STEPTOE & JOHNSON

WHITEPAPER

COVERAGE TRIGGER THEORIES: WHAT IS THE 'X' FACTOR?

BY: MELANIE MORGAN NORRIS
MICHELLE E. PIZIAK

Ph: 304-231-0460
304-353-8126
melanie.norris@steptoe-johnson.com
michelle.piziak@steptoe-johnson.com
www.steptoe-johnson.com

Coverage Trigger Theories

What Is the X-Factor?

By Melanie Morgan Norris and Michelle E. Piziak

Melanie Morgan Norris and Michelle E. Piziak are of counsel and co-leaders of the Steptoe & Johnson First Party Team, resident in the firm's Wheeling and Charleston, West Virginia, offices, respectively. Both authors are members of DRI and its Insurance Law Committee. Special thanks to Lyle B. Brown, Bridget M. Cohee, Christina Denmark, Tracey B. Eberling, Lauren M. Palmer, Jeffrey K. Phillips and Candace B. Smith for their contributions to this article.

Many comprehensive general liability (CGL) insurance policies have traditionally been written as "occurrence" policies that provide coverage for losses resulting from the occurrence of an accident or injury during a policy period. Most occurrences are a one-time event resulting in an immediate injury to a claimant, such as an automobile accident, and it is clear whether or not the occurrence falls within a potentially applicable policy. Yet, there are many occurrences, such as those involving toxic torts or environmental pollution, for which it is difficult to pinpoint the date of the occurrence either because there is a latency period between the injurious event and the manifestation of damage, such as may occur with asbestosis. Or the injurious event is of an ongoing nature, for instance, a leaking chemical tank, or the damage is continuous or progressive in nature as is often seen with water infiltration damage from defective construction. Under such circumstances, pinpointing the date of occurrence or the date of damage is crucial in determining the applicable liability policy.

Of course, as with any coverage determination, the policy language itself is the initial point of inquiry. However, over the years and primarily prompted by the volume of asbestos litigation in the 1980s, four "coverage trigger theories" have evolved from the case law: (1) the

"exposure" trigger theory applies the policy that was in effect at the time of the exposure to the harm; (2) the "manifestation" trigger theory applies the policy that was in effect at the time the damages manifested or became known; (3) the "injury-in-fact" trigger theory applies the policy or policies that were in effect at any time actual injury occurred; and (4) the "continuing injury" trigger applies the policy or policies that were in effect at any time from the initial exposure through the manifestation of the injury. *See Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 682 n.10 (6th Cir. 2000) (citing *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1195–96 (2d Cir. 1995)).

The trigger of coverage is not used to determine whether coverage exists, but only "acts as a gatekeeper, matching particular claims with particular periods of times hence particular insurance policies." James Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate Over the Appropriate Trigger Rule*, 45 Drake L. Rev. 625 (1997). Only after a court determines which policy applies in a situation can the larger question be answered about whether coverage exists for the claim. The problem is that under similar facts and policy language, courts applying differing coverage trigger theories have reached disparate conclusions about the applicable policy periods. Even more problematic, while some jurisdictions have become entrenched in a single coverage trigger theory, other jurisdictions apply multiple coverage trigger theories depending upon the type of claim presented. Still other jurisdictions are undecided. It can be difficult to decipher the "X Factor," or variable, that will drive a court's decision about which coverage trigger theory to apply. Familiarity with the four common theories, as well as the particular coverage trigger theories previously adopted by a specific jurisdiction is crucial to analyze and advocate effectively for the coverage trigger theory that best supports your client's coverage position.

The Exposure Coverage Trigger

Generally speaking, under the exposure theory, the policy triggered is the one that was in effect at the time of the underlying injury-causing event. *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *clarified*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981), is one of the seminal cases to discuss and adopt the exposure theory, sometimes also known as the injurious exposure theory. At issue was the applicability of multiple commercial general liability policies issued to an asbestos manufacturer by five separate carriers spanning over a 20-year period of time. The manufacturer had been named as a defendant in more than 1,000 asbestos lawsuits across the country and sought a defense and indemnification from each of the five carriers. In adopting the exposure theory, the court concluded that the terms "bodily injury" and "occurrence" were ambiguous when applied in a progressive disease context. *Forty-Eight*, 633 F.2d at 1222 (applying Illinois and New Jersey law). The court reasoned that in the case before it, there was uncontroverted medical evidence that a "bodily injury" occurred in the form of tissue damage shortly after the initial inhalation of asbestos fibers, even if full-blown asbestosis had not yet manifested. The court also recognized that it would be overly burdensome and costly to require medical testimony pinpointing the precise onset of disease for each asbestosis claimant in every case. *See id*. at 1217–18.

The exposure trigger theory has received criticism from the insurance world as having only a limited usefulness because it is too difficult to underwrite policies based upon exposure. *See* Nicholas R. Andrea, *Exposure, Manifestation of Loss, Injury-in-Fact, Continuous Trigger: The Insurance Coverage Quagmire*, 21 Pepp. L. Rev. 813, 837 (1994). At least one commentator contends that "the only serious proponents of the exposure theory are asbestos manufacturers and insurers who could lose more under the manifestation theory." *Id*.

Nonetheless, since evolving in the asbestos context, the exposure theory has been adopted and applied in other latent or progressive disease cases, such as lead poisoning and silicosis. *See, e.g., Clemco Industries v. Commercial Union Ins. Co.,* 665 F. Supp. 816 (N.D. Cal. 1987) (applying exposure theory in California silicosis litigation); *United States Liability Ins. Co. v. Selman,* 70 F.3d 684 (1st Cir. 1995) (applying exposure theory in Massachusetts lead poisoning litigation). It has also been applied in cases involving bodily injury claims arising from alleged faulty products. *See, e.g., Kremers-Urban Co. v. American Employers Ins. Co.*, 351 N.W.2d 156, (Wis. 1984) (applying coverage to policy in effect at time drug was ingested in DES litigation against drug manufacturer by daughters of pregnant women who had taken the drug during pregnancy).

Courts have applied the exposure theory to occurrences involving property damage as well. For example, the United States District Court for Alaska expressly rejected the manifestation theory in favor of the exposure theory in a case involving a lawsuit by an oil refinery seeking insurance coverage for environmental cleanup costs. *See Mapco Alaska Petroleum, Inc. v. Central National Inc. Co. of Omaha*, 795 F. Supp. 941 (D. Alaska, 1991). "Product spills" from the refinery's ongoing business operations resulted, years later, in groundwater contamination with benzene. The CGL policies at issue defined "occurrence" as "an accident, including continuous and repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.* at 947. The court determined that coverage would be triggered by the environment's exposure to the contaminants rather than by the manifestation of the damage some years later. *Id*. at 948. *See also Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co., Inc*., 842 F.2d 977 (8th Cir. 1988) (concluding that Missouri would adopt the exposure theory of

coverage and determining that because hazardous wastes are extremely harmful, there was an immediate exposure and injury upon their release into the environment).

The Manifestation Coverage Trigger

Under the manifestation theory, the policy triggered is the one that was in effect at the time the damage "manifested" or was discovered, even if some damage actually occurred earlier but was undetected. For occurrences involving bodily injury, manifestation occurs when a sick individual has either actual or constructive knowledge of his or her condition, or when the individual is diagnosed, whichever comes first. *See, e.g.*, *Forty-Eight*, 633 F.2d at 1216. With respect to property damage, manifestation occurs when a reasonable person would be conscious of the existence of an actionable defect. *See, e.g., Am. Home Assurance Co. v. Libbey-Owens-Ford Co*., 786 F.2d 22, 30 (1st Cir. 1986).

Courts adopting the manifestation theory have reasoned that under the typical policy language, "an occurrence happens when the injurious effects of the occurrence become 'apparent', or 'manifest themselves.'" *Ray Industries, Inc. v. Liberty Mut. Ins. Co*., 974 F.2d 754 (6th Cir. 1992) (citing *Honeycomb Sys., Inc. v. Admiral Inc. Co*., 567 F. Supp. 1400, 1405 (D. Me. 1983)). The manifestation theory has been deemed preferable as a "bright-line" trigger in situations for which it may otherwise be difficult to determine when the damage actually occurred. *See, e.g., Mraz v. Canadian Universal Ins. Co*., 804 F.2d 1325 (4th Cir. 1986) (applying Maryland law to adopt manifestation theory where it would otherwise be difficult to determine when the damage from hazardous waste actually occurred).

The manifestation trigger theory has been adopted as an alternative to the exposure theory for property damage claims in environmental cleanup cases. *See, e.g., CPC International, Inc. v. Northbrook Excess & Surplus Ins. Co*. 668 A.2d 647 (R.I. 1995). In *CPC International*,

the Rhode Island Supreme Court expressly rejected the exposure theory, concluding that the theory is contrary to the language of an occurrence policy when an occurrence, by definition, is an event that results in compensable property damage during the policy period. The court concluded that there can be no "occurrence" without damage that becomes apparent during the policy, and further, property loss and compensable damages cannot be assessed unless the property damage has actually manifested. *Id*. at 649.

Courts have likewise adopted the manifestation theory as the more favorable approach in latent disease cases such as asbestosis cases. *See, e.g., Eagle Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982). In *Eagle Picher*, the court specifically rejected the exposure theory adopted by *Forty-Eight*, 633 F.2d at 1212, that mere exposure to asbestos resulted in instant injury. The medical evidence presented to the court in *Eagle Picher* demonstrated that injury to the lung did not result simultaneously with exposure, rather it occurred after the asbestos fiber had traveled through the air passageways of the body and defeated the body's natural defense mechanisms. Thus, the *Eagle Picher* court determined that there was no injury upon exposure to asbestos and that a coverage trigger based upon manifestation of the injury was more in keeping with both the policy language and the medical evidence.

Injury-In-Fact Coverage Trigger

Under the injury-in-fact theory, or "actual injury" theory, the policy period triggered is the one that was in effect when the damage is shown to have in fact occurred, irrespective of when the exposure occurred or when the damage was discovered. *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 748 F.2d 760 (2nd Cir. 1984), is the seminal case discussing and adopting the injury-in-fact trigger. There, a drug manufacturer sought coverage for 54

separate product liability cases filed against it. The Second Circuit, applying New York law, considered and rejected the exposure theory, reasoning that exposure does not necessarily result in immediate injury. The court likewise rejected the manifestation theory, reasoning that there may be instances when a body is injured before symptoms appear. The court instead determined that a policy coverage trigger based upon the risk at the time of the injury-in-fact most appropriately gave effect to the plain meaning of the policy language, which covered disease, bodily injury or sickness that occurs during the policy period. *See id*. at 764.

Under the injury-in-fact theory, "a real but undiscovered injury, proved in retrospect to have existed at the relevant time, [will] establish coverage, irrespective of the time the injury became [diagnosable]." *Id*. 766 (internal citations omitted). In the bodily injury context, when an "injury-in-fact" is deemed to have occurred will largely be treated as a medical determination; however, the nature of the injury may also influence the trigger date. *See* James Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate Over the Appropriate Trigger Rule*, 45 Drake L. Rev. 625, 642 (1997) (noting that in breast implant cases, the injury or trigger date has varied depending upon whether the claimant alleged autoimmune disease, rupture or contracture). From a policyholder's perspective, the injury-in-fact theory can be onerous because it requires the policyholder to prove a discrete injury or damage occurred during the relevant policy period and jurisdictions vary on the quantum proof required. *See* Scott Seaman and Jason Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* § 2.2 (2013). It also limits, rather than expands, the potentially applicable policy periods. For this reason, most courts have disfavored the injury-in-fact approach due to its limited benefit to an insured.

Since its inception, the injury-in-fact trigger theory has been applied in a variety of both bodily injury and property damage contexts, including construction defect, product liability,

invasion of privacy, asbestosis, mold, and pollution cleanup cases. *See, e.g*., *OneBeacon Ins. Co. v. Don's Bldg. Supply, Inc.*, 553 F.3d 901, 902 (5th Cir. 2008) (applying Texas law and concluding injury-in-fact theory applied to determine trigger of coverage in a lawsuit arising out of a contractor's sale of defective synthetic stucco that had allowed water damage to occur); *Stonewall Ins. Co. v. Asbestos Claims Management Corp*., 73 F.3d 1178 (2nd Cir. 1995), *modified on other grounds,* 85 F.3d 49 (2nd Cir. 1996) (holding that under New York law, occurrence-based policies were triggered throughout gradual disease processes where injury could be shown by preponderance of the evidence to be occurring at each point in that process); *Quaker State MinitLube, Inc. v. Fireman's Fund Ins. Co*., 868 F. Supp. 1278 (D. Utah 1994) (applying Utah law and adopting injury-in-fact theory to environmental cleanup case); *Northern States Power Co. v. Fidelity and Cas. Co. of New York*, 523 N.W.2d 657 (Minn. 1994) (noting in environmental cleanup litigation that "Minnesota follows the 'actual injury' or 'injury-in-fact' theory to determine which policies have been triggered by an occurrence causing damages for which an insured is liable").

Continuous Injury or Multiple Trigger

The trigger of coverage theory that is most beneficial to an insured is the "continuous or multiple trigger," sometimes called "continuous injury" or "triple trigger." 4 Law and Prac. of Ins. Coverage Litig. § 46:21 (2013) (Westlaw through June 2013). According to this theory, bodily injury and property damage that "are continuous or progressively deteriorating throughout successive policy periods" are covered "by all policies in effect during those periods." 43 Am. Jur. 2d Ins. § 680 (footnote omitted) (2013). As one commentator has described it, "[t]he theory operates on the basic assumption that indemnification and defense liability extends to all insurers on the risk from initial exposure to final manifestation of loss." Nicholas R. Andrea, *Exposure*,

Manifestation of Loss, Injury-in-Fact, Continuous Trigger: The Insurance Coverage Quagmire, 21 Pepp. L. Rev. 813, 844 (1994) (footnote omitted). In other words, bodily injury or property damage "occurs (1) at the time of first exposure, (2) when the injury/property damage becomes apparent, and (3) at all times in between, *irrespective* of whether bodily injury/property damage occurred during the entire period." 1 Envtl. Ins. Litig.: L. and Prac. § 6L28 (2013) (emphasis in original).

Keene Corp. v. Ins. Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), is the leading case on triple trigger theory. *Keene*, similar to many of the trigger cases, arose from asbestos litigation, and the court analyzed a situation where "inhalation—the 'occurrence' that causes the injury—takes place substantially before the manifestation of the ultimate injury." The *Keene* court considered "the reasonable expectations" of the insured and what it believed to be "the purpose of the policies," stating that to secure the insured's rights "both inhalation exposure and exposure in residence [the continuous development of alleged disease while it is in a person's body] must . . . trigger coverage." *Id.* at 1041, 1045–1046. According to *Keene*, "[t]his conclusion is consistent with the law involving insurance coverage of losses that begin during a period of coverage but continue to develop after a policy's expiration." *Id.* at 1046 (citation omitted). The "reasonable expectations" of an insured, commonly linked to allegations of policy ambiguity, is akin to other policy reasons for triple trigger application. *See* Andrea, *supra,* at 844 (recognizing that some courts use the theory to construe a policy strictly against insurers or due to policy ambiguity) (footnotes omitted).

The triple trigger theory may be used in asbestos cases, but it potentially has a wide-ranging application. For example, the theory was used in determining coverage under a contractor's liability policies after a lawsuit was brought alleging dry rot. *See Gruol Construction*

Co., Inc. v. Ins. Co. of North America, 524 P.2d 427 (Wash. 1974) ("The accident mentioned in the policy need not be a blow but may be a process. . . . *A glacier moves slowly but inevitably."*) (quoting *Travelers v. Humming Bird Coal Co.*, 371 S.W.2d 35, 38 (Ky. Ct. App. 1963) (emphasis added)). It has also been used as a method of allocating damages to policies triggered under an *alternate* trigger theory. *See CSX Transp. v. Admiral Ins. Co.*, No. 93-132-CIV-J-10, 1996 WL 33569825 (M.D. Fla. Nov. 6, 1996) (using the "injury-in-fact" theory to determine the trigger of coverage but relying upon *Keene,* 667 F.2d 1034 667 F.2d 1034 (D.C. Cir. 1981), to allocate liability).

"Double Threat" or "Triple Threat" Jurisdictions

Some courts want to be armed with a "double threat" or "triple threat" to address trigger issues. In other words, some courts seek to multipurpose their adopted trigger theory or adopt multiple trigger theories to use in different contexts. Thus, there are jurisdictions that examine coverage triggers on a case-by-case basis, some that distinguish between bodily injury and property damage triggers, and potentially taking that distinction further, some that isolate first-party triggers from third-party triggers. The prudent practitioner will be aware of the "X Factor" or "X Factors" that his or her courts look for to develop those factors which best serve a client's position.

Often, the trigger theory that a court chooses to apply will depend upon the language of the particular policy at issue. For example, the Supreme Court of New Hampshire used different trigger theories in the context of multiple liability policies potentially applicable to allegations of soil and groundwater pollution based upon differences in the language of the same type of policy. *See Energynorth Nat. Gas, Inc. v. Underwriters at Lloyd's,* 150 N.H. 828, 848 A.2d 715 (N.H. 2004). The New Hampshire court found that the policies triggered by property damage

during the policy period required an operative event, meaning an "injury-in-fact," while the "accident" policies were not limited to a single, discrete trigger and were, therefore, subject to the "exposure theory" to trigger coverage. *Id.*

Practitioners should also be cautious of courts that apply different trigger theories seemingly on a "case-by-case" basis so that the determination of which theory applies may depend upon the facts. For example, courts applying Louisiana law have used both the exposure and manifestation theories to determine the date of occurrence in the third-party context. The exposure theory was applied in lawsuits alleging a defective product, the improper storage and transportation of purportedly hazardous substances, and fires said to have resulted from contaminated electrical boxes. *See Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); *Duhon v. Nitrogen Pumping & Coiled Tubing Specialists, Inc.*, 611 So.2d 158 (La. Ct. App. 1993); *Emar, Inc. v. Webster Homes, Inc.*, 488 So.2d 346 (La. Ct. App. 1986). In contrast, in *James Pest Control, Inc. v. Scottsdale Ins. Co.*, 765 So.2d 485 (La. Ct. App. 2000), a Louisiana appellate court determined that when termite damage was manifested determined which liability policy or policies were triggered. The same theory, manifestation, was applied in *Korossy v. Sunrise Homes, Inc.*, 653 So.2d 1215 (La. Ct. App. 1995), when homeowners sued a developer and marketer over the alleged differential settlement of foundations. According to the *James Pest Control* court, an "occurrence" is one of "property damage" that does not exist until it is discovered. *James Pest Control*, 765 So.2d at 491. The distinguishing "X Factor" for the court was the ability to determine "when a hidden property damage actually occurs." *Id.*

California decisions are similarly complex. In the third-party liability context, the Ninth Circuit has applied the "injury-in-fact" theory. *See Smith v. Hughes Aircraft Co.*, 22 F.3d 1432 (9th Cir. 1994) (insured alleged to have contaminated drinking water). Notably, however, in

Armstrong World Industries, Inc. v. Aetna Cas. & Surety Co., 45 Cal. App. 4th 1 (1996), the court found that the trial court did not err in taking a continuous trigger approach based upon an injury-in-fact analysis. The "continuous trigger" theory was also employed by the Supreme Court of California in the third-party, liability action of *Montrose Chem. Corp. of America v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995). However, the Ninth Circuit Court of Appeals applied the exposure theory in a lawsuit regarding coverage for claims against a heart valve manufacturer. Notably, the California Supreme Court has applied the manifestation theory in the first-party context. *Prudential-LMI Commercial Ins. v. Superior Court*, 51 Cal.3d 674, 798 P.2d 1230, 274 Cal.Rptr. 387 (Cal. 1990).

In addition to states that apply multiple trigger theories, there is at least one state supreme court that has combined two traditional trigger theories based upon the court's conclusion that no single theory properly gave effect to the policy provisions. In *Joe Harden Builders, Inc. v. Aetna Cas. and Surety Co.*, 486 S.E.2d 89 (S.C. 1997), the United States District Court certified a question to the South Carolina Supreme Court, inquiring when progressive property damage caused by faulty construction was deemed to have "occurred" for purposes of coverage. In answering the certified question, the South Carolina Supreme Court discussed each of the four coverage trigger theories, rejecting outright both the exposure and manifestation theories as conflicting with the policy provisions in most standard occurrence policies. *See id*. at 234–35.

The court concluded that the continuous trigger theory, although giving effect to the standard policy provisions regarding continuous or repeated exposure was flawed because it had the potential to trigger coverage even if no damage had yet occurred. The South Carolina Supreme Court concluded, instead, that the injury-in-fact theory was "consistent with the policy's requirement that damage occur during the policy period." *Id*. at 236. As such, the court

adopted the injury-in-fact theory in conjunction with a "modified" continuous trigger theory, holding that coverage for the progressive property damage was triggered at the time of the injury-in-fact and continued thereafter; therefore, the court allowed coverage under all the policies in effect from the time of the injury-in-fact during the progressive damage. *See id*. at 236–37.

In some jurisdictions, the "X Factor" used by courts is a distinction in the type of damages alleged. In *Trustees of Tufts University v. Commercial Union Ins. Co.*, 415 Mass. 844, 616 N.E.2d 68, 75 (Mass. 1993), the Massachusetts Supreme Court made this type of distinction, recognizing that "different triggers may be applied to different types of injuries and property damage." (citations and footnote omitted). Likewise, Ohio courts consider, among other factors, the nature of the damage at issue to determine which of several theories trigger coverage. *Plum v. West Am. Ins. Co*., No. C-050115, , 2006 WL 256881, at *4 ¶19 (Ohio Ct. App. Feb. 3, 2006) ("[w]hether a manifestation trigger or a different trigger will apply depends on the nature of the damage."). In short, some courts will apply a coverage trigger theory that best suits the nature of the underlying loss or damage.

Similar to Ohio, in cases involving toxic torts, Pennsylvania has broadly interpreted the term "bodily injury" as used in the insuring agreement of commercial general liability policies to extend coverage under all of the possible triggers—exposure, continuing exposure, or "exposure in residence," and manifestation. *J.H. France Refractories Co. v. Allstate Insurance Co.*, 626 A.2d 502 (Pa. 1993). In this holding, the Pennsylvania Supreme Court reviewed detailed expert testimony that explained the disease process from initial exposure through the development of asbestosis and silicosis, and it adopted the lower court's determination that "bodily injury" "also encompasses the progression of the disease throughout and after the period of exposure until,

ultimately, the manifestation of recognizable incapacitation." *Id*. However, Pennsylvania courts have declined to apply the multiple trigger approach in cases other than those involving toxic torts. In *Consulting Engineers, Inc. v. Insurance Co. of North America*, 710 A.2d 82 (Pa. Super. 1998), a Pennsylvania appellate court rejected the "multiple trigger" argument in a declaratory judgment action filed by two carriers disclaiming coverage and a defense for a claim for malicious prosecution. The court instead applied the manifestation theory because there was no "latent" injury similar to those found in toxic tort cases.

For others, the "X Factor" is whether the claim for coverage involves a first or a third party. Commentators and courts that favor this distinction rely on the differing language in, and the reasonable expectations of the insured under, the two types of policies. One commentator, who favors the distinction between first-party and third-party, has argued that insurance policy language requires such differentiation. *See* Chandra Lantz, *Triggering Coverage of Progressive Property Loss: Preserving the Distinctions Between First- and Third-Party Insurance Policies*, 35 Wm. & Mary L. Rev. 1801 (Summer 1994). According to the commentary, contractual provisions that trigger first-party coverage "at the 'inception of the loss" differ from third-party provisions providing coverage for "'property damage' occurring during the policy period." *Id.* at 1811–13. The first-party versus third-party distinction was also recognized by the Supreme Court of Nevada in *Jackson v. State Farm Fire and Cas. Co.*, 835 P.2d 786, 789 (Nev. 1992). There, the court held that the manifestation theory was more appropriate in first-party liability cases because the theory "promotes greater certainty in the insurance industry (which ultimately results in lower costs to the insureds) and enables the reasonable expectations of the insureds to be met."

In short, many courts are influenced by different "X Factors" in different situations. It is not unheard of to apply a different coverage trigger theory for each type of coverage, for each form of damage, and for each distinction in policy provisions.

The Great Unknown

As opposed to opting for a single theory based upon an "X Factor," or looking for a "double threat" or "triple threat," the high courts in some jurisdictions have not yet determined which theory is appropriate. In states such as West Virginia, where the supreme court of appeals has not provided guidance on which trigger theory the state will adopt, practitioners are free to argue for the theory best for a client.

For example, in *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, the circuit court discussed the various trigger of coverage theories as they applied to delayed manifestation claims in other jurisdictions. *See* 2003 WL 23652106, at *14–17 (W. Va. Cir. Ct. Oct. 18, 2003). The court applied the continuous trigger theory to determine coverage under the plaintiff's policies. *See id.* Specifically, the court found it persuasive that the manifestation of loss approach would permit the insurer to terminate coverage before "the onset of a recognizable disease" and thus deprive the insured of benefits. *Id.* Rather, the court favored the continuous trigger approach because it preserved benefits for the insured. *See also U.S. Silica Co. v. Ace Fire Underwriters Ins. Co.*, Civil Action No. 06-C-2 (Morgan Cnty. Cir. Ct., W. Va., 2013) (finding coverage triggered under three policies, from the first exposure until claim is brought or death occurred). Similarly, Kentucky courts have not adopted one of the standard trigger theories; however, recent decisions in other jurisdictions, applying Kentucky law, indicate that Kentucky courts may follow an approach more similar to the manifestation or injury-in-fact theories, rather than the exposure or

continuing injury theories. *See Stillwell v. Brock Bros., Inc.*, 736 F. Supp. 201, 205-06 (S.D. Ind. 1990) (applying Kentucky law).

Game Pointers

As demonstrated here, there are several theories of insurance coverage triggers. Some courts seek a single theory; however, some apply one theory but analyze others in that application. In short, courts in your jurisdiction may have an "X Factor" that they look for. Alternatively, your court may be willing to use a different theory depending on whether an underlying claim is first-party or third-party, the relevant policy language, the nature of the damages alleged, or the nature of the causation of the damages alleged. Deciphering the "X Factor" that a particular court will look for when determining which coverage trigger theory to apply may be difficult in those jurisdictions that have not decided or have applied a variety of theories in the past. The prudent practitioner is one who remains cognizant of all of the issues and arguments attendant to the trigger dilemma, while analyzing and advocating for the theory that best serves a client both in the case at hand and long term.