireman's Fund Ins. Co., 270 Cal. Rptr. 405, 406 (Ct. App. 1990) (insurer sought to deny coverage for damage caused by molten zinc leaking on equipment on basis that damage was caused by a latent defect); Tzung v. State Farm Fire & Casualty Co., 873 F.2d 1338, 1339 (9th Cir. 1989) (insurer sought to deny coverage for latent soil erosion damage to building); Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1342 (D.D.C. 1986), *cert. denied*, 112 S. Ct. 1777 (1992) (claimant alleged "delayed manifestation" of period between contamination and discovery of contamination).

14. *See, e.g.*, Commercial Union Ins. Co. v. Sepco Corp., 765 F.2d 1543, 1544 (11th Cir. 1985) (insurer seeking to deny coverage of disease not manifesting itself in policy period).

15. Gail B. Agrawal, Comment, *Asbestosis: Who Will Pay the Plaintiff?*, 57 TUL. L. REV. 1491, 1497 (1983).

16. *Id.* An insurer's duty to defend is broad, often encompassing unmeritorious claims that the claimant files against the insured. R. KEETON, BASIC TEXT ON INSURANCE LAW 462 (1971). The duty to indemnify exists when the insured shows "that there was in fact an occurrence within the scope of the insuring agreements under which the insurer agreed 'to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages.'" *Id.* at 462 n.2.

17. *See, e.g.*, Gruol Constr. Co. v. Insurance Co. of N. Am., 524 P.2d 427, 430 (Wash. Ct. App. 1974) (finding different insurers on risk during periods of defective

subjects all insurers to open-ended liability for damages that may appear years after the policy period has expired.[18] Furthermore, many types of damages are undetectable while they are festering and it is nearly impossible to determine when the harm actually occurred.[19]

Courts have reacted to this problem with a variety of contrasting theories. In California, for example, the courts have applied two different approaches in resolving the conflict without commenting on inconsistency.[20] The absence of a standard approach creates uncertainty for both the insurer and the insured. According to at least one court, the conflicts that exist under state laws will not be resolved until the issue is decided by the United States Supreme Court.[21]

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backfilling, discovery of dry rot, and festering period in between).

18. *See infra* text accompanying notes 81-86 for discussion of a case where nearly two decades had passed between the policy period and a suit requesting coverage under that policy. Another issue, not confronted in this Article, is statute of limitations problems due to the amount of time that often passes between exposure to a contaminant and the resulting disease. *See* Agrawal, *supra* note 15, at 1493. A majority of courts have sidestepped such potential statute of limitation problems through applying a rule that a plaintiff's cause of action accrues when the plaintiff actually or constructively becomes aware of the injury. *Id.* at 1493 nn.11-12.

19. *See, e.g.*, Central Nat'l Ins. Co. v. Superior Court, 3 Cal. Rptr. 2d 622, 623-24 (Ct. App. 1992) (finding surface water damage to home accumulated for over a decade before damage became observable); Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549, 1555 (D.N.J. 1985) (recognizing asbestosis involves progressive tissue deterioration over long time period before disease manifests itself).

20. *See, e.g.*, Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230, 1246 (Cal. 1990) (holding that "inception of loss" was the point in time when "appreciable" damage occurs and a reasonable insured would have notice); Montrose Chem. Corp. v. Admiral Ins. Co., 5 Cal. Rptr. 2d 358, 369 (Ct. App. 1992) (holding that exposure and "continuing injury" triggers coverage); Central Nat'l Ins. Co. v. Superior Court, 3 Cal. Rptr. 2d 622, 626 (Ct. App. 1992) (holding that "inception of loss" is point in time when reasonable insured is on notice of loss); Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co., 273 Cal. Rptr. 431, 435 (Ct. App. 1990) (applying the "delayed discovery" rule); Home Ins. Co. v. Landmark Ins. Co., 253 Cal. Rptr. 277, 282 (Ct. App. 1988) (same); Snapp v. State Farm Fire & Casualty Ins. Co., 24 Cal. Rptr. 44 (Ct. App. 1962) (holding that the "inevitability" of an event does not preclude coverage under policy).

21. ACandS, Inc. v. Aetna Casualty and Sur. Co., 576 F. Supp. 936, 943 (E.D. Pa. 1983), *aff'd in part, rev'd in part*, 764 F.2d 968 (3d Cir. 1985). Because there is no federal trigger-of-coverage statute, federal courts deciding such cases must look to the applicable state jurisprudence and other circuit cases that interpret the state law in question. *See, e.g.*, Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1041 n.10 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (noting an absence of applicable state decisions in Pennsylvania, Massachusetts and Connecticut); *ACandS*, 764 F.2d at 971 (holding Pennsylvania law was applicable to the trigger issue). One court wondered whether resolution of the issue would ever come before the Supreme Court because of the Court's "policy against reviewing rulings of [Courts of] Appeals that purport to be based on state law." Lac D'Amiante Du Quebec, Ltee. v. American

This Article attempts to resolve the courts' dilemma of deciding how to determine when coverage is triggered, when faced with conflicting caselaw and divergent theories. Section II discusses how courts have construed the relevant provisions under Comprehensive General Liability policies as well as how they have interpreted certain terms within contracts of insurance.[22] Section III defines and explores the main theories applied when courts are confronted with the question of when policy coverage is triggered. These theories are the exposure theory,[23] the manifestation of loss theory,[24] the injury-in-fact theory[25] and the continuous trigger theory.[26] Finally, Section IV examines the adverse impact caused by the application of divergent theories, and advocates a universal approach to policy coverage.[27]

II. COMPREHENSIVE GENERAL LIABILITY POLICY COVERAGE

A. *Pertinent Comprehensive General Liability Coverage Provisions*

In resolving questions of insurance coverage, one should first focus

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Home Assurance Co., 613 F. Supp. 1549, 1551 n.3 (D.N.J. 1985). The Supreme Court confronted the trigger-of-coverage issue, at least by implication, in Urie v. Thompson, 337 U.S. 163 (1949). In *Urie*, the Court considered whether a cause of action for silicosis accrued during exposure to silicosis or manifestation of the disease for statute of limitation purposes. *Id.* at 169. In holding that the manifestation of the disease was the significant period for statute of limitation purposes, the Court concluded that a contrary construction would impose upon the plaintiff a duty "to diagnose . . . a disease whose symptoms had not yet obtruded on his consciousness." *Id.*

22. *See infra* notes 28-97 and accompanying text. One district court described the Comprehensive General Liability policy as:

> [A] standard liability insurance policy that, with only rare exception, is routinely used by the insurance industry in the United States. Under this policy an insurer must indemnify the insured for "all sums which the insured shall be legally obliged to pay as damages because of . . . bodily injury . . . caused by an occurrence." The insurer is additionally obligated to defend any suit against the insured to recover damages "on account of such injury . . . even if any of the allegations of the suit are groundless, false or fraudulent.

Abex Corp. v. Maryland Casualty Co., 790 F.2d 119, 121 (D.C. Cir. 1986) (citations omitted).

23. *See infra* notes 98-137 and accompanying text.
24. *See infra* notes 138-70 and accompanying text.
25. *See infra* notes 171-81 and accompanying text.
26. *See infra* notes 182-223 and accompanying text.
27. *See infra* notes 224-54 and accompanying text.

on the specific policy provisions involved.[28] Most disputes centered around Comprehensive General Liability (CGL) policies involve one of two versions of the CGL policy: a standardized version drafted in 1966 or a standardized version drafted in 1973.[29] Both versions obligate the insurer to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages" because of bodily injury or property damage caused by an occurrence.[30]

The major differences between the two standardized types of CGL policies is how each type defines the term "occurrence."[31] "Occur-

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28. *See, e.g.*, Abex Corp. v. Maryland Casualty Co., 790 F.2d 119, 124 (D.C. Cir. 1986) (interpreting the proper meaning of the policy term "occurrence" in order to determine what events will trigger insurers' duty to defend); Hancock Labs., Inc. v. Admiral Ins. Co., 777 F.2d 520, 522 (9th Cir. 1985) (analyzing trigger-of-coverage issue by construing policy terms "bodily injury" and "occurrence"); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1217 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981) (analyzing trigger-of-coverage issue by construing policy term "bodily injury"); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987) (analyzing trigger-of-coverage issue by construing policy terms "suit" and "damages"); Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co., 483 A.2d 402, 405 (N.J. 1984) (holding that the starting point in evaluating a claim is the policy itself).

29. Arness & Eliason, *supra* note 12, at 946. The CGL policy was first introduced in 1940 and underwent substantial changes in 1943, 1955, 1966, and 1973. *Id.*

"Liability Insurance" is defined as a "[c]ontract by which one party promises on consideration to compensate or reimburse other if he shall suffer loss from specified cause or to guaranty or indemnify or secure him against loss from that cause." BLACK'S LAW DICTIONARY 915 (6th ed. 1990); *see also* Garvey v. State Farm Fire & Casualty Co., 770 P.2d 704, 705 n.2 (Cal. 1989) (distinguishing liability insurance, which serves to protect an insured against third parties who claim injury, from first-party insurance, which protects the insured against loss or damage).

30. Commercial Union Ins. Co. v. Sepco Corp., 765 F.2d 1543, 1544 (11th Cir. 1985). In *Sepco Corp.*, the court held that exposure to loss-creating agents constitutes an occurrence for purposes of coverage. *Id.* at 1546.

Generally, where a single event or process results in damages or injuries, it is considered one occurrence even though the losses are spread over a long period of time or among a great number of people. *See, e.g.*, Barrett v. Iowa Nat'l Mut. Ins. Co., 264 F.2d 224, 226 (9th Cir. 1959) (holding that the breaking of several windows while house was being worked on constituted one occurrence); Saint Paul-Mercury Indem. Co. v. Rutland, 225 F.2d 689, 704 (5th Cir. 1955) (holding that train derailment which caused damage to sixteen train cars constituted one occurrence); Union Carbide Corp. v. Travelers Indem. Co., 399 F. Supp. 12, 21 (W.D. Pa. 1975) (holding that defective chemical that caused injury to many users constituted a single occurrence); Southern Intl. Corp. v. Poly-Urethane Indus., Inc., 353 So. 2d 646, 648 (Fla. Dist. Ct. App. 1977) (holding that contractor damaging several condominiums when applying a sealant constituted a single occurrence).

31. Prior to the revision of the CGL in 1966, the use of the term "accident" as opposed to "occurrence" in liability policies greatly confused the courts. American Motorists Ins. v. E.R. Squibb & Sons, 406 N.Y.S.2d 658, 660 (1978). Specifically, there was confusion as to whether "accident" referred to the act or the resulting injury. *Id.*

rence" in the 1966 CGL policy refers to "an accident, including injurious conditions which results during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."[32] In contrast, "occurrence" in the 1973 CGL policy is defined typically as "an accident, including continuous or repeated exposure to conditions, which results in *bodily injury* or *property damage* neither expected nor intended from the standpoint of the *insured.*"[33] The 1973 version is more encompassing because even events that are not sudden may trigger a policy's coverage.[34]

In response to this confusion, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau replaced the word "accident" with the word "occurrence"—a change that insurance commentators at the time interpreted to refer to the injury and not the time of the accident or exposure. *Id.* However, not all courts construe the term "accident" in pre-1966 policies to necessarily exclude coverage for long-term contamination losses. *See* Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co., 817 F. Supp. 1136, 1147 (D.N.J. 1993) (holding "accident" to include long-term contamination of soil and water).

32. Arness & Eliason, *supra* note 12, at 946. Whether an insured expected or intended a loss is often at issue when a court decides whether coverage exists under various types of insurance policies. *See* Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888, 891 (Me. 1981) (holding insured's aggravated assault of claimant was not expected or intended); Nielsen v. St. Paul Cos., 583 P.2d 545, 546-47 (Or. 1978) (holding "expected or intended" refers to injury not act); Northwestern Nat'l Casualty Co. v. Phalen, 597 P.2d 720, 724 (Mont. 1979) (same); Altena v. United Fire & Casualty Co., 422 N.W.2d 485, 490 (Iowa 1988) (holding insured's rape of cousin was intentional and not covered under policy); Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834, 835 (Minn. 1982) (holding that the sexual assault was expected and intended and therefore not covered under the policy); State Farm Fire & Casualty Co. v. Muth, 207 N.W.2d 364, 366-67 (Neb. 1973) (holding that insured who purposely fired B-B gun but accidentally injured claimant did not expect or intend loss).

33. Arness & Eliason, *supra* note 12, at 946 (emphasis in original); Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1340 (D.D.C. 1986) (holding that CGL occurrence for bodily injury purposes triggered at time released contaminants actually caused diagnosable medical injury), *cert. denied*, 112 S. Ct. 1777 (1992). *Cf.* Gruol Constr. Co. v. Insurance Co. of N. Am., 524 P.2d 427, 429 (Wash. Ct. App. 1974) (defining occurrence as "continuous or repeated exposure to substantially the same continuous conditions").

34. Arness & Eliason, *supra* note 12, at 947. The Third Circuit stated that the test for determining an occurrence was whether there exists "one proximate, uninterrupted, and continuing cause" that created all the losses. Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 61 (3d Cir. 1982) (interpreting policy language) (quoting Bartholomew v. Inc. Co. N. Am., 502 F. Supp. 246, 251 (D.R.I. 1980), *aff'd sub nom.*, Bartholomew v. Appalachian Inc. Co., 655 F.2d 27 (1st Cir. 1981)); *but see* Elston-Richards Storage Co. v. Indemnity Ins. Co. of N. Am., 194 F. Supp. 673, 678-82 (W.D. Mich. 1960) (holding that each separate incident of damage constitutes a sepa-

Another difference between the 1966 and 1973 CGL policies involves the definition of property damage. Prior to the 1973 revision, some courts held that property damage includes intangible losses to property such as loss of use or diminution of value.[35] The drafters of the 1973 revision added the modifier, "physical" injury to property damage so that policies would no longer cover intangible losses.[36] An example of the effect of this revision exists in *Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co.*[37], where a manufacturer of tennis rackets attempted to obtain indemnification from its insurer for the cost of defective frames.[38] The court denied the claim, holding that the "mere inclusion" of a defective part did not constitute property damage where other parts were not physically harmed.[39] As a result, the insured must show that some tangible physical injury took place to trigger coverage under a CGL policy.[40]

Although drafters have revised CGL policies several times over a period of many years, the policies are treated the same for purposes of analyzing coverage.[41] Therefore, the threshold issue of when the policy regards the plaintiff as injured for purposes of coverage remains the

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rate occurrence), *aff'd*, 291 F.2d 627 (6th Cir. 1961).

35. *See, e.g.*, McDowell-Wellman Eng'g Co. v. Hartford Accident and Indem. Co., 711 F.2d 521, 525-26 n.7 (3d Cir. 1983)(citations omitted); Hasenstein v. Saint Paul-Mercury Indem. Co., 65 N.W.2d 122, 124-26 (Minn. 1954).

36. *See* Laurie Vasichek, *Liability Coverage for "Damages Because of Property Damage" Under the Comprehensive General Liability Policy*, 68 MINN. L. REV. 795, 800-13 (1984); George H. Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED'N INS. COUNS. Q. 217, 224-26 (1975).

37. 508 F.2d 417 (7th Cir. 1975).

38. *Id.* at 419-20.

39. *Id. See, e.g.*, Liberty Bank of Mont. v. Travelers Indem. Co., 870 F.2d 1504, 1509 (9th Cir. 1989) (holding that economic losses, such as lost profit or good will, are intangible property damage and not covered under CGL policy); Sting Sec., Inc. v. First Mercury Syndicate, Inc., 791 F. Supp. 555, 561 (D. Md. 1992) (holding that lost profits are intangible property damages and not covered under CGL policy); Wyoming Sawmills v. Transportation Ins. Co., 578 P.2d 1253, 1256 (Or. 1978) (holding that diminution in property value is intangible property damage and not covered under CGL policy). *Cf.* Safeco Ins. Co. v. Munroe, 527 P.2d 64, 68 (Mont. 1974) (holding that physical damage to wheat justified coverage under CGL policy).

40. American Home Assurance Co. v. Libbey-Owens-Ford Co., 786 F.2d 22, 25 (1st Cir. 1986) (holding that CGL policy of window manufacturer covered consequential losses stemming from physical injury to windows). Generally, the risk of replacing and repairing defective materials is not covered by a liability insurer. Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 825-26 (1961); *but see* Hauenstein v. St. Paul-Mercury Indem. Co., 65 N.W.2d 122, 125 (Minn. 1954) (finding coverage where defective plaster had to be removed from walls).

41. Barbara Wrubel, *Liability Insurance for Insidious Diseases: Who Picks Up the Tab?*, 48 FORDHAM L. REV. 657, 666-67 (1980).

same.[42] In addition to the variations in CGL policies, the insured's rights and obligations may also depend on the manner in which the court construes the applicable policy language.[43]

B. Relevant Principles of Construction Affecting CGL Policies

After figuring out the pertinent policy provisions at issue, a court must consider certain principles of construction that affect the interpretation of CGL policies.[44] A proper analysis should include a close examination of the language of the policy in determining how coverage is triggered. For example, one commentator noted that depending on whether a court employed the exposure or the manifestation theory, the court may be forced to construe the policy so that additional terms are added in order to justify applying either theory.[45]

Generally, however, insurance contracts are subject to the same construction as the courts afford to other contracts.[46] For example, courts

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42. *Id.* at 668.

43. *See, e.g.*, Honeycomb Sys., Inc. v. Admiral Ins. Co., 567 F. Supp. 1400, 1405-06 (D. Me. 1983) (holding turned on construction of term "occurrence"); Gassaway v. Travelers Ins. Co., 439 S.W.2d 605, 608-09 (Tenn. 1969) (holding turned on construction of phrase "expected by the insured"); United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838, 842 (Mich. Ct. App. 1983) (holding turned on construction of term "damages"); Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754, 761 (6th Cir. 1992) (holding turned on construction of term "suit").

44. *See, e.g.*, *Ray Indus.*, 974 F.2d at 759 (holding that court must first determine whether policy is ambiguous when construing policy coverage); Powers v. Detroit Auto. Inter-Ins. Exch., 398 N.W.2d 411, 420 (Mich. 1986) (holding that court must decide which interpretation of policy should apply); Gray v. Zurich Ins. Co., 419 P.2d 168, 171 (Cal. 1966) (holding that courts must ascertain a policy's meaning according to the insured's reasonable expectations); *see also* Rohner v. Niemann, 380 A.2d 549, 552 (Del. 1977) (holding that construction of an insurance contract is a question of law); New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267, 1269 (3d Cir. 1992) (holding that court possesses plenary review over "correct construction" of policy), *cert. denied*, 113 S. Ct. 1846 (1993).

45. Wrubel, *supra* note 41, at 677. However, one commentator argues that the courts' application of principles of construction to the trigger-of-coverage issue has created, rather than resolved, the inconsistent judicial resolutions to the issue. *Adjudicating Asbestos Liability: Alternatives to Contract Analysis*, 97 HARV. L. REV. 739, 740 (1984) (hereafter "Adjudicating Liability").

46. Martin v. Phillips, 356 So. 2d 1016, 1018 (La. Ct. App. 1977) (holding principles of contract construction apply to insurance contracts); Robichaux v. Group. Hosp. Serv. Inc., 379 S.W.2d 874, 876 (Mo. Ct. App. 1964) (determining identical proposition); Hocker v. New Hampshire Ins. Co., 922 F.2d 1476, 1480 (10th Cir. 1991) (determining identical proposition); Enterprise Tools Inc. v. Export-Import Bank, 799 F.2d

interpret insurance contracts in their entirety, as opposed to interpreting isolated provisions.[47] As with other contracts, courts also examine the objectives of the respective parties—the insurer and the insured—when construing policy coverage.[48] Finally, as with other contracts, absent conflicts with statutes or public policy, courts presume that insurance contracts encompass the parties' "entire and final" agreement.[49]

Because of this presumption, a court interpreting an insurance policy may not expand or contract the scope of coverage beyond the contemplation of the contract parties.[50] Notwithstanding the courts' reluctance to extend coverage, several factors bearing specifically on interpretation of insurance contracts merit closer examination. What follows are six principles of construction that directly affect the ultimate resolution of what triggers coverage under a given CGL policy.

1. Ambiguous Terms are Construed in Favor of Coverage

After determining that certain policy terms are ambiguous, courts apply a principle of construction that goes beyond the literal words of the policies themselves.[51] When policy language is clear, the plain meaning of the policy terms controls, but when the terms are ambiguous the policy is interpreted in the insured's favor.[52] The purpose of

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437, 439 (8th Cir. 1986) (determining identical proposition), *cert. denied*, 480 U.S. 931 (1987).

47. *See, e.g.*, Fresard v. Michigan Millers Mut. Ins. Co., 327 N.W.2d 286, 289 (Mich. 1982) (holding that "meaning should be given to all terms"); Allstate Ins. Co. v. Freeman, 443 N.W.2d 734, 749 (Mich. 1989) (holding that full effect should be given to all words within a policy). *Cf.* Shadbolt v. Farmers Ins. Exch., 551 P.2d 478, 480 (Or. 1976) (interpreting provisions in context of entire agreement); Prowant v. Sealy, 187 P. 235, 239 (Okla. 1919) (holding courts must gather the parties intentions from the context of the entire agreement).

48. Wrubel, *supra* note 41, at 674-75.

49. *Id.* at 675.

50. *See* Aetna Casualty & Sur. Co. v. Hanna, 224 F.2d 499, 503 (5th Cir. 1955). *Accord* Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. Inc., 842 F.2d 977, 985 (8th Cir. 1988) (adopting identical rule); Ladd Constr. Co. v. Insurance Co. of N. Am., 391 N.E.2d 568, 571 (Ill. App. Ct. 1979) (adopting identical rule).

51. Vargas v. Insurance Co. of N. Am., 651 F.2d 838 (2d Cir. 1981) (holding that insured was covered because terms were capable of more than one "reasonable and fair interpretation"). *But see Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988). The principle is also referred to as "contra preferentem" which is defined as "against the party who proffers or puts forward a thing." BLACK'S LAW DICTIONARY 327 (6th ed. 1990); *see also* Mazzilli v. Accident & Casualty Ins. Co. of Winterthur, 170 A.2d 800, 803 (N.J. 1961) (illustrating principle).

52. Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 17 (1st Cir. 1982) (holding that theory of coverage justified by ambiguity of "occurrence"); Filor,

this construction is to fulfill the policy's fundamental purpose of covering the insured for a loss.[53] Sometimes parties assert that CGL policy definitions are themselves ambiguous. For example, one defendant argued that since "bodily injury" was simply defined as "bodily injury" in the policy definitions, the term was more of a "chant" than a definition and therefore represented an ambiguity.[54] The court should apply a strict construction against the insurer and a more liberal construction as to the insured to determine if an ambiguity exists.[55] A similar approach was adopted in *Cohen v. North American Life & Casualty Co.*,[56] in which the court was confronted with the proper interpretation of a policy providing for "disability caused solely by disease."[57] The insured's disease did not become apparent until after the period of policy coverage, although the cause of the disease existed prior to the

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Bullard & Smyth v. Insurance Co. of N. Am., 605 F.2d 598, 602 (2d Cir. 1978) (insurer must prove desired construction of terms is "only construction which may fairly be placed on them"); Sincoff v. Liberty Mut. Fire Ins. Co., 183 N.E.2d 899, 901 (N.Y. 1962)(insurer must show insured's interpretation of terms is unreasonable). Because most words are subject to more than one interpretation, a court should look to see whether the term in dispute is ambiguous under a "common-sense" approach rather than a "hypertechnical" approach. New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267, 1270 (3d Cir. 1992) (citing 2 COUCH, COUCH ON INSURANCE 2D, § 15:17 at 177-78, 190 (rev. ed. 1984).

53. Wrubel, *supra* note 41, at 679. The only time that a court will construe a policy provision in favor of the insurer is when the construction is the only one the court can reasonably give to the terms. Cantanucci v. Reliance Ins. Co., 349 N.Y.S.2d 187, 191 (1973), *aff'd*, 324 N.E.2d 360 (1974).

54. Brief for Defendant/Appellee-Cross Appellant Forty-Eight Insulations, Inc., at 50, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978). Another example of how ambiguities consistently surface in the insurance context is exemplified by the varying interpretations of the word "sudden" in pollution exclusions of policies. In Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571, 1573 (S.D. Ga. 1987), the district court interpreted "sudden" in pollution exclusions as tantamount to "abruptness." However, in Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 994 (N.J. Super. Ct. 1982), the New Jersey Superior Court interpreted "sudden" in pollution exclusions to mean that "the permeation of pollution into the ground water may have been gradual rather than sudden."

55. 12 J. APPLEMAN & APPLEMAN, INSURANCE LAW AND PRACTICE, § 7401, at 197 (rev. ed. 1976).

56. 185 N.W. 939 (Minn. 1921).

57. *Id.* at 939. In addition, the policy provided indemnification for a disability "solely as the result of disease which shall originate and begin after this policy shall have been in continuous force for 30 days." *Id.*

period of policy coverage.[58] In holding that the insurer was liable, the court noted that the rule of interpretation "is the usual one . . . . [I]t must be favorable to the insured."[59]

2. Policy Terms are Strictly Construed Against Commercial Entities

Courts are confronted with a presumption in favor of coverage if the conflict is not readily resolved by the policy's terms.[60] However, some jurisdictions counter this presumption by strictly construing policy terms where the insured party is a commercial entity.[61] This construction may be particularly important in resolving trigger-of-coverage questions because commercial entities such as asbestos installers,[62] construction companies,[63] and insulation manufacturers[64] are frequently the insured parties in such cases.

One of the reasons that courts construe ambiguous terms against insurers is because most policyholders lack the same resources, bargaining strength, and information as insurance companies.[65] However, the fact that large commercial entities that purchase insurance often possess "risk management divisions" possessing "sophistication [rivaling] that of the insurance companies themselves" justifies applying a strict construction to those entities.[66]

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58. *Id.*

59. *Id.* The court held that the insured was not concerned with the "remote cause of the disease." *Id.*

60. Another court defined the principle of construction in a different way, stating that the policy should be understood as "a layman would read it" as opposed to an attorney or expert on insurance. Crane v. State Farm Fire & Casualty Co., 485 P.2d 1129, 1130 (Cal. 1971) (holding that medical expenses for child injured at home while mother was working covered under homeowner's policy despite "business pursuits" exclusion in policy).

61. *See, e.g.*, Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). The court in *Standard Venetian Blind* rejected the use of this construction in the case before it, holding that provisions excluding coverage are "plain and free from ambiguity" and declined to "rewrite the parties' written contract." *Id.*; Eastern Associated Coal v. Aetna Casualty & Sur. Co., 632 F.2d 1068 (3d Cir. 1980) (holding that equality in bargaining power between the contracting parties justifies a strict construction against commercial entities).

62. *See, e.g.*, ACandS, Inc. v. Aetna Casualty & Sur. Co., 764 F.2d 968 (3d Cir. 1985)(asbestos installation).

63. *See, e.g.*, American Home Assurance v. Libbey-Owens-Ford Co., 786 F.2d 22 (1st Cir. 1986)(window installation subcontractor).

64. *See, e.g.*, Aetna Casualty & Sur. Co., v. PPG Indus., Inc., 554 F. Supp. 290 (1983)(foam insulation).

65. K. ABRAHAM, INSURANCE LAW AND REGULATION, 28 (1990) (general discussion and cases on how standard policies are drafted by insurance companies construing ambiguous language).

66. Arness & Eliason, *supra* note 12, at 950. On the other hand, the New Jersey

3. The Reasonable Expectations of the Insured Should be Honored

A maxim central to the interpretation of insurance contracts states that the reasonable expectations of the insured when purchasing an insurance policy should be enforced even if "painstaking study" of the policy's terms would have revealed that the insured's expectations were unreasonable.[67] The policy rationale of the reasonable expectations construction is that although the insured should ideally read the entire policy, in reality "only a hearty soul would . . . plow[] through all the fine print."[68] In *Kievit v. Loyal Protective Life Insurance Co.*,[69] the court applied the reasonable expectations principle to an insured whose dormant Parkinson's disease was reactivated after a piece of lumber hit him on the head.[70]

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district court expressly rejected the theory that the commercial entity construction cancels out the ambiguity construction. Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co., 817 F. Supp. 1136, 1154 (D.N.J. 1993) (holding that ambiguity of term "accidental" justified construction in favor of insured despite fact that insured was commercial entity). One reason why the commercial entity construction does not cancel out the ambiguity construction may be because most commercial entities do not have a part in negotiating or drafting the eventual insurance agreement. New Castle County v. Hartford Accident and Indem. Co., 933 F.2d 1162, 1189 (3d Cir. 1991) (noting that insurers usually draft policy language without the input from or negotiation with the insured). Therefore, an ambiguous term should not be construed in favor of the insured where the insured is a commercial entity which actively negotiated the actual terms of the insurance policy. In such cases, the court would be safe in presuming that a commercial entity, with considerable resources for consultation, knew and expected the ramifications of the policy terms.

67. KEETON, *supra* note 16, at 351. Some of the early reasonable-expectations cases involved situations where the insured did not have the ability to solicit the meanings of the policy terms from the insurer. *See, e.g.*, Lachs v. Fidelity & Casualty Co., 118 N.E.2d 555, 558 (N.Y. 1954) (applying principle to flight insurance); Steven v. Fidelity & Casualty Co., 377 P.2d 284, 288 (Cal. 1962) (same); Klos v. Mobile Oil Co., 259 A.2d 889, 894 (N.J. 1969) (applying principle to life insurance solicitation by mail); *see also* William Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267 (1986) (providing a comprehensive review of the reasonable expectations doctrine).

68. Another view of the reasonable-expectations doctrine is that it is merely an extension of the principle that ambiguities are construed against the insured. ABRAHAM, *supra* note 65, at 42. One authority on insurance law noted that traditionally "ambiguities . . . [are] resolved favorably to the insured's claim only if a reasonable person in his position would have expected coverage." KEETON, *supra* note 16, at 352. *Cf.* Herzog v. National Am. Ins. Co., 465 P.2d 841, 843 (Cal. 1970) (holding that coverage for motor bike injury under homeowner's liability provision was unreasonable).

69. 170 A.2d 22 (N.J. 1961).

70. *Id.* at 24. Despite the reasonable-expectations doctrine, it is still the burden of

The *Kievit* court held that the insured was covered despite his pre-existing condition, explaining that when the public purchases insurance, they are entitled a broad degree of protection in accordance with their reasonable expectations.[71] The reasonable expectations principle applies in both decisions interpreting coverage clauses and decisions that decide the manner in which they are triggered.[72]

4. Policy Terms are Interpreted to Possess their Plain Meaning

A fourth principle of construction impacting CGL policy coverage is the notion that when a court interprets insurance terms, the court should interpret the provision according to the normal and typical meaning of the terms in dispute.[73] Some courts employ the "plain meaning" rule from the viewpoint of the ordinary or reasonable person.[74] Other courts interpret the plain meaning rule to employ the vantage point of the insured in the particular case.[75]

However, the plain meaning of a policy term is susceptible to several outside influences. For example, when parties admit expert testimony,

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the insured, not the insurer, to establish the validity of a policy claim. Riehl v. Travelers Ins. Co., 772 F.2d 19, 23 (3d Cir. 1985) (noting the burden in a toxic dumping case); Eastern Associated Coal Corp. v. Aetna Casualty & Sur. Co., 632 F.2d 1068, 1074 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981) (holding that the insured bears the burden of establishing a claim); Mackiw v. Pennsylvania Threshermen & Farmers Mut. Casualty Ins. Co., 193 A.2d 745, 751 (Pa. 1963) (holding that insured failed to meet the burden of establishing damages).

71. *Kievit*, 170 A.2d at 26; *see also* Dittmar v. Continental Casualty Co., 150 A.2d 666, 672 (N.J. 1959) (holding that disability policies should "be afforded a liberal construction"); Steven v. Fidelity & Casualty Co., 377 P.2d 284, 288-89 (Cal. 1962) (noting that a reasonable person would expect flight protection to cover substitute flight); Allen v. Metropolitan Life Ins. Co., 208 A.2d 638, 644 (N.J. 1965) (explaining that when the public buys insurance, they are entitled to a "broad measure of protection").

72. *See, e.g.*, AIU Ins. Co. v. Superior Court, 799 P.2d 1253 (1990) (holding that coverage clauses are interpreted to protect an insured's reasonable expectations); Montrose Chem. Corp. v. Admiral Ins. Co., 5 Cal. Rptr. 2d 358, 366-67 (Ct. App. 1992) (explaining that insured reasonably expected coverage for continuous and progressive damages).

73. 13 J. APPLEMAN, *supra* note 55, § 7384 at 71.

74. *See, e.g.*, Berkshire Mut. Ins. Co. v. La Chance, 343 A.2d 642, 643 (N.H. 1975) (policy should be interpreted in light of the "ordinarily intelligent insured"); Magulas v. Travelers Ins. Co, 327 A.2d 608, 609 (N.H. 1974) (stating that the reasonable expectations of the insured should be honored).

75. *See, e.g.*, Shields v. Hiram C. Gardner, Inc., 444 P.2d 38, 43 (Idaho 1968) (noting that construction must comport with what the insured party is likely to contemplate); Rayert v. Loyal Protective Ins. Co., 106 P.2d 1015, 1018 (Idaho 1940) (explaining that a policy must be given liberal construction to comport with insured's understanding).

the average juror may differ regarding the reasonable interpretation of a policy term.[76] Furthermore, a court may take into consideration extrinsic evidence on the meaning of a policy term. For example, the First Circuit advised district judges that they would be "well advised" to admit all extrinsic evidence on the meaning of a policy term unless such evidence is privileged, takes too much time, or is otherwise inadmissible.[77]

Silverstein v. Metropolitan Life Insurance Co.[78] offers a classic example of the effect of the plain meaning rule. In *Silverstein*, the court faced the issue of whether a dormant ulcer was sufficient to trigger coverage under a policy providing coverage for "disease" or "infirmity."[79] Judge Cardozo, writing the opinion for the court, interpreted the policy definition from the vantage point of the "ordinary businessman" and determined that a completely dormant infirmity did not trigger policy coverage until it manifested itself.[80]

5. Ownership During the Policy Period is Not Required

Another issue of construction directly affecting CGL policy coverage involves whether the claimant suing the insured must have, in fact, owned the damaged property during the policy period for CGL coverage to exist. The court in *Garriott Crop Dusting Co. v. Superior Court*[81] directly confronted this issue. In *Garriott*, the insured, a crop duster, purchased CGL policies spanning the period from 1967 to 1970, during which time the insured's caused the toxic contamination of adjacent properties.[82] The City of Bakersfield purchased one of the contaminated properties in 1985 and subsequently sued Garriott.[83] Garriott's insur-

76. 3 ARTHUR CORBIN, CORBIN ON CONTRACTS § 542 (1960); 4 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 629 (3d ed. 1961).

77. Eagle-Picher Indus., Inc. v. Liberty Mut. Ins., 682 F.2d 12, 18 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

78. 171 N.E. 914 (N.Y. 1930).

79. *Id.*

80. *Id.* at 915. The court remarked, "[a]n ulcer as trivial and benign as an uninfected pimple is at most a tendency to an infirmity and not an infirmity itself." *Id.*

81. 270 Cal. Rptr. 678 (Ct. App. 1990).

82. *Id.* at 680.

83. *Id.* at 679. The insurer based its argument on the holding of the court in Remmer v. Glens Falls Indem. Co., 295 P.2d 19 (Cal. Ct. App. 1956), an application the *Garriott* court rejected. *Garriott*, 270 Cal. Rptr. at 685. In *Remmer*, the court held that the time of an occurrence under a CGL policy is the time of actual damage. *Remmer*, 295 P.2d at 21. The *Garriott* court, however, limited the general rule

er denied coverage, asserting that there was no obligation because the City did not purchase the contaminated property until fifteen years after the policies issued by them had expired.[84]

The *Garriott* court rejected the insurer's argument that the claimant must be the owner of the property during the policy period. Instead, the court construed CGL coverage such that when an insured is sued for property damage occurring during the policy period, CGL coverage is triggered.[85] A contrary holding, the court indicated, would violate "every fundamental rule" of insurance interpretation.[86]

6. Only Contingent Losses May be Insured

Finally, a basic principle of insurance law construction is that "an insurer cannot insure against a loss that is known or apparent to the insured."[87] In fact, this principle, known as the "loss-in-progress rule,"[88] is so prevalent that many states specifically codify it.[89] The loss-in-progress rule is premised on the fact that if a court forces an insurer to cover a loss that is known to the insured prior to the policy, the court forces the insurer to become a guarantor of a property's quali-

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of *Remmer*, holding that the rule does not apply when the act causing the damage and the damage itself occur during the same policy period. *Garriott*, 270 Cal. Rptr. at 685. To hold otherwise, the court reasoned, would be to create a "prerequisite to coverage" not contained in the policies themselves. *Id.*

84. *Garriott*, 270 Cal. Rptr. at 685.

85. *Id.*

86. *Id.*

87. Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1238, 1230 n.7 (Cal. 1990); *see also* Bartholomew v. Appalachian Ins. Co., 655 F.2d 27, 28-29 (1st Cir. 1981) (holding that insurance may only cover contingent risks); Kenneth S. Abraham, *Environmental Liability and Limits of Insurance*, 88 COLUM. L. REV. 942, 953 (1988) (discussing the fundamental proposition of insurance law that fortuitous losses are a prerequisite to coverage).

88. Home Ins. Co. v. Landmark Ins. Co., 253 Cal. Rptr. 277, 281-82 (Ct. App. 1988) (holding that coverage may be provided only for non-contingent loss). *See* RESTATEMENT OF CONTRACTS § 291 cmt. a. (1932). The Restatement defines a "fortuitous event" as an "event . . . dependent on chance . . . beyond the power of human beings; it may be within the control of third parties . . . provided the fact is known to the parties."; RESTATEMENT (SECOND) OF CONTRACTS § 399 cmt. a (1981). The Second Restatement of Contracts defined an "aleatory contract" as a contract "dependent on chance [or dependent on a] fact unknown to the parties." *Id.*

89. *See, e.g.*, CAL. INS. CODE § 250 (West 1972) (limiting insurance to "any contingent or unknown event"); N.Y. INS. LAW § 1101(a) (McKinney 1985) (insurance must be "dependent upon . . . a fortuitous event"); MD. ANN. CODE art. 48A, § 2 (1957) (insurance coverage hinges on "determinable contingencies"); LA. REV. STAT. ANN. § 22:5(1)(a) (West 1959 & Supp. 1991) (similar wording); WYO. STAT. § 26-1-102 (1977) (defining insurance contract to cover "fortuitous occurrences" and "ascertainable risk contingencies").

ty, a responsibility not within the contemplation of the insurance contract.[90] On the other hand, if a loss pre-exists the policy, coverage may nevertheless be found if neither the insurer nor the insured possessed actual or constructive knowledge of the loss.[91]

Insurers often employ the contingent losses principle in cases of continuous and progressive property damage by arguing that certain losses were inevitable at the onset of the policy and therefore are not covered.[92] In *Snapp v. State Farm Fire & Casualty Co.*,[93] for example, the insurer argued that because the instability of a landfill prior to the policy made later earth movement unavoidable, the ensuing damage was not insurable.[94] The court in *Snapp*, however, rejected the insurer's argument and held that even though the loss might, in fact,

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90. Greene v. Cheetham, 293 F.2d 933, 937 (2d Cir. 1961). *See also* Intermetal Mexicana, S.A. v. Insurance Co. of N. Am., 866 F.2d 71, 77-78 (3d Cir. 1989) (holding that taking of equipment under court order was not a fortuitous event); Insurance Co. of N. Am. v. United States Gypsum Co., 678 F. Supp. 138, 141, 142-43 (W.D. Va. 1988) (holding that collapse of ground was fortuitous regardless of insured's knowledge of mining in the area); Mellon v. Federal Ins. Co., 14 F.2d 997, 1000-02 (S.D.N.Y. 1929) (holding that explosion was not fortuitous because deliberate); Employers Casualty Co. v. Holm, 393 S.W.2d 363, 368 (Tex. Civ. App. 1965) (holding water damage to be fortuitous where neither party contemplated loss).

91. For example, in Burch v. Commonwealth County Mut. Ins. Co., 450 S.W.2d 838 (Tex. 1970), the Texas Supreme Court allowed coverage under an automobile policy for a collision that occurred on the first day of the stipulated policy period, even though the accident occurred one day before actual issuance by the insurer's agent. In adopting the majority rule, the supreme court held that so long as neither insurer nor insured knew of the loss when they entered into the insurance contract, a court could grant recovery under the policy. *Id.* at 839-40. *See generally* 43 AM. JUR. 2d *Insurance* § 1057 (1982).

92. *See, e.g.*, Atlantic Lines v. American Motorists Ins., 547 F.2d 11, 12 (2d Cir. 1976) (holding that insured must demonstrate that loss was fortuitous under policy); Kilroy Indus. v. United Pac. Ins. Co., 608 F. Supp. 847, 857 (C.D. Cal. 1985) (holding that nonfortuitous losses are not coverable); Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230, 1246-47 (Cal. 1990) (insurer argued that it was not accountable for loss because loss was continuous and progressive over several policy periods); Sabella v. Wisler, 377 P.2d 889, 897 (Cal. 1963) (insurer disputes coverage to insured because loss was not fortuitous where house was built on uncompacted fill); Advance Micro Devices, Inc. v. Great Am. Surplus Lines Ins. Co., 245 Cal. Rptr. 44, 50 (Ct. App. 1988) (holding no coverage due to insured's knowledge of preexisting conditions); Avis v. Hartford Fire Ins. Co., 195 S.E.2d 545, 547 (N.C. 1973) (stating that only losses of a fortuitous nature fall under coverage).

93. 24 Cal. Rptr. 44 (Ct. App. 1962). See *infra* notes 143-46 and accompanying text for a more extensive discussion of *Snapp*.

94. *Id.* at 45.

have been inevitable at the time of formation of the contract, there was no guarantee that the loss would occur during the policy.[95]

Notwithstanding their usefulness, the principles discussed above do not dispositively decide issues of coverage. Rather, the facts and policy considerations presented by each case unavoidably impact the interpretation of policy terms.[96] Even after considering the applicable policy provisions, the relevant interpretive principles and the particular facts of the case, the insured is still faced with the fundamental problem of defining what triggers coverage under his or her policy.[97] The following section examines the theories used by the courts in resolving the trigger-of-coverage issue.

III. THE TRIGGER-OF-COVERAGE THEORIES: EXPOSURE, MANIFESTATION OF LOSS, INJURY-IN-FACT, AND CONTINUOUS TRIGGER

After considering the specific provisions of CGL policies and the maxims of construction that affect the interpretation of such provisions, courts still arrive at different theories of how coverage is triggered under CGL policies. Specifically, courts have propounded four possible solutions to the trigger of coverage question: the exposure theory,[98] the manifestation of loss theory,[99] the injury-in-fact theory[100] and the continuous trigger theory.[101]

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95. *Id.* at 45-46.

96. Independent Petrochemicals Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1337 (D.D.C. 1986) (holding that "policy considerations and medical facts of each case" impact the court's resolution of coverage issues), *aff'd in part, rev'd in part*, 944 F.2d 940 (1991). Mitchell L. Lathrop noted that the scope of coverage of a particular insurance policy is determined "from the facts of the particular claim" as well as the policy's terms. Lathrop, *supra* note 2, § 32.08

97. Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1042 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). The *Keene* court noted that in analyzing the duty of the insurer to the insured, there are three basic steps: ascertaining the trigger of coverage, deciding the extent of coverage, and allocating the coverage among insurers where two or more policies are triggered. *Id.* This Article is concerned primarily with the trigger theory issue and the allocation issue to the extent that the trigger-of-coverage impacts them.

98. *See infra* notes 102-37 and accompanying text for discussion on the exposure theory.

99. *See infra* notes 138-70 and accompanying text for discussion on the manifestation of loss theory.

100. *See infra* notes 171-81 and accompanying text for discussion on the injury-in-fact theory.

101. *See infra* notes 182-223 and accompanying text for discussion on the continuous trigger theory.

A. Exposure Theory of Triggering Coverage

Under the exposure theory of triggering coverage, exposure to the agent that eventually produces the loss, such as inhalation of asbestos dust, triggers the policy.[102] Therefore, the exposure theory is, in effect, a "continuing tort," making all insurers liable during the periods of exposure.[103] An insured who is successfully sued in a jurisdiction applying the exposure trigger of loss theory is entitled to indemnification by the policy in effect during the period where the claimant came into contact with the injurious condition.[104] Courts have applied the exposure trigger-of-coverage theory in scenarios involving bodily injury[105] as well as situations dealing with property damage.[106]

1. The Exposure Theory in the Bodily Injury Context

a. Asbestos inhalation injuries

The courts first confronted the trigger-of-coverage quandary in the context of bodily injury caused by asbestos, typically involving claimants who inhaled asbestos fibers in the workplace and years later developed asbestosis.[107] The Fifth, Sixth, Ninth and Eleventh Circuits all

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102. Agrawal, *supra* note 15, at 1506. In fact, injury caused by inhalation of asbestos is one of the most common contexts in which courts confront the trigger-of-coverage theory. *See, e.g.*, ACandS, Inc. v. Aetna Casualty & Sur. Co., 764 F.2d 968, 973 (3d Cir. 1985) (continuous trigger applied to asbestosis); Eagle-Picher Indus. v. Liberty Mut. Ins., 682 F.2d 12, 20 (1st Cir. 1982) (manifestation theory applied to asbestosis), *cert. denied, sub nom.*, Froude v. Eagle-Picher Indus., 460 U.S. 1028 (1983); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1334, 1345 (D.C. Cir. 1981) (continuous trigger theory applied to asbestosis), *cert. denied*, 455 U.S. 1007 (1982); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1221 (6th Cir. 1980) (exposure theory applied to asbestosis), *cert. denied*, 454 U.S. 1109 (1981).

103. Earnest, *supra* note 9, at 67. In the area of workers' compensation policies, a topic not discussed in this Article, coverage is generally predicated upon when the last exposure occurred. G.Z. NOTHSTEIN, TOXIC TORTS—LITIGATION OF HAZARDOUS SUBSTANCE CASES 361 (1st ed. 1984); *see also* Hartford Accident & Indem. v. Aetna Life & Casualty, 483 A.2d 402, 410 (N.J. 1984) (holding that exposure theory mandates coverage only where exposure results in injury).

104. Terry A.H. Senne, *Insurance Law—Products Liability Insurance—Time of Exposure Triggers Coverage for Asbestos Related Disease*, 26 WAYNE L. REV. 1127, 1128 n.7 (1980).

105. *See infra* notes 107-31 and accompanying text for discussion on the exposure theory applied in the context of bodily injury claims.

106. *See infra* notes 132-37 and accompanying text for discussion on the exposure theory in the context of property damage claims.

107. R. Kennedy, *Primary, Excess and Reinsurer Disputes*, *in* ENVIRONMENTAL AND

have sporadically applied the exposure theory of triggering coverage, holding that the occurrence of "the first physiological, cellular damage" triggers liability, even if the disease does not manifest itself until a later date.[108]

For instance, in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*,[109] the decision of whether to adopt the exposure theory or another theory confronted the court.[110] Forty-Eight Insulations manufactured asbestos from 1955 to 1970 and was insured under CGL policies of five different insurers: the Insurance Company of North America ("INA") from 1955 to 1972; Affiliated FM Insurance ("Affiliated FM") from 1972 to 1975; Illinois National Insurance ("Illinois National") from 1975 to January 1976; Travelers Indemnity Company of Rhode Island ("Travelers") from January to November 1976; and Liberty Mutual Insurance ("Liberty") after November of 1976.[111]

Numerous claimants filed suits against Forty-Eight Insulations, alleging that the manufacturer's failure to warn employees of the dangers associated with asbestos fibers caused them bodily injury.[112] INA, Affiliated FM, Illinois National, and Liberty Mutual asserted that no coverage existed under the policies because no disease manifested itself during their policy periods.[113] Forty-Eight and Travelers urged the court that the relevant dates for triggering coverage was not when as-

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TOXIC TORT CLAIMS: INSURANCE COVERAGE IN 1989 AND BEYOND, 346 (1989). Asbestosis is a progressive disease that results "when fibrous lung tissue surrounds small asbestos particles which have been inhaled in order to prevent the fibers from moving around or causing irritation to neighboring cells . . . . [T]he encapsulation process diminishes pulmonary function and makes breathing difficult." LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 58.04 (1992).

108. Kennedy, *supra* note 107, at 349. Furthermore, the Eighth Circuit in dicta observed that "Missouri would probably adopt the 'exposure theory' of coverage." Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. Inc., 842 F.2d 977, 984 (8th Cir. 1987), *cert. denied, sub nom.*, Missouri v. Continental Ins. Cos., 488 U.S. 821 (1988).

109. 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1987).

110. *Id.* at 1216-17.

111. *Id.* at 1215. Another decision in which the court faced the issue of asbestos injury was Commercial Union Ins. Co. v. Pittsburgh Corning Corp., 553 F. Supp. 425, 433 (E.D. Pa. 1981) (holding that exposure to asbestos triggered policy coverage). *Cf.* Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1389-90 (E.D.N.Y. 1988) (holding delivery of, not exposure to, Agent Orange to soldiers in Vietnam triggers coverage).

112. *Forty-Eight*, 633 F.2d at 1213. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1974) (stating that "[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning on the container, as to its use"). *See also* 1 M. STUART MADDEN, PRODUCTS LIABILITY, § 10.3 (2d ed. 1988) (discussing failure to warn under the Uniform Commercial Code).

113. *Forty-Eight*, 633 F.2d at 1216-17. These companies urged the court to follow a manifestation theory, which held that no "bodily injury" took place until the asbestosis became diagnosible. *Id.*

bestosis manifested itself in the claimants but, rather, when the actual exposure to asbestos occurred.[114]

The Forty-Eight court recognized that it is not economically feasible to introduce medical testimony in each asbestosis case to determine the precise point of onset of the disease.[115] Furthermore, the court rejected the proposition that medical advances could be used to determine the exact point when the bodily injury occurred. In arriving at its decision to apply an exposure trigger of coverage, the court first accepted Forty-Eight's argument that the policy terms "bodily injury" and "occurrence" were ambiguous when applied to a cumulative and progressive disease, and therefore construed the terms in favor of the insured.[116] The court also reasoned that an exposure theory was warranted because medical testimony showed that tissue damage occurs immediately after asbestos inhalation, despite the fact that the disease did not become discoverable until many years later.[117]

b. Non-asbestos injuries

Although the first exposure trigger cases involved exposure to asbestos, courts have not confined the exposure theory in the bodily injury context solely to asbestosis. In *Clemco Industries v. Commercial Union Insurance Co.*,[118] the court applied the exposure rule to the dis-

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114. *Id.* at 1217. The exposure theory "characterizes asbestosis as a series of continuing injuries to the body that accumulate to cause death or disability." For a more detailed discussion on asbestosis and its ramifications, see Selikoff et al., *Asbestosis and Neoplasis*, 42 AM. J. MED. 487 (1967); Selikoff et al., *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANN. N.Y. ACAD. SCI. 139 (1965); Borel v. Fiberboard Paper Prods., 493 F.2d 1076, 1083-85 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (holding that asbestosis injury to workers created liability of employer).

115. *Forty-Eight*, 633 F.2d at 1218. The court commented, "[W]e prefer to say that bodily injury is bodily injury from the very beginning, rather than . . . years from initial exposure because that's when an x-ray shows it." *Id.* at 1217 n.10.

116. *Id.* at 1222.

117. *Id.* at 1222-23. *See* Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1992). In *Porter*, the plaintiff was a worker who contracted asbestosis as the result of a filter supplied by American Optical. *Id.* at 1131. Relying upon *Forty-Eight*, the court held that the exposure theory was the appropriate trigger-of-coverage and observed that the coverage should be apportioned among all of American Optical's insurers who had policies in effect during the claimant's exposure to asbestos particles. *Id.* at 1145.

118. 665 F. Supp. 816 (N.D. Cal. 1987), *aff'd without opinion*, 848 F.2d 1242 (9th Cir. 1988).

ease of silicosis, stressing the similar characteristics of silicosis and asbestosis.[119] In cases involving diseases with long latency periods, such as asbestosis and silicosis, the court stated that the exposure theory was "the only workable theory."[120]

Additionally, courts have not limited the exposure theory, as applied in the bodily injury context, solely to the inhalation of harmful substances that cause injury. In *Hancock Laboratories, Inc. v. Admiral Insurance*,[121] a patient who received an implant of a bacteria-infected heart valve sued the valve's manufacturer.[122] The Ninth Circuit adopted the exposure theory, holding that exposure to the contaminated valve "set in motion" the growth of the bacteria.[123] First, the court noted that the driving force behind the construction of policy terms is the goal of promoting coverage and that the exposure theory fulfills this goal by allowing insurers to clearly determine their obligations.[124] Second, the court observed that if it adopted the manifestation theory, it might create a shortage of coverage for injured claimants.[125] The court theorized that after a certain number of injuries caused by the manufacturer were discovered, the manufacturer would be unable to procure adequate insurance.[126]

However, not all courts have been willing to apply the exposure theory of triggering coverage to bodily injury situations. For example, in *American Motorists Insurance v. E.R. Squibb & Sons*,[127] the manufacturer of DES, a synthetic hormone which caused several cases of cervical cancer, urged the court to adopt the exposure theory.[128] The court first noted that pre-1966 insurance policies covered damages covered by an "accident," while subsequent policies covered for damages caused by an "occurrence."[129] According to the court, CGL drafters made the change because "great difficulty" was caused by the ambiguous nature

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119. *Id.* at 828-29. *See* Urie v. Thompson, 337 U.S. 163 (1941) (considering the disease of silicosis in the context of a statute of limitations issue).

120. *Clemco Industries*, 665 F. Supp. at 828.

121. 777 F.2d 520 (9th Cir. 1985).

122. *Id.* at 524-25. Recently, the medical field has experimented with the implementation of baboon livers into human subjects. *See Man Seems to Reject Baboon Liver*, N.Y. TIMES, Jan. 16, 1993, (Valley ed.) at 6, col. 3.

123. *Hancock*, 777 F.2d at 524.

124. *Id.*

125. *Id.*

126. *Id.* at 525. The conclusion of the court proved to be somewhat extreme. Insurance companies adjusted to judicial interpretations that broadened the scope of coverage by creating new, more narrowly-tailored policy language. ABRAHAM, *supra* note 65, at 449.

127. 406 N.Y.S.2d 658 (App. Div. 1978).

128. *Id.* at 660.

129. *Id.*

of the term "accident."[130] The court agreed with various insurance commentators when it held that an exposure theory was inappropriate, stating that under the policy language "results" and not "acts" determine the correct resolution of the coverage issue.[131]

2. The Exposure Theory in the Property Damage Context

Courts have also applied the exposure theory to scenarios involving coverage of property damage claims filed against the insured. In *Firemans Fund Insurance Cos. v. Ex-Cell-O Corp.*,[132] the court determined the coverage obligations of several insurers with respect to clean-up costs accrued from twenty-two contaminated dumping sites.[133] The court determined that each insurer whose policy was in effect during the exposure period was obligated to provide a share of coverage to the insured.[134] Each insurer's obligation was proportionate to the amount of time the insurer's policy was in effect during the period of exposure.[135]

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130. *Id.* If the resolution was made so clear from merely switching the term "accident" to "occurrence," why have courts proposed as many as four different theories of triggering coverage? *See, e.g.*, Todd Shipyards Corp. v. Black, 717 F.2d 1280, 1286 (9th Cir. 1983) (holding that in a worker's compensation case manifestation trigger of coverage theory applies), *cert. denied*, 466 U.S. 937 (1984); Commercial Union Ins. Co. v. Pittsburgh Corning Corp., 553 F. Supp. 425, 433 (E.D. Pa. 1981) (holding that exposure trigger of coverage theory applies); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1390 (E.D.N.Y. 1988) (holding that delivery of the loss-causing agent triggers coverage); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1045 (D.C. Cir. 1981) (holding that continuous trigger of coverage theory applies), *cert. denied*, 455 U.S. 1007 (1982).

131. *American Motorists*, 406 N.Y.S.2d at 660 (citing Singaas v. Diedrich, 238 N.W.2d 878 (Minn. 1976)).

132. 662 F. Supp. 71, 74 (E.D. Mich. 1987).

133. *Id.* at 73. An analogous issue is whether toxic clean up costs under statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). 42 U.S.C. § 9601 constitute "damages" to the insured. *See* Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., 842 F.2d 977, 979 (8th Cir.) (holding that CERCLA cleanup costs are not claims for damages under CGL policies), *cert. denied*, 488 U.S. 821 (1988); *Cf.* New Castle County v. Hartford Accident & Indem. Co., 673 F. Supp. 1359, 1366 (D. Del. 1987) (holding that damages include clean up costs). Generally, courts have not held that insurance coverage exists for the costs of complying with injunctions, even where the claimant could have brought the suit for damages. Garden Sanctuary, Inc. v. Insurance Co. of N. Am., 292 So. 2d 75, 77-78 (Fla. Ct. App. 1974); Ladd Constr. Co. v. Insurance Co. of N. Am., 391 N.E.2d 568, 570 (Ill. 1979).

134. *Ex-Cell-O*, 662 F. Supp. at 76.

135. *Ex-Cell-O*, 662 F. Supp. at 76. The *Ex-Cell-O* court's holding is represented by

Despite the willingness of some courts to apply the exposure theory, the theory may ultimately have a limited life span. The validity of the exposure theory is questionable because it assumes that injury occurs immediately upon exposure even if scientific support for that presumption is lacking.[136] As one insurance company executive observed, it is often impossible to "underwrite insurance based on an exposure theory . . . . The only serious proponents of the exposure theory are asbestos manufacturers and insurers who could lose more under the manifestation theory."[137] Thus, the manifestation theory is often proposed as a viable alternative to the exposure theory.

B. Manifestation of Loss Theory of Triggering Coverage

Under the manifestation of loss theory, a claim that is discoverable or becomes apparent under the policy period triggers coverage under a CGL policy.[138] Where a disease coming from exposure to a certain substance causes liability, the date of manifestation, and thus the trigger for policy coverage, is determined either when the claimant has actual or constructive knowledge of the disease, or when the disease is diagnosed, whichever occurs first.[139] Policy coverage for property damage

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the following formula:

$$\text{\% Share of Insurer's Coverage} = \frac{\text{Time of exposure whole insurer's policy in effect}}{\text{Time of exposure to contaminant}}$$

136. Wrubel, *supra* note 41, at 699.

137. James Podgers, *Toxic Time Bombs*, 67 A.B.A. J. 139, 141 (1981) (quoting William Bailey, chairman of the Task Force on Cumulative Trauma and Latent Injury). Although insurers may have valid reasons to disfavor adoption of the manifestation theory, the theory is regularly applied by all jurisdictions. *See* Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754, 765 (6th Cir. 1992) (holding the manifestation theory represents the "rule in most jurisdictions"); Honeycomb Sys., Inc. v. Admiral Ins. Co., 567 F. Supp. 1400, 1405 (D. Me. 1983) (holding manifestation of loss is the "general rule").

138. *See generally* Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549, 1556 (D.N.J. 1985) (explaining the manifestation theory); Chemstar, Inc. v. Liberty Mut. Ins. Co., 797 F. Supp. 1541, 1548 (C.D. Cal. 1992) (holding that coverage is triggered when property damage manifests); New Hampshire Ball Bearings v. Aetna Cas., No. C-87-457-L, 1994 U.S. Dist. LEXIS, at 32 (D.NH. filed April 1, 1994)(holding coverage triggered at time contamination reasonably capable of discovery). One defense attorney observed that the enactment of a manifestation theory may cause manufacturers to go out of business and preclude injured plaintiffs from having a source of recovery. Podgers, *supra* note 137, at 141 (adopting view of Frederick Baron of Dallas).

139. *See e.g.*, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1216 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981) (discussing the distinction between manifestation and exposure theories advanced by the parties). A related, but different issue involves the question of what event tolls the statute of limitations in a

commences when the reasonable person would be conscious of the existence of an actionable defect.[140] The manifestation theory, therefore, mandates that the policy in effect at the point in time when the damage or injury is first discovered covers the loss.

1. Manifestation of Loss Under First Party Coverage

Courts, in applying the manifestation of loss trigger-of-coverage, often distinguish between insurance policies providing first party coverage and third party policy coverage.[141] "First party" insurance coverage requires an insurer to compensate the insured for injuries to the insured or the insured's property.[142] The first party manifestation cases include losses resulting from earth movement, construction defects, and repeated-exposure to the elements.

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cause of action. Most courts hold that the statute of limitations begins to run when a plaintiff discovers the injury. *See* Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 159-60 (8th Cir. 1975) (holding statute of limitations does not begin to run until damage is discovered); Harig v. Johns-Manville Prods. Corp., 394 A.2d 299, 305 (Md. 1978) (holding discovery rule applies to statute of limitations in latent disease cases); *but see* Thorton v. Roosevelt Hosp., 391 N.E.2d 1002, 1003-04 (N.Y. 1979) (holding plaintiff may not invoke discovery rule since statute of limitations begins to run from point of actual injury and not from point of discovery of disease).

140. American Home Assurance Co. v. Libbey-Owens-Ford Co., 786 F.2d 22, 30 (1st Cir. 1986). *Cf.* Todd Shipyards Corp. v. Black, 717 F.2d 1280, 1284 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) (holding that Congress intended that the "employer during the last employment in which the claimant was exposed to injurious stimuli prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease . . . should be liable").

141. Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230, 1232, 1246 (Cal. 1990) (noting the distinction between first-party and third-party coverage). One court denied coverage, interpreting the word "accident" not to be the time of the damage-causing act but the time when the party was damaged. Maples v. Aetna Casualty & Sur. Co., 148 Cal. Rptr. 80, 83 (Ct. App. 1978). It should be noted, however, that the cases discussed in this Article deal mainly with the 1966 and 1973 CGL policies and generally interpret how "occurrence," not "accident," is defined.

142. Richard L. Antognini, *When Will My Troubles End? The Loss in Progress Defense in Progressive Loss Insurance Cases*, 25 LOY. L.A. L. REV. 419 n.1 (1992); *see also* Garvey v. State Farm Fire & Casualty Co., 770 P.2d 704, 705 n.2 (Cal. 1989) (discussing the distinction between first and third party insurance). Although this Article focuses on third party insurance, the courts' use of various trigger theories is illustrated in both the first party and the third party insurance contexts.

a. Earth movement causing first party loss

One of the first cases to apply the manifestation of loss theory in the first party insurance is *Snapp v. State Farm Fire & Casualty Co.*[143] In *Snapp*, the insurer asserted that the homeowner policy did not cover the damage caused by movement of unstable fill.[144] Recognizing that new losses materialized during the insurer's policy period and progressed after the expiration of the policy term, the court rejected the contention of the insurer and concluded that the date of materialization of the loss determines which carrier must indemnify for a loss suffered by the insured.[145] Thus, according to the court in *Snapp*, the time at which damage is discovered determines the manifestation of the loss.[146]

b. Construction defects causing first party loss

In addition to cases involving damage caused by earth movement, the manifestation theory has frequently been applied to cover the damage caused by construction defects involving first party insurance.[147] In *Home Insurance Co. v. Landmark Insurance Co.*,[148] the issue involved which of two first party insurers was liable for the loss from progressive property damage spanning successive policy periods.[149] The court found the first insurer solely liable, determining that the date of manifestation determines which carrier must provide indemnity for a loss

143. 24 Cal. Rptr. 44 (Ct. App. 1962). See *supra* text accompanying notes 93-97 for analysis of the *Snapp* holding that losses must be contingent before insurance coverage applies.

144. *Id.* at 829. *See, e.g.*, Remmer v. Glens Falls Indem. Co., 295 P.2d 19, 22 (Ct. App. 1956) (holding insurer carrying the policy in effect at the time property damage occurred liable).

145. *Id.* at 831-32.

146. *Id.* Insurance coverage for cases involving injuries caused by defective products and servicing of those products also apply the discovery rule to the statute of limitations. *See* Scott v. Keever, 512 P.2d 346 (Kan. 1973) (sale of product occurred during policy period, but injury occurred after expiration of policy); Insurance Co. of N. Am. v. Sam Harris Constr. Co., 583 P.2d 1335, 1337 (Cal. 1978) (finding coverage for negligent servicing of an airplane within the policy period although damage occurred after policy period had expired).

147. The effects of trigger of coverage decisions adverse to the construction industry include more difficulty in obtaining insurance coverage, less certainty of coverage in a given case, increase in deductibles, and extreme escalation of attorneys' fees. Jullian J. Hubbard, *Defect Claims Keep Escalating While Coverage is at a Premium*, 48 BUS. J. SAN JOSE, 29 (March 18, 1991).

148. 253 Cal. Rptr. 277 (Ct. App. 1988).

149. *Id.* at 278. The concrete facade of the insured's hotel began to manifest visible deterioration, becoming progressively worse and extending through the expiration of Home's coverage and into the inception of the Landmark policy. *Id.*

suffered by the insured.[150] Although *Home* was a first party case, insurers could not rely on its precedent because the holding was fact specific[151] and has been subsequently questioned.[152]

c. Repeated exposure causing first party loss

Some courts, however, have applied the manifestation theory of coverage to the first party context when the loss involves repeated and progressive exposure to the damage-causing event.[153] In *Prudential-LMI Insurance Co. v. Superior Court*,[154] for example, repeated soil subsidence caused progressive property damage. Despite a policy that covered the plaintiff during the three years that the damage allegedly occurred, the insurer denied coverage.[155]

The *Prudential-LMI* court held that in a first party property damage case, the carrier insuring the property at the time of manifestation of loss is singularly responsible for indemnification.[156] According to this court, the manifestation of loss theory is appropriate for claims of continuing and progressive property damage where the injury is "immedi-

150. *Id.* at 280. One commentator noted that the *Home Insurance* court may not have relied upon the holdings of the personal injury disease cases because property damage, unlike asbestosis, does not progress "slowly for many years before there are any discernable symptoms." Raoul D. Kennedy, *Primary, Excess, and Reinsurer Disputes*, *in* ENVIRONMENTAL AND TOXIC TORT CLAIMS 1989, at 351 (PLI Commercial Law & Practice Course Handbook Series No. 495, 1989). There may, however, be actual types of property damage that do progress slowly before the damage manifests itself.

151. *Home Ins. Co*, 253 Cal. Rptr. at 280-82.

152. Prudential-LMI Commercial Ins. Co. v. Superior Court, 798 P.2d 1230, 1245 n.8 (Cal. 1990) (questioning *Home*'s applicability to first party cases because the *Home* court failed to distinguish between first party and third party policy language). *Home*'s uncertain status exemplifies the dilemma courts encounter when deciding which coverage theory to apply.

153. *See infra* text accompanying notes 154-58. A distinction exists between single-occurrence progressive loss cases and multiple-occurrence progressive loss cases. Single-occurrence progressive loss cases involve one occurrence that becomes progressively worse and causes damage. *See e.g.*, *Home Ins. Co.*, 253 Cal. Rptr. at 278-79. The multiple-occurrence cases involve repeated exposure to, for example, surface water, causing residential damage. *See e.g.*, Central Nat'l Ins. Co. v. Superior Court, 3 Cal. Rptr. 2d 622, 624 (Cal. Ct. App. 1992).

154. 798 P.2d 1230 (Cal. 1990).

155. *Id.* at 1233-34. The insurer argued that because the insured had installed carpet two years after coverage had ended and found no signs of cracking, there was no soil subsidence during its policy term. *Id.*

156. *Id.* at 1246.

ate, cumulative, and exacerbated by *repeated exposure.*"[157] However, the *Prudential-LMI* court stated that it would leave the issue of third-party claims stemming from repeated and progressive property damage for a later case.[158]

2. Manifestation of Loss Under Third Party Policy Coverage

a. Third party bodily injury claims

Unlike first party coverage, third party coverage requires the insurer to compensate the insured for a loss in which the insured becomes liable to a third party.[159] In *Eagle-Picher Industries Inc. v. Liberty Mutual Insurance Co.*,[160] the court considered whether to adopt the manifestation theory or the exposure theory when dealing with third-party coverage involving bodily injury.[161] In *Eagle-Picher*, numerous plaintiffs sued an asbestos manufacturer, alleging that exposure to the manufacturer's products over the course of two decades resulted in personal injury and wrongful death.[162] Seeking to avoid coverage, two of the insurers argued that their policies were only triggered by manifestation of asbestosis, and not by the claimants' exposure to the product.[163] Two other insurers desired that the loss be apportioned on a pro rata basis among all insurers, and thus argued that exposure to the product, not manifestation of illness, triggered coverage.[164]

In determining that the manifestation theory was the proper trigger of coverage, the court stated that CGL policies make a clear distinction

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157. *Id.* (emphasis added). In *Central National Insurance Co.*, 3 Cal. Rptr. 2d at 622, the court adopted the *Prudential-LMI* holding and applied it to first party loss involving repeated and progressive construction defects. *Id.* at 626.

158. *Prudential-LMI*, 798 P.2d at 1246. A California court concluded that in first party cases the policy in effect when the manifestation of damage occurs should cover the injury completely, despite the fact that the true severity of the damage might not be discoverable until long after the lapse of the policy. Pines of La Jolla Homeowners Assoc. v. Industrial Indem., 7 Cal. Rptr. 2d 53, 57 (Ct. App. 1993) (applying manifestation theory to construction case).

159. See *supra* note 141 and accompanying text for an explanation of the difference between first party and third party coverage.

160. 682 F.2d 12 (1st Cir. 1982).

161. *Id.* at 16.

162. *Id.* at 15. It would not be surprising for those insurers, who desired a manifestation theory, to turn around and argue for an exposure theory in a subsequent case if such a theory favored noncoverage. See *supra* notes 5-8 and accompanying text for an example of how parties attempt to convince the courts to adopt different theories depending on the interests at stake. One solution might be for the policy to directly spell out which trigger of coverage theory will control in the event that a suit is filed against the insurer.

163. *Id.* at 16.

164. *Id.*

between the act creating the injury and the resulting injury itself.[165] The *Eagle-Picher* court reasoned that due to the act-result distinction, even when a disease exists in a dormant state, bodily injury, and therefore coverage, does not occur until the disease becomes "manifest or active."[166]

b. Third party property damage claims

In addition to bodily injury claims, the manifestation of loss trigger-of-coverage can be seen in third party property damage cases. In *Fireman's Fund Insurance Co. v. Aetna Casualty & Surety Co.*,[167] two insurance companies issued to a construction company several liability policies during successive policy periods.[168] Although Fireman's was the carrier when the construction defects were initially discovered, Aetna was the carrier at risk when the defects progressed and their cause became known.[169] Applying the manifestation of loss theory to third party insurance, the court held that the carrier of the risk during the original manifestation of loss is solely responsible for the insured's coverage.[170]

C. The Injury-in-Fact Theory of Triggering Coverage

Under the injury-in-fact theory of triggering coverage, the policy is triggered when an injury or damage actually occurs, irrespective of the time of exposure or discovery.[171] The injury-in-fact trigger of coverage

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165. *Id.* at 19. Apparently, the distinction between exposure and manifestation is not as clear as the *Eagle-Picher* court would suggest. One commentary has pointed out that a "pure" manifestation approach is actually applied less than any other theory. Michael A. Pope & Edward D. Rickert, *Environmental and Toxic Tort Claims: Insurance Disputes at the Primary, Excess, and Reinsurance Level*, *in* ENVIRONMENTAL AND TOXIC TORT CLAIMS 291 (1989).

166. *Eagle-Picher*, 682 F.2d at 20.

167. 223 Cal. App. 3d 1621 (1990).

168. *Id.* at 1623.

169. *Id.*

170. *Id.* at 1630. The court referred to the manifestation rule as "delayed discovery," holding that a loss is not manifest until a party "actually discovers or reasonably should have discovered his injury and its negligent cause." *Id.*

171. G.Z. NOTHSTEIN, *supra* note 103, at 143. *See also* United States v. Conservation Chem. Co., 653 F. Supp. 152, 197 (W.D. Mo. 1986) (holding injury-in-fact to be trigger under Missouri law); Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1344 (D.D.C.), *modified*, 672 F. Supp. 1 (D.D.C. 1986) (explaining injury-in-fact theory); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1387-88

merits discussion, despite its less enthusiastic application when compared to other approaches.[172]

The first application of the injury-in-fact theory was as a judicial attempt to bring much needed consistency to the "conceptual chaos of the trigger of coverage controversy."[173] In *American Home Products Corp. v. Liberty Mutual Insurance Co.*,[174] fifty-four claimants sued a pharmaceuticals manufacturer for injuries caused by several of its products.[175] The court noted that while injury may closely follow exposure, there may be cases in which exposure is not immediately followed by injury, and thus, the manifestation theory should be rejected.[176] In particular, affidavits by CGL draftsmen that the policy was created to cover for the occurrence of actual injury, not just injuries that became discoverable during the policy period, convinced the court to dispose of the manifestation theory.[177]

(E.D.N.Y. 1988) (holding injury-in-fact or actual injury to trigger coverage in bodily injury case); Triangle Publications, Inc. v. Liberty Mut. Ins. Co., 703 F. Supp. 367, 371 (E.D. Pa. 1989) (holding that showing of injury-in-fact required to trigger coverage in bodily injury case); Dow Chem. Co. v. Associated Indem. Corp., 724 F. Supp. 474, 478 (E.D. Mich. 1989) (explaining injury-in-fact theory); State Farm Mut. Auto. Ins. Co. v. Longden, 197 Cal. App. 3d 226, 231 (1987) (holding that time of occurrence is time of actual damage); Detrex Chem. Indus., Inc. v. Employers Ins. of Wassau, 746 F. Supp. 1310, 1324-25 (N.D. Ohio 1990) (holding injury-in-fact the applicable coverage trigger).

172. Pope & Rickert, *supra* note 165, at 296. It is surprising that so few courts have adopted the injury-in-fact trigger. From a logical standpoint, the theory has a certain attractiveness. For example, CGL policies which cover "occurrences," allowing insurers to show the actual time of occurrence, such as injury-in-fact, would be desirable.

173. *See* David J. Dykhouse and Joseph L. Falik, *Trigger of Coverage: The Business Context, the Plain Language, and American Home Products*, 16 CONN. L. REV. 497, 512 (1984).

174. 748 F.2d 760 (2d Cir. 1984).

175. *Id.* at 762. In pharmaceuticals cases, the injury-in-fact theory may be more appropriate than the exposure theory because the initial ingestion of drugs often does not cause immediate injury. *See, e.g.*, Schering Corp. v. Home Ins. Co., 712 F.2d 4, 8 (2d Cir. 1983) (holding that the injury caused by the ingestion of a pregnancy drug is actually suffered "in utero" rather than at ingestion); Emons Indus., Inc. v. Liberty Mut. Fire Ins. Co., 481 F. Supp. 1022, 1026 (S.D.N.Y. 1979) (holding both ingestion and subsequent actual injury to be "potentially liability producing").

176. *American Home Prod.*, 748 F.2d at 764. The court explained that exposure does not equal injury because an injury could clearly occur during the policy period, while the exposure that caused it preceded that period. *Id.* This explanation lends credence to the notion that exposure as a trigger is only appropriate when applied to injuries occurring almost immediately after exposure. See *infra* note 193 and accompanying text for an explanation of how some of these unique characteristics exist in the disease of asbestosis.

177. *Id.* at 765. According to one commentator, the changes made in the standardized CGL policy after 1966 were in response to consumer demand for a wider scope

After the *American Home Products* decision, some courts began applying the injury-in-fact rule under other rationales. In *Abex Corp. v. Maryland Casualty Co.*,[178] when an asbestos brake lining manufacturer (Abex) was named as a defendant in more than 200 tort cases, its insurers refused to defend the company in the underlying tort claims.[179] The Second Circuit, attempting to apply New York law, determined the injury-in-fact theory is the appropriate trigger-of-coverage and commented, "[t]he plain language of the definition of 'occurrence' used in the CGL policy requires exposure that 'results, during the policy period in bodily injury' in order for an insurer to be obligated to indemnify the insured. Any argument that mere exposure—without injury—triggers liability is simply unsound linguistically."[180]

However, despite the apparent simplicity of the injury-in-fact trigger theory, courts have refused to give the theory widespread acceptance and commentators rarely mention it.[181]

D. The Continuous Trigger Theory of Policy Coverage

1. Basic Rule and Policy Rationales

The continuous trigger of coverage theory combines the basic principles of all the trigger theories.[182] The theory operates on the basic as-

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of coverage. Bruce D. Hall, *Contractors' Liability Insurance for Property Damage Incidental to Normal Operations—The Standard Coverage Problem*, 16 KAN. L. REV. 181, 203 (1968).

178. 790 F.2d 119 (D.C. Cir. 1986).

179. *Id.* at 122-23. The court observed that because of the difficulty in determining the commencement of asbestos-caused injury, the various parties involved each had different viewpoints with respect to when coverage was triggered. *Id.* at 121. If all parties to an insurance contract understand the effect of the various trigger theories, as in this case, perhaps the standardized CGL policy can be modified by the parties to explicitly include a provision on what event triggers coverage under a policy.

180. *Id.* at 127. Often, the determination of which trigger of coverage theory to apply in federal court ultimately depends on how the district court resolves the choice of law issue. *See, e.g.*, Eli Lilly & Co. v. Home Ins. Co., 653 F. Supp. 1, 7 (D.D.C. 1984)(holding that Indiana law governs trigger of coverage issue), *aff'd*, 764 F.2d 876 (D.C. Cir. 1985); Independent Petrochemical Corp. v. Aetna Casualty & Sur., 654 F. Supp. 1334, 1345 (D.D.C. 1986) (holding that choice of law determines trigger-of-coverage issue).

181. There is a significant number of commentaries on the trigger of coverage that fail to even mention the injury-in-fact trigger theory. *See, e.g.*, Arness & Eliason, *supra* note 12; Earnest, *supra* note 9.

182. Agrawal, *supra* note 15, at 1495 n.34.

sumption that indemnification and defense liability extends to all insurers on the risk from initial exposure to final manifestation of loss.[183] The continuous trigger-of-coverage theory is also commonly referred to as the "triple trigger theory" because exposure, exposure in residence, the stage between exposure and manifestation, and manifestation of loss trigger coverage all act as triggers-of-coverage.[184] One court, in applying the continuous trigger theory, held that all insurers who were on the risk for coverage during any of three stages were jointly and severally liable.[185]

There are several policy rationales behind applying the continuous trigger-of-coverage theory instead of the alternate trigger theories. One district court, in deciding to apply a continuous trigger theory, found that the fundamental reason for adopting one theory over the other is to give the insured maximum coverage.[186] In its application of the continuous trigger theory in one case, the Third Circuit reasoned that this theory was appropriate in light of the policy of strict construction of coverage against insurers.[187] The continuous trigger theory was also utilized by a state court after it decided that the policy term "bodily injury" was too ambiguous and imprecise for any other theory.[188] Whatever the policy reasons behind the different applications of the continuous trigger theory, it is important to explore its impact in the contexts of bodily injury and property damage, where it is most often applied.

2. The Continuous Trigger Theory Applied to Bodily Injury Claims

In terms of personal bodily injury claims against the insured, the continuous trigger theory operates upon the presumption that an injury,

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183. Earnest, *supra* note 9, at 67.

184. NOTHSTEIN, *supra* note 103, at 639.

185. Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1041 (D.C. Cir. 1981) (holding that the continuous trigger theory allows the insured to select whichever policy falls in the trigger policy); *see also* Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549, 1556 (D.N.J. 1985) (holding that application of continuous trigger results in joint and several liability); Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co., 817 F. Supp. 1136 (D.N.J. 1993) (same); Hatco Corp. v. W.R. Grace & Co., 801 F. Supp. 1334, 1354 (D.N.J. 1992) (same).

186. Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1403, 1409 (E.D. Tex. 1988) (citations omitted). Without a continuous trigger theory, the insured will be forced to forever maintain the same level of coverage because otherwise the insured will be without coverage if the accident takes place after the policy has expired. FRUMER & FRIEDMAN, *supra* note 107, § 58.05.

187. ACandS, Inc. v. Aetna Casualty & Sur. Co., 764 F.2d 968, 973 (3d Cir. 1985).

188. Vale Chem. Co. v. Hartford Accident & Indem. Co., 490 A.2d 896, 901 (Pa. Super. Ct. 1985), *rev'd*, 516 A.2d 684 (1986).

such as a disease, becomes worse with time.[189] One commentator expressed this presumption in the form of a formula: "[A]t year X the condition is less serious than it is a X + 1."[190] Courts originally applied the continuous trigger-of-coverage to cases involving asbestos-caused personal injury claims[191] and later extended the application of the theory to personal injury cases resulting from other causes.[192]

a. Coverage for asbestos personal injury claims

Because asbestos has a slow breakdown and contamination, it is a more likely candidate for application of the continuous trigger-of-coverage.[193] In *Keene Corp. v. Insurance Co. of North America*,[194] a case involving coverage for bodily injury caused by asbestos, the D.C. Circuit applied the continuous trigger-of-coverage after an insulation manufacturer sought a declaration as to its rights under several CGL policies.[195] Plaintiffs, alleging that the insured's products gave them asbestosis and other maladies, filed multiple lawsuits against the insured.[196] After being sued, Keene tendered the claims to its insurers with the expectation that the insurers would provide defense and indemnification.[197] However, each of Keene's insurers either partially or completely denied coverage.[198]

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189. Arness, *supra* note 12, at 972.

190. *Id.*

191. See *infra* notes 193-205 and accompanying text for a discussion of the continuous trigger theory in the context of asbestos-caused bodily injury claims.

192. See *infra* notes 206-10 and accompanying text (discussing the continuous trigger theory in the context of non-asbestos bodily injury claims).

193. Asbestosis evolves without symptoms for a long period of time although the first actual tissue injury occurs immediately after the inhalation of the asbestos. Home Ins. v. Landmark Ins. Co., 253 Cal. Rptr. 277, 281 (Ct. App. 1988). As a result, some courts "view each deposit of scar tissue as a separate occurrence of bodily injury in a continuing tort." *Id.*

194. 667 F.2d 1034 (D.C. Cir. 1981).

195. *Id.* at 1038.

196. *Id.* at 1042-43. The first case to consider legal liability stemming from the contraction of asbestosis was Borel v. Fiberboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). In *Borel*, the Fifth Circuit concluded that an asbestos manufacturer's failure to warn a worker about the danger of contracting asbestosis from handling its product created an "unreasonably dangerous condition" and was therefore actionable. *Id.* at 1093.

197. *Keene*, 667 F.2d at 1042-43.

198. *Id.* at 1043. Not only have insurers reacted to the trigger of coverage issue by denying coverage, but they have also raised coverage prices and limited the amount

Several of the insurers argued for adoption of a manifestation approach, suggesting that only manifestation of asbestosis or other disease would trigger coverage.[199] On the other hand, Keene and one of its insurers argued for an exposure approach, contending that mere exposure to asbestos constitutes an injury.[200]

The *Keene* court, however, rejected both the manifestation and exposure theories and, instead, allowed three separate triggers of policy coverage to operate.[201] The manifestation theory applied because it comports with the reasonable expectations of the insured, and the exposure and exposure-in-residence theories applied because a harmful process may be underway before a latent disease actually manifests itself.[202] The D.C. Circuit combined the three triggers into one theory and concluded that if a policy is in effect during any portion of the continuous "injurious process," coverage is triggered and the insurer is liable.[203]

At least one commentator has criticized *Keene's* reliance on the insured's expectations in approving the continuous trigger theory, stating that an insured cannot reasonably expect to be provided with coverage twenty years after the expiration of the policy.[204] Nevertheless, since *Keene*, numerous courts have adopted the continuous trigger approach of providing three triggers-of-coverage to an insured who is sued for personal injury and property damage.[205]

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of coverage available. *See generally* INTER-AGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEPARTMENT OF COMMERCE, FINAL REPORT at VI-11 to 24 (1978); *see* Dykhouse & Falik, *supra* note 173, at 499. The problems illustrated by *Keene*, therefore, include problems for potential insureds nationwide as well as those in the case. The fact that there is no industry preference for a particular trigger of coverage theory has complicated the issue. *Adjudicating Liability*, *supra* note 45, at 745. Because it is not clear which theory would prompt insurers to increase coverage and lower prices, the problem resists a "quick fix" solution.

199. *Keene*, 667 F.2d at 1042-43.

200. *Id.* at 1042.

201. *Id.* at 1042-43. It is odd that the *Keene* court did not attempt to resolve this ambiguity in favor of the insured. Courts almost universally agree that contracts are to be construed against the insurer and in favor of coverage when an ambiguity presents itself in the policy language. WILLIAM R. VANCE & BUIST M. ANDERSON, HANDBOOK ON THE LAW OF INSURANCE 809 (3d ed. 1951); *see supra* notes 51-66 and accompanying text for a discussion of the construction of ambiguities in insurance policies.

202. *Keene*, 667 F.2d at 1044-45.

203. *Id.* at 1047. One commentator observed that although the *Keene* decision was widely criticized by the insurance industry, the decision was correct in light of the standard policy language, insurance industry evidence, medical evidence of how and when an injury occurs, and earlier decisions in the non-asbestosis context.

204. Agrawal, *supra* note 15, at 1513-14.

205. See infra text accompanying notes 206-23 for a discussion of the various contexts that the courts have applied the continuous trigger approach.

b. Coverage for non-asbestos personal injury claims

Some courts find that the continuous trigger-of-coverage theory is applicable in the non-asbestos context as well. In *Eli Lilly and Co. v. Home Insurance Co.*,[206] the court faced a difficult trigger issue when it identified the proper scope of a liability coverage for a drug designed to prevent miscarriages which caused cervical cancer years after patients ingested it.[207] The manufacturer urged the court to adopt the "multiple trigger" approach, making all of the insurers liable for indemnification and defense at any time between exposure to the drug and manifestation of a drug-related disease.[208]

The court of appeal turned to principles of insurance construction and determined that Indiana law requires a finding that a policy is ambiguous before applying a multiple-trigger theory.[209] Holding that the policy was ambiguous as to the terms "injury" and "occurs," the court construed the policy against the insurers and utilized a continuous trigger-of-coverage theory.[210]

3. The Continuous Trigger Theory Applied to Property Injury Claims

Critics of the continuous trigger theory in the property damage context point out that property damage is different from progressive diseases in that property damage characteristically does not "become worse with time."[211] Notwithstanding this criticism, a few courts have extended the continuous trigger-of-coverage theory to the property damage context.

a. Coverage for asbestos property damage claims

In *Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance,*

206. 794 F.2d 710 (D.D.C. 1986).
207. *Id.* at 712-13.
208. *Id.* at 713.
209. *Id.* at 714.
210. *Id.* at 722. Despite the principle of construction that mandates that ambiguities be construed against the insurer, a more general principle of contract interpretation involves ascertaining the true intent of parties who enter into a contract. VANCE & BUIST, *supra* note 201, at 809. It is hard to predict whether a court will still interpret ambiguities against the insurer when it is apparent that such a construction does not embody the true intent of the parties to the insurance contract.
211. Arness, *supra* note 12, at 972.

Co.,[212] the insured argued that the existence of asbestos within a building causes "continuing damage" to the property; therefore, all insurers on the risk from the time of installation to removal are liable to the insured.[213] Recognizing that the issue was one of first impression, the court reasoned that an approach that provides a continuous trigger in bodily injury cases, but only a single trigger in property damage cases, is "illogical" and "impractical."[214] Because asbestos undergoes "a slow, continuous degradation," the district court concluded that the same factors apply equally to both property damage and bodily injury scenarios.[215]

b. Coverage for non-asbestos property damage claims

More recently, some courts have applied the continuous trigger theory to non-asbestos property damage scenarios. In a case currently under review by the California Supreme Court, *Montrose Chemical Corp. v. Admiral Insurance Co.*,[216] the court faced the issue of coverage in the context of long-term toxic contamination.[217] The insured, Montrose, manufactured pesticides from 1947 to 1982.[218] The insurer, Admiral, issued four CGL policies to Montrose spanning from 1982 to 1986, during which time five plaintiffs filed separate actions against Montrose because of Montrose's ineffective storage of chemicals.[219] Admiral contended that it had no duty to defend or indemnify Montrose because the loss, or contamination, had occurred prior to its policy periods.

In resolving the trigger of coverage problem, the *Montrose* court relied on several rationales. First, the court speculated that insureds who purchase third party insurance generally have no way to gauge their future potential liability to others, and therefore, reasonably expect to

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212. 613 F. Supp. 1549 (D.N.J. 1985).

213. *Id.* at 1560.

214. *Id.* at 1560-61.

215. *Id.* at 1561. Asbestos degradation is such a slow process that even if all asbestos products were banned today, the projections for asbestos-related deaths into the next century exceed 200,000. *Adjudicating Liability*, *supra* note 45, at 739 n.1.

216. 5 Cal. Rptr. 2d 358 (Ct. App. 1992), *cert. granted*, 24 Cal. Rptr. 2d 661 (Cal. 1992).

217. *Id.* at 360.

218. *Id.* Experts now conclude that the average cost of decontaminating a typical toxic waste site is about $12 million, including $800,000 to analyze the site, $7.2 million to clean up the site, and $4.1 million in post-cleanup costs. WARREN FREEDMAN, HAZARDOUS WASTE LIABILITY 530 (1987).

219. *Montrose*, 5 Cal. Rptr. 2d at 360. Ineffective waste disposal can occur through overfilling tanks, corroding tanks and pipes, or through fiberglass tanks rupturing. Steffen W. Plehn, *An Introduction to LUST*, *in* 1984 HAZARDOUS WASTE AMENDMENTS AND SUPERFUND DEVELOPMENTS: THE TOUGH NEW REGULATORY ENVIRONMENT 6 (1985).

be covered by more than one policy if a loss occurs.[220] Second, the court rejected the manifestation rule because "occurrence" was defined in the policy as "continuous or repeated exposure to conditions" that resulted in a loss, not as the discovery of a loss itself.[221] Finally, the *Montrose* court noted that "occurrence" policies such as Montrose's policy cover pre-policy occurrences, thus, they are distinct from less expensive policies covering "claims made" during the policy period.[222] In the court's opinion, the continuous trigger approach was correct because the drafters of the CGL policy envisioned that successive policies would be used by insureds to cover progressive and continuing losses.[223]

IV. IMPACT

A. *The Current Problem Created by the Conflict*

The divergence of theories on what events trigger coverage under CGL policies is a problem in need of a solution.[224] Whichever trigger

220. *Montrose*, 5 Cal. Rptr. 2d at 366-67. Analysts have reacted with mixed feelings to the reasonable expectations rationale as a basis for the continuous trigger theory. *See, e.g.*, R. Keeton, *Insurance Law Rights at Variance With Policy Provisions*, 83 HARV. L. REV. 961 (1970) (supporting rationale); *Insurance Liability in the Asbestos Disease Context—Application of the Reasonable Expectations Doctrine*, 27 SAN DIEGO L. REV. 239, 257 (noting that courts may unrealistically find reasonable expectations under continuous trigger theory); Agrawal, *supra* note 15, at 1513 (observing that reasonable expectations rationale is "frought with difficulties"). The calculated risk that an insured takes when contemplating how much insurance coverage is available cannot be underrated. The basic essence of insurance stems from its utility in handling uncertainties associated with risk and spreading those risks in such a way that individual losses can be effectively managed for the benefit of the insured. FREEDMAN, *supra* note 218, at 527.

221. *Id.* at 363-65.

222. *Id.* at 367.

223. *Id.* at 369. One district court adopted a continuous trigger approach, reasoning that an injury caused by a continuous process should result in a continuous trigger-of-coverage. United States Fidelity & Guar. Co., 683 F. Supp. 1139, 1163 (W.D. Mich. 1988). It would be a mistake, however, to assume that a continuous injury necessarily will compel a court to apply a continuous trigger-of-coverage. *See, e.g.*, Gruol Constr. Co. v. Insurance Co. of N. Am., 524 P.2d 427, 431 (Wash. Ct. App. 1974) (holding that only insurers while loss is progressing are liable). On the other hand, *Gruol* decidedly represents a minority view. Lathrop, *supra* note 2, § 32.09.

224. One specific area of the problem, represented by latent disease claims caused by exposure to contaminants, represents a "ticking time bomb." Podgers, *supra* note

theory the particular court applies, the implications of that decision for the insureds and insurers are dramatic and far reaching.[225] Despite interpreting identical language as presented in the provisions of the CGL policies, different courts utilize different theories of triggering policy coverage.[226] In addition, quantifying how many new theories may appear in the future is difficult because the legal system is coerced into finding new ways to handle the increase in latent disease suits.[227] The courts have also applied the theories inconsistently, as the supposedly "express terms" of CGL policies do not mandate the use of one theory over another.[228]

Insurance companies typically attempt to use the inconsistencies surrounding the trigger-of-coverage issue to their advantage. Insurers urge courts to adopt different trigger theories in different cases depending upon which theory works best to their advantage.[229] Naturally, as the trigger-of-coverage controversy erupted, businesses and their insurers each insisted on different theories of triggering coverage depending upon their respective interests in the particular case.[230]

The trigger-of-coverage dilemma has adversely affected both insurers and insureds. Due to the existence of uncertain liability and coverage, both sides of the insurance contract suffer from the absence of a uniform approach.

1. Problems of the Insured Due to the Trigger of Coverage Dilemma

As a result of the manipulation of the trigger issue by insurers, an

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136, at 140.

225. Michael A. Pope & Edward D. Rickert, *Environmental and Toxic Tort Claims: Insurance Disputes at the Primary, Excess and Reinsurance Level*, ENVIRONMENTAL AND TOXIC TORT CLAIMS: INSURANCE COVERAGE IN 1989 AND BEYOND 349 (1989).

226. *See, e.g.*, Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 61-62 (3d Cir. 1982) (holding first manifestation of loss triggers coverage); American Home Assurance Co. v. Libbey-Owens-Ford Co., 786 F.2d 22, 30 (1st Cir. 1986) (holding time of reasonable discovery triggers coverage); Dow Chem. Co. v. Associated Indem. Corp., 724 F. Supp. 474, 487 (holding injury-in-fact triggers coverage); Sandoz, Inc. v. Employer's Liab. Assurance Corp., 554 F. Supp. 257, 265-66 (D.N.J. 1983) (holding the wrongful act triggers coverage).

227. Podgers, *supra* note 137, at 140. As the courts have developed different theories in order to maximize coverage, the courts have "failed to create a uniform judicial interpretation of 'occurrence.'" Judith M. Nixon, *The Problem With RCRA—Do the Financial Responsibility Provisions Really Work?* 36 AM. U. L. REV. 133, 147 (1986). Ironically, by desiring to maximize coverage to the insured in a particular case, the courts instead may have created uncertainty for future plaintiffs unable to determine which trigger theory is applicable in a given case.

228. Wrubel, *supra* note 41, at 669.

229. Senne, *supra* note 104, at 1128 n.7.

230. *See* Dykhouse & Falik, *supra* note 173, at 501-02.

insured suffers when insurers dispute their coverage obligations by asserting different trigger theories.[231] In addition, insureds have faced increased difficulty in purchasing insurance; insurers, reacting to massive increases in litigation due to coverage uncertainty, have reduced the amount of coverage available to potential insureds.[232]

2. Problems Caused to the Insurer Due to the Trigger of Coverage Dilemma

Insurers suffer as their insureds begin to go out of business in the face of increased liability, resulting in insurers issuing policies without the ability to assess their potential future obligations.[233] Furthermore, the host of problems related to the lack of a uniform approach to the trigger-of-coverage dilemma is not confined to the present. The unresolved conflict over which trigger theory applies in a given situation threatens to produce numerous problems in the future if left unresolved.

B. The Future Dangers of Not Resolving the Conflict

The divergence of theories concerning what events trigger coverage under CGL policies presents potential long-term problems. For instance, one of the greatest challenges facing the legal system involves "dealing effectively with the swarm of litigation spawned by asbestos, toxic wastes and other substances" whose damage may not be completely realized for many years.[234] Another commentator predicted that the problem threatens to dismantle not only the legal system, but "the pub-

231. One commentator has advanced the proposition that insurance companies would likely not provide insurance, provide insufficient coverage, or provide it at unreasonable rates due to the uncertainty of the law in the trigger-of-coverage area. Nixon, *supra* note 227, at 137. A legislative solution to the trigger issue could resolve the uncertainty regarding the trigger-of-coverage dilemma. However, developing policies on a jurisdiction-by-jurisdiction approach would then burden insurers. Furthermore, it seems inefficient for an insured's coverage to depend on the particular jurisdiction in which he or she is located.

232. *See* Hubbard, *supra* note 147, at 29 (illustrating how insurers began to "shrink" coverage available to potential insureds due to increased litigation).

233. Utilizing a uniform standard and eliminating the uncertainty surrounding the trigger of coverage issue would allow insurers to lower prices due to increased accuracy in calculating their potential coverage obligations. Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230, 1246 (Cal. 1990).

234. Arness & Eliason, *supra* note 12, at 943.

lic, the economy and the industrial marketplace as well."[235] However, the most dire prediction was that the trigger issue, if left unresolved, "may shake the foundations" of the tort system and damage the economy of the United States.[236] Regardless of which commentator accurately portrays the present and future severity of the problem, the common imperative in all three views holds that the problem must be resolved.

C. *A Proposed Method for Solving the Dilemma*

A suggested process to resolve the trigger-of-coverage quagmire now follows. However, notwithstanding whether this solution is ultimately adopted, whatever solution is adopted should incorporate the relevant policy interests and principles of construction in insurance law.[237] Furthermore, the courts must adopt a universal solution, thus providing the requisite amount of certainty necessary for equity to both sides of the insurance contract.[238] With these general principles in mind, a court could deal with the trigger-of-coverage dilemma in the following manner.

1. Presumption: Continuous Trigger of Coverage

As noted, the adopted solution should take into account relevant principles of policy construction. Applying the initial presumption of the continuous trigger theory, as opposed to the other theories previously discussed, directly maximizes coverage available to the insured and efficiently construes ambiguities in favor of the insured.

a. Maximizing the coverage available to the insured

If an important consideration in interpreting the trigger-of-coverage question entails maximizing the amount of policy coverage available to the insured,[239] then a presumption in favor of the continuous trigger

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235. Agrawal, *supra* note 15, at 1491.

236. Podgers, *supra* note 137, at 139.

237. See *supra* notes 44-97 and accompanying text for principles of construction relevant to the interpretation of insurance contracts.

238. See *supra* note 220 for one court's view on the importance of developing a uniform standard to establish a solution to the trigger-of-coverage problem.

239. The Ninth Circuit, in Hancock Labs., Inc. v. Admiral Ins. Co., 777 F.2d 520, 523 n.5 (9th Cir. 1985), noted that when construing the extent of coverage available to the insured, general principals of insurance policy require interpreting the provisions to "give effect" to the policy's central purpose of coverage. Because providing indemnification remains the central purpose of CGL policy coverage, courts have developed various trigger theories to give the insured maximum coverage. Dayton Ind. School Dist. v. National Gypsum Co., 682 F. Supp. 1403, 1409 (E.D. Tex. 1988) (holding the

theory is appropriate.[240] In *United States Fidelity & Guaranty Co. v. Thomas Solvent Co.*,[241] the district court adopted the continuous trigger theory of coverage, reasoning that courts usually adopt coverage theories in order to "maximize coverage" to the insured.[242] The presumption provides maximum coverage because the continuous trigger-of-coverage theory provides three separate policy triggers, while the other theories provide only one trigger.[243] The in-fighting between various insurers attempting to avoid coverage will not force the insured to sit by the sidelines and wait for a winner to emerge, because the continuous trigger presumption guarantees coverage from the outset.

b. Resolving ambiguities in favor of the insured

The continuous trigger theory accords with the fundamental principle of insurance construction that mandates that courts must resolve ambiguities in favor of coverage.[244] Because insurers and insureds make strong competing arguments for the adoption of four different theories, it is apparent that certain ambiguities inherently exist in all of the theories.[245] If courts must construe ambiguities in favor of coverage, it

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time between asbestos installation and date of removal triggered coverage).

240. At least one court attempted this approach. In an unpublished trial court decision, one judge held that in the context of asbestos property damage cases, a presumption of continuous trigger should be applied. Asbestos Insurance Coverage Cases, No. 1072, slip. op. at 22-24 (Cal. Super. Ct. Aug. 29, 1988). The judge also determined that an insurer could rebut the presumption by showing that no release of asbestos occurred during its policy period. *Id.*

241. 683 F. Supp. 1139 (W.D. Mich. 1988).

242. *Id.* at 1163. The *Thomas Solvent* court did not discuss, however, what happens when the desire to maximize coverage exceeds what the insured reasonably expected to be covered for. An interesting hypothetical, apparently judicially unconfronted, would ask whether to apply a continuous trigger theory or manifestation trigger theory when a reasonable insured would expect some loss but continuous trigger would maximize coverage.

243. *See supra* note 181 and accompanying text.

244. KEETON, *supra* note 16, at 351. Courts derive this theory from the basic proposition that policy language should be interpreted as laypersons would comprehend it and not through the eyes of "sophisticated underwriters." *Id.* The Second Circuit held that this construction recognizes a great disparity between an insurer and insured's understanding of the subject matter. Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947). For the Second Circuit's logic to remain consistent, if disparity in knowledge of insurance law forms the basis for the ambiguity, it would be logical not to apply the construction where both parties possessed the knowledge of "sophisticated underwriters."

245. In other words, if the word "occurrence" was not inherently ambiguous, there

should be applied universally and each theory's ambiguities should be resolved in favor of coverage. This result can be achieved by the adoption of a continuous trigger theory, which is actually a combination of all the trigger theories.[246] The only issue remaining, therefore, is not whether *any* insurer will pay, but rather *which* insurer will pay.

c. Application of the presumption

Returning to the hypothetical discussed in the introduction to this Article,[247] the continuous trigger theory would implicate the coverage provisions of Insurer One, Insurer Two and Insurer Three. Insurer One is liable because the ineffective disposal of chemicals constitutes the first exposure.[248] Insurer Two is liable because its policy was in effect during the exposure in residence, the continued leakage of the chemicals.[249] Finally, Insurer Three is liable because the damage became apparent during its policy term.[250] As a result, the presumption provides A with the maximum amount of coverage available because liability simultaneously attaches to Insurer One, Insurer Two and Insurer Three.[251] A further result, if the solution is universally adopted, is that the insurer and insured will know their rights and obligations when the contract is entered into, rather than letting a court determine their rights and obligations for them. The primary criticism of this approach is that it may force the triggering of a policy provision when an injury,

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would not be so many countervailing judicial theories as to when an occurrence happens.

246. The result also fulfills the reasonable expectations of insureds: that they will receive coverage when they purchase insurance. *See supra* notes 67-72 and accompanying text for a description of the reasonable expectations doctrine.

247. See *supra* text accompanying notes 1-8 for the hypothetical situation that illustrates the trigger of coverage dilemma facing the courts.

248. *See, e.g.*, Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F. Supp. 71, 76 (E.D. Mich. 1987) (holding that the exposure theory controls in an environmental contamination case). *But cf.* Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342, 346 (E.D. Pa. 1987) (holding that the date of dumping triggers coverage).

249. See *supra* text accompanying note 183 for the definition of "exposure in residence."

250. *See, e.g.*, Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325, 1328 (4th Cir. 1986) (holding that the date in which the hazardous waste leakage was discovered triggers coverage).

251. In such a situation, some courts apportion damages between insurers whose policies have been triggered. *See, e.g.*, California Union Ins. Co. v. Landmark Ins. Co., 193 Cal. Rptr. 461, 471 (Ct. App. 1983) (holding that, in a case involving cumulative losses, both insurers were liable for half of the damages). Other courts hold that no basis exists in CGL policies for the apportionment of defense and indemnification costs on a pro rata basis. *See, e.g.*, Zurich Ins. Co. v. Raymark Indus., Inc., 514 N.E.2d 150, 165 (Ill. 1987) (holding that nothing in the policy provided for proration).

in actuality, did not occur during the policy period. This disadvantage, however, could be remedied by allowing an insurer to rebut the presumption of coverage with a showing of adequate proof.

2. Rebuttal: Injury-in-Fact

Despite the initial attractiveness of the continuous trigger theory, it does not seem completely fair that an insurer who has tangible proof that a loss occurred outside of its policy coverage should be estopped from proving this fact.[252] In contrast, an insurer should be permitted to prove when injury-in-fact occurred in order to rebut the presumption of continuous trigger.[253] For example, in the hypothetical, suppose that a court applied a rebuttable presumption of continuous trigger to Insurer One, Insurer Two and Insurer Three. Insurer Three, whose policy was triggered because the damage became apparent during its policy period, could introduce evidence that the loss actually occurred during an earlier policy period. If the courts created a presumption in favor of continuous trigger and allowed the presumption to be rebutted by a showing of injury-in-fact, the end result would give the insured maximum coverage without forcing the insurer to cover a loss that did not occur during its policy period.[254]

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252. An insured cannot rightfully expect an insurer to pay for a loss that did not occur during its policy period because "[s]ense of personal responsibility . . . is one of the ethical pillars of insurance." FREEDMAN, *supra* note 218, at 529; *see also* Time Oil Co. v. Cigna Property and Casualty Ins. Co., 743 F. Supp. 1400, 1415 (W.D. Wash. 1990) (holding that insurance policies historically require "the utmost good faith").

253. See *supra* notes 171-81 and accompanying text for a discussion of the injury-in-fact theory of triggering coverage. It is fair to allow an insurer to rebut a presumption of continuous trigger by showing that an injury-in-fact is outside of its coverage responsibility. Insurers should not be criticized for disputing coverage so long as they are disputing coverage with legal justification. Hall, *supra* note 177, at 203.

254. According to some courts, insurance policies should be interpreted in the context of the business purposes for which the parties contracted in the first place. Union Carbide Corp. v. Travelers Indem. Co., 399 F. Supp. 12, 17 (W.D. Pa. 1975) (holding that "occurrence" should be interpreted in light of the risk insured against); Champion Int'l Corp. v. Continental Casualty Co., 546 F.2d 502, 505 (2d Cir. 1976) (holding that courts should interpret policies in light of the "business purposes" of the parties).

V. CONCLUSION

The problem explored in this Article has resulted in such a large increase in asbestos-coverage lawsuits, that insurers are producing a new version of the CGL policy that only provides coverage for the first injuries that manifest themselves or the first claims made during the policy period.[255] Under an optimistic viewpoint, such a new formulation of CGL policies may someday resolve the present controversy surrounding the trigger of coverage issue.

Looming in the background, however, are all of the 1966 and 1973 CGL policies that may be the subject of judicial controversy far into the future.[256] As the problem stands now, with a divergence of trigger theories, insureds are unsure whether they are adequately covered and insurers have no way of calculating their future liability.[257] Thus, it is crucial for the courts or the legislatures to institute a uniform standard so that both insurer and insured may understand their respective rights and obligations.

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255. Earnest, *supra* note 9, at 66. The new policy, based upon the claims made within a policy period, is called an Environmental Impairment Liability (EIL) policy. Nixon, *supra* note 227, at 149. The EIL policy was developed because insurers were reluctant to commit themselves for too long into the future, primarily because the risks posed by hazardous wastes have such long latency periods. *Id.*

256. Because "years may separate inception and manifestation" of losses covered under a policy, the current CGL policies typified by the 1966 and 1973 versions will still require interpretation regarding trigger of coverage even if a new type of policy is developed. *See* Nixon, *supra* note 227, at 136 for commentary on the ramifications of open-ended liability in general.

257. The dramatic increase in environmental litigation and the liberal interpretation of insurance policies has "combined to shock the insurance industry." *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1575 (1986).

258. Nicholas R. Andrea is an associate at Lynberg & Watkins, an insurance defense law firm in Los Angeles, California.