Nailing Down Occurrence Triggers for Property Damage in the Wake of Redevelopment - Why a Distinction Should Be Made Between First and Third Party Policies

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I. INTRODUCTION: THE AFTERMATH OF DISASTER—LOUISIANA’S CURRENT REBUILDING CRISIS

Devastation, destruction, and a new way of life were introduced to the residents of the Gulf Coast on August 29, 2005 with the arrival of Hurricane Katrina. Unfortunately for Louisiana, the road to recovery after the devastation of Katrina was tragically interrupted almost one month later in the form of another category three hurricane named Rita. The amount of damage caused by Hurricane Katrina alone is staggering, with an impacted area of 90,000 square miles—an area larger than Great Britain.1 As of March 8, 2006, over $36.9 billion had already been appropriated for response and recovery efforts in the Gulf Coast, with even more funds being requested.2

Louisiana has focused its use of such resources on rebuilding the state in an attempt to bring back the many residents and businesses that had to take to higher ground.3 Such a rebuilding effort has been dubbed by some as “the biggest redevelopment effort in history.”4 However, with such a mass effort of rebuilding, the concern turns to the scores of contractors who are flocking to the Gulf Coast in an attempt to get a bite at the FEMA apple.5

2. Id.
4. Id. (quoting Walter J. Leger Jr., chairman of the housing task force for the Louisiana Recovery Authority).
The number of citations issued to contractors for "shoddy work" and failure to obtain requisite state licenses has increased from 237 in the year leading up to Katrina to over 460 since. In addition, consumer complaints against contractors and fines levied against them have also dramatically increased. It seems inevitable that these rebuilding efforts will be plagued by a multitude of construction defect claims, some arising at the outset of construction while others may go unnoticed for years. Thus, it becomes necessary to explore Louisiana's remedy for such defects in the context of insurance coverage and determine whether this remedy is up for the long and arduous task it will be confronted with for years to come. The time is now to provide illumination on an area of insurance law in Louisiana that heretofore has been masked in a gray fog.

This Comment examines the jurisprudential response to construction defects resulting in property damage in the context of insurance coverage. The question that must be clearly answered up front with property damage claims is whether there was an "occurrence" that "triggered" coverage for the claimed "property damage." What is typically at issue is whether insurance coverage is triggered when the damage is discovered or when

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6. Id.
7. Id. There were over $500,000 in fines against unlicensed builders, up from between $100,000 to $200,000 in years prior to Katrina. Id.
8. "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Sample Commercial General Liability Policy, ISO Properties, Inc. (2003), reprinted in WILLIAM SHELBY MCKENZIE & ALSTON JOHNSON, INSURANCE LAW & PRACTICE app. C, in 15 LOUISIANA CIVIL LAW TREATISE, 1124 (3d ed. 2006) [hereinafter Sample Policy].
9. "Trigger" is a term used to describe what must happen, according to the terms of an insurance policy, for the potential of coverage to arise. Montrose Chem. Corp. of Cal. v. Admiral Ins. Co., 913 P.2d 878, 880 n.2 (Cal. 1995).
10. "Property damage" is generally defined as "[p]hysical injury to tangible property [wherein] such loss of use shall be deemed to occur at the time of physical injury that caused it." MCKENZIE & JOHNSON, supra note 8. See also id. § 183, at 494 ("The requirement of bodily injury or property damage during the policy period as the trigger of coverage is often referred to as 'occurrence' basis coverage.").
damage results from exposure to this “shoddy work,” which may occur years prior to its discovery.\textsuperscript{11}

Courts have utilized different trigger theories in an attempt to interpret insurance policy language to determine whether damage occurred at the exposure to a harmful condition, such as the first time it rained on a leaky roof, or whether damage occurred when the resultant rotten framing was discovered by the property owner. The problem with the use of such theories, as Louisiana jurisprudence demonstrates, is the lack of consistency regarding when and why one particular theory is used over the other. Thus, the determination of which insurer must provide coverage for potentially millions of dollars worth of post-Katrina rebuilding efforts is at the mercy of a court simply employing one theory over the other. Rather than bearing the resultant risk and uncertainty, it is likely that insurers will pass this uncertainty on to insureds in the form of increased premiums.

It must be mentioned at the outset, however, that the employment of any trigger theory to determine when the “property damage” occurred is only the beginning of the analysis. Although beyond the scope of this Comment, an in-depth analysis must also be undertaken to determine whether there are applicable exclusions in the policy that ultimately exclude coverage.\textsuperscript{12} This Comment

\textsuperscript{11} McKENZIE & JOHNSON, supra note 8, § 183, at 497 (“With construction defects, the real issue usually is not whether there has been an ‘occurrence,’ but whether there has been property damage during the policy period and, if so, whether any exclusion is applicable. If the roof leaks or the wall collapses, the resulting property damage during the policy period triggers coverage under an ‘occurrence’ basis policy, even if the sole cause is improper construction and the only damage is to the work performed by the contractor. On the other hand, the mere existence of a construction defect does not trigger coverage under an ‘occurrence’ basis policy because coverage is triggered only if the defect causes property damage during the policy term.”).

\textsuperscript{12} See id. (“Whether there is coverage for property damage resulting from the insured’s work or products requires additional analysis into whether one of the property damage exclusions is applicable. In the Commercial General Liability form, property damage that occurs while the work is in progress may be excluded under Subsection (5) or (6) of Exclusion (j), now known as the ‘damage to property’ exclusion. Property damage that occurs after the work is complete (as defined in the Products-Completed Operations Hazard) may be excluded by Exclusion (l), the ‘damage to work’ exclusion. If the damage is to ‘your product,’ as defined in the policy, the ‘damage to products’ exclusion,
focuses solely on when property damage is deemed to have occurred according to common law trigger theories by attempting to interpret policy language. And, although inspired in part by the potential property damages resulting from hurricane rebuilding efforts, the forthcoming analysis of the proper employment of trigger theories is equally relevant in any context concerning other types of damage, whether property or personal injury.

This Comment explores the trigger theories that have developed in Louisiana and contrasts them with those of other jurisdictions. The outcome of this comparison is the author’s recommendation that one theory does not fit all insurance policies, but instead different trigger theories should be utilized depending on the type of insurance. For first party insurance coverage, the most equitable and economically viable theory is based on when the damage is discovered or manifested. In contrast, for third party insurance coverage, the coverage trigger should depend on when the actual injury took place, or in the alternative, if damage is progressive, then coverage should be triggered in a continuous manner from its inception to discovery.

II. BACKGROUND TO TRIGGER THEORIES AND LOUISIANA’S APPLICATION OF THEM

In order to properly understand the development of the manifestation and exposure theories in Louisiana, one must first be

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Exclusion (k), may be applicable. If the work fails to perform properly, then Exclusion (m) for ‘impaired property’ may be applicable. Exclusion (n), the ‘sistership’ exclusion, may prevent coverage for losses resulting from the recall of products or work. The effect of these property damage exclusions should be carefully analyzed for any claim resulting from construction defects. Also, there may be contractual provisions that affect recovery of damages for defective work.

13. First party insurance provides coverage for damage sustained directly by the insured, such as a standard homeowner’s life, disability, health, fire, theft, and casualty policy. Montrose, 913 P.2d at 886.

14. A third party liability policy provides coverage for the insured’s liability to a third party, such as a comprehensive general liability policy, a director’s and officer’s liability policy, or an errors and omissions policy. Id.

15. Id. at 882 n.6.
aware of the different trigger theories that have emerged in other jurisdictions. Part A will provide a brief explanation of the four most common theories. Thereafter, Parts B and C will demonstrate how the manifestation and exposure theories, respectively, were developed in Louisiana. Part D will conclude with an examination of the current status of Louisiana law regarding such theories.

A. Introduction to Trigger Theories

When confronting the issue of when insurance coverage should be triggered, the courts have not been without guidance. In fact, numerous theories have surfaced to help the court answer this question. The most common theories include: (1) the manifestation theory; (2) the exposure theory; (3) the injury-in-fact theory; and (4) the continuous injury theory.\(^6\)

The manifestation theory provides that insurance coverage is triggered when the injury or damage is discovered or becomes apparent during a policy period.\(^7\) The policy in effect when this discovery is made is responsible for providing coverage.\(^8\) As a result, under this theory, even if the damage was caused by a delictual act that took place under a prior policy, the policy in effect at the time the damage is discovered is nevertheless responsible for coverage.

At the other end of the spectrum, the exposure theory provides that the policy in effect when the property was exposed to the harm must provide coverage.\(^9\) This theory assumes that damage occurs simultaneously with exposure.\(^10\) Therefore, even if the damage is not discovered until years later when a different policy is in place, the policy in effect when the property is damaged is responsible for coverage.

The other two theories, the injury-in-fact theory and the continuous injury theory, fill the gap between the manifestation and exposure theories. For instance, the injury-in-fact theory

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17. Id. at 264.
18. Id.
19. Id. at 263.
20. Id.
provides that the policy in effect when the damage actually occurred is responsible for coverage, regardless of when the exposure or manifestation occurred. This theory, however, requires a difficult factual finding as to when the injury, in reality, occurred. Consequently, technical or scientific evidence is usually required. On the other hand, the continuous injury trigger encompasses both the manifestation and exposure theories by providing that all policies in effect either at the time of exposure, during any later periods of continuing exposure, or at the time of manifestation are responsible to provide coverage. Under this theory, if multiple policies are implicated, each policy is allocated a portion of the loss.

B. Louisiana's Development of the Manifestation Theory

In Oceanonics, Inc. v. Petroleum Distributing Co., the Louisiana Supreme Court first recognized the substantial change in policy language under an occurrence-based policy as opposed to earlier accident-based policies. The court found that the policy in question did not provide coverage since the occurrence-based policy limited coverage to property damage occurring during the policy period. Therefore, it excluded damage that occurred after the policy period even though the damage resulted from a delictual act committed during the policy period. In doing so, the court reasoned that such exclusion was not against public policy since an

21. Id. at 265.
22. Id.
23. Id. at 267.
24. Id. at 268.
25. 292 So. 2d 190 (La. 1974).
26. MCKENZIE & JOHNSON, supra note 8, § 183, at 496 (“Oceanonics involved the 1966 policy form in which the definition of ‘occurrence’ required bodily injury or property damage during the policy period. The 1973 and 1986 CGL policies require bodily injury or property damage within the policy period in provisions separate from the definition of ‘occurrence.’ With this modification, the definition of ‘occurrence’ is an ‘accident’ (including exposure to the same conditions). . . . [B]ut ‘occurrence’ basis policies clearly require that the bodily injury or property damage resulting from such an accident occur during the policy period.”).
27. Oceanonics, 292 So. 2d at 191–92.
28. Id.
insured could secure coverage for claims arising from prior delictual acts by purchasing completed operations and products liability coverage.  

Although the court did not refer to the manifestation theory in its analysis, the fifth circuit in Korossy v. Sunrise Homes, Inc. characterized the court’s reasoning as in line with the manifestation theory. In this case, the fifth circuit determined whether a developer’s comprehensive general liability policy provided coverage for the developer’s liability as a result of excessive settlement of numerous homes the developer built. The court expressly adopted the manifestation theory over the exposure theory and found that the excessive settlement did not become damage until the homeowners discovered it. The court reasoned that the policy requires an occurrence to “result” in damage, which did not occur until the damage manifested.

Numerous cases have similarly held that the manifestation theory should be utilized to determine trigger issues; however,
while doing so, some courts have provided further justifications for this theory. For instance, in *Lafayette Insurance Co. v. C.E. Albert Construction Co.*, the court reasoned that to adopt the exposure theory would arguably require an insurer to "remain a guarantor of its insured's actions forever." Thus, the court found that an electrical subcontractor's insurer did not provide coverage for fire damage because its policy was not in effect when the defective wire failed.

Also, in *James Pest Control, Inc. v. Scottsdale Insurance Co.*, the court adopted the manifestation theory, reasoning that its application "eliminates the difficult factual issue of determining when a hidden property damage actually occurs." Therefore, the court found the comprehensive general liability policy of a pest control contractor was not triggered until the termite infestation was discovered by the homeowners.

Furthermore, the court in *New Orleans Assets, L.L.C. v. Travelers Property Casualty Co.* applied the manifestation theory over the exposure theory in a construction defect claim resulting in mold damage. In doing so, the court reasoned that the manifestation theory is appropriate because it incorporates the loss in progress rule, which provides that an insured cannot insure against a known loss. Thus, the policy in effect at the time of

1986) (refusing to extend insurance coverage when language limits coverage to damage occurring during its term).

35. 661 So. 2d 1093, 1096 (La. App. 4th Cir. 1995).
36. Id.
37. 765 So. 2d 485, 491 (La. App. 5th Cir. 2000).
38. Id.
40. Id. at *3 n.2 ("The loss-in-progress rule and the manifestation trigger protect an insured's access to insurance. Even if damage manifests in a building, subsequent insurers would be willing to issue policies because they could rely on the loss-in-progress rule to preclude coverage for progressive property damage."). *But see* Estate of Patout v. City of New Iberia, 849 So. 2d 535, 543 (La. App. 3d Cir. 2002) ("We have found no Louisiana cases that have adopted the 'known loss' doctrine. We decline to venture into unchartered waters. As a result, the trial court properly denied application of the 'known loss' doctrine.").
manifestation is liable for the entire loss, even if damage progresses after the policy expires.41

C. Louisiana’s Development of the Exposure Theory

The court in Korossy v. Sunrise Homes, Inc., in choosing to extend Oceanonics to stand for the manifestation theory, expressly rejected the exposure theory as employed by the Louisiana Supreme Court in Davis v. Poelman.42 In Davis, the court determined when coverage was triggered for a plane that had been damaged from exposure to the elements due to the breach of an agreement to store the plane in a hangar.43 The court rejected the argument that there was no coverage since the policy had expired prior to Davis becoming aware of the damage.44 Instead, it found that the occurrence that triggered coverage was the violation of the agreement to store the plane, since this was the cause of the plaintiff's loss.45 Therefore, because the policy was in effect at the time of the breach, coverage was required.46 Thus, as the Korossy court found, without using the exposure theory by name, the Davis court seemed to be applying the exposure theory.47

Unlike the Korossy court’s rejection of the exposure theory, many courts have either refused to apply the manifestation theory over the exposure theory as a matter of law or simply found the exposure theory to be the proper theory to trigger coverage.48 For

42. Korossy v. Sunrise Homes, Inc., 653 So. 2d 1215, 1226 (La. App. 5th Cir. 1995) (citing Davis v. Poelman, 319 So. 2d 351, 354 (La. 1975)).
43. Davis, 319 So. 2d at 354.
44. Id.
45. Id.
46. Id.
47. Korossy, 653 So. 2d at 1226.
48. See Cole v. Celotex Corp., 599 So. 2d 1058, 1076–79 (La. 1992) (adopting the exposure theory in deciding an insurance coverage dispute in the context of personal injuries resulting from asbestos exposure). The Cole court gave numerous policy reasons to support its adoption of the exposure theory: First, applying the exposure theory was consistent with a literal reading of the policy language because medical evidence indicates that injury occurs shortly after the inhalation of asbestos fibers. Id. Second, the exposure theory would maximize coverage to the plaintiff while at the same time spread losses back over numerous years and likely numerous insurers. Id. at 1077. And third, the
instance, in *Orleans Parish School Board v. Scheyd, Inc.*, the court found that a plumbing subcontractor’s comprehensive general liability policy did not unambiguously exclude coverage so as to preclude the insurer’s duty to defend. 49 In *Scheyd*, the school board became aware of plumbing problems four years after the construction of their new building and approximately five years after the plumbing subcontractor’s comprehensive/commercial general liability (CGL) policy expired. 50

The *Scheyd* court refused to follow the manifestation theory as a matter of law, which would have denied coverage on summary judgment since the damage was discovered years after the policy expired. 51 Instead, the court reasoned that although the policy language requires property damage to occur during the policy period, the language does not require this damage to become noticeable during this period. 52 The court refused to make the “quantum leap” and apply the manifestation theory as a matter of law and instead suggested that the manifestation theory may be a rule better suited for situations where there is no evidence of when the damage actually occurs. 53

In addition, in *Grefer v. Travelers Insurance Co.*, the court rejected the reasoning in *Korossy* and applied the exposure theory over the manifestation theory in a property damage claim resulting from contamination to a lessor’s property. 54 The court found coverage was triggered when radioactive scales were dispersed on

exposure theory upholds the contracting parties’ intent because they would expect coverage to parallel liability. *Id.*

49. 673 So. 2d 274, 278 (La. App. 4th Cir. 1996).
50. *Id.* at 276.
51. *Id.* at 277.
52. *Id.* at 278.
53. *Id.* at 277–78.
54. 919 So. 2d 758, 766 (La. App. 1st Cir. 2005). *See also* Herzog Contracting Corp. v. Oliver, 918 So. 2d 516, 522 (La. App. 2d Cir. 2005) (“In order for there to be coverage under these policies, the property damage must have occurred during the policy period. The property damage was the contamination . . . to the property . . . .”), *writ denied,* 926 So. 2d 542 (La. 2006); Norfolk S. Corp. v. Cal. Union Ins. Co., 859 So. 2d 201 (La. App. 1st Cir. 2003) (finding exposure theory applicable to long-term environmental damage).
the property causing contamination, not when the land owner was subsequently informed of the contamination years later. The court reasoned that the policy language limiting coverage to property damage occurring during the policy period unambiguously provided coverage when the exposure occurred.

D. So Where Does This Leave Us in Louisiana?

The United States District Court for the Western District of Louisiana attempted to answer that very question in looking to Louisiana law in a duty to defend case. The court in Fontenot v. One Beacon America Insurance Co. surveyed Louisiana cases applying the two trigger theories, ultimately concluding that the insurer's "reliance on cases applying the manifestation rule is misplaced." In so concluding, the court found that Louisiana jurisprudence is far from uniform on this issue and could not say with certainty that coverage was excluded. The court found the language in Rando ("a clear signal from the Supreme Court on this issue would surely do much to eliminate expensive future litigation") as well as the reasoning in Scheyd ("we cannot make the 'quantum leap' and say that the manifestation rule is applicable as a matter of law") to be a clear indication that Louisiana jurisprudence is unsettled on whether to apply the manifestation or exposure theory to determine the trigger for coverage in construction defect cases.

55. Grefer, 919 So. 2d at 766.
56. Id. Gray's CGL Policy stated that "[t]his insurance applies only to 'bodily injury' and 'property damage' which occurs during the policy period." Id. at 765. The excess policy defined "occurrence" as "a continued or repeated exposure to conditions occurring during the Policy Period and which results in . . . damage to property during the Policy Period . . . ." Id. at 766.
58. Id. at *7-8.
59. Id.
60. Id. (quoting Rando v. Top Notch Props., L.L.C., 879 So. 2d 821, 833 (La. App. 4th Cir. 2004)).
61. Id. (quoting Orleans Parish Sch. Bd. v. Scheyd, Inc., 673 So. 2d 274, 278 (La. App. 4th Cir. 1996)).
62. Id. at *6-7.
Therefore, the answer to that question is unresolved and will be another litigated issue in the upcoming storm of construction defect claims arising from post-hurricane rebuilding efforts. However, the real question is not which theory should we categorically adopt in this context, but rather are we even on the right track?

Instead of trying to fit all insurance policies into the manifestation or exposure boxes, there should be a preliminary distinction as to the type of policy we are dealing with. To date, not one Louisiana case has recognized the significance of the differing liabilities and coverage concerns resulting from a distinction between first party or third party policies when determining whether coverage has been triggered. The source of the frustration and confusion the courts are facing in trying to apply these theories may be alleviated by an initial determination of the type of coverage purchased—first party or third party.

III. WHY LOUISIANA SHOULD DISTINGUISH BETWEEN FIRST PARTY AND THIRD PARTY POLICIES IN RESOLVING COVERAGE TRIGGER ISSUES

Part A commences the analysis by introducing the distinctions between the risks and liabilities for first party policies versus third party policies. Based in part on those distinctions, Part B recommends the manifestation theory for first party policies, whereas Part C posits the inappropriateness of the manifestation theory for third party policies. The analysis will then, in Part D, recommend an injury-in-fact theory for third party policies with one exception, in Part E, for progressive property damage.

A. The Distinction between First Party and Third Party Policies

In order to properly analyze coverage trigger issues, it is necessary to first distinguish between first party insurance policies and third party liability policies. Cases which fail to do so while attempting to determine whether coverage has been triggered generally have "muddied the waters" or "shed more darkness than

light on the matter." The primary reasons for such a distinction at the outset are due to the differing nature of risks insured and the different causation analyses that must be undertaken, depending on the type of policy.

A first party insurance policy covers loss or damage that is sustained directly by the insured. Examples of first party policies include homeowner's, life, disability, health, fire, theft, and casualty insurance. First party property policies are contractual agreements whereby the insurer indemnifies the insured in the event the property suffers a covered loss. Therefore, coverage is typically determined by reference to causation resulting from certain covered "perils."

Third party insurance policies, on the other hand, provide coverage for the insured's liability to a third party. Examples of third party policies include CGL policies, directors and officers' liability policies, or errors and omissions policies. Such policies typically require the insurer to pay judgments that the insured becomes legally obligated to pay as a result of damage they caused. Thus, coverage issues in third party liability policies must be resolved by reference to "traditional tort concepts of fault,

64. Id. at 887.
65. Id. at 886.
66. Id.
67. Id. See also MCKENZIE & JOHNSON, supra note 8, § 180, at 964–65 ("These types of coverage are usually found lumped together in a so-called homeowners or 'package' policy, which is simply a composite of fire, theft, windstorm, and other coverages written together for marketing purposes.").
69. Id. "The term 'perils' in traditional property insurance parlance refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which brings about the loss." Garvey, 775 P.2d at 710 (quoting Bragg, Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 FORUM 385, 386–87 (1985)), quoted in Montrose, 913 P.2d at 886.
70. Montrose, 913 P.2d at 886.
71. Id. See also MCKENZIE & JOHNSON, supra note 8, at § 180, at 482 ("Under the standard policy form, the CGL policy protects against the premises, operations, products, completed operations, and independent contractors hazards, but coverage for a specific hazard may be excluded by endorsement. Likewise, additional coverages may be provided by endorsement.").
72. Montrose, 913 P.2d at 886.
proximate cause and duty."73 Furthermore, by insuring for personal liability and providing coverage for the insured's potential negligence, "the insurer agrees to cover the insured for a broader spectrum of risks."74

Another reason for a distinction between first party and third party policies is that parties will likely have different expectations depending on the type of coverage.75 An insured under a first party policy typically purchases coverage sufficient to cover his entire potential loss.76 For example, a property owner who purchases fire insurance will likely elect coverage which will cover the full value of the property in the event a fire destroys the property.77 Therefore, the first party insured has no incentive to look to more than one policy if a fire does take place.78 With third party policies, in contrast, an insured is only making an educated guess regarding its potential liability to third parties; thus, such a guess may fall far short of the actual exposure, differing substantially from first party coverage expectations.79

Given the different liabilities, causation analysis, expectations, and policy language involved between first party and third party insurance policies, it logically follows that the two policies' coverage triggers should be analyzed separately as well.

B. Why the Manifestation Theory Works with First Party Policies

"[T]he clear weight of authority in more recent cases considers defects in construction that result in damage subsequent to completion to be accidents and occurrences when they manifest themselves."80 This observation is a proper way to analyze coverage triggers, however, only when dealing with first party insurance policies. This distinction should be made because when

73. *Id.* (quoting Garvey, 770 P.2d at 710).
74. *Id.*
75. *Id.* at 886–87.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
dealing with first party insureds, the damage sustained is incurred directly by the holder of the policy (the payor of the premiums) as opposed to a third party.

The language of a typical homeowner’s policy by itself provides a strong justification for why the manifestation theory should be used to determine when coverage is triggered. A homeowner’s policy provides the insured with coverage for property damage in the event the property suffers a covered loss.  

Whether a loss is covered or not depends on the relationship of certain enumerated perils versus other exclusions in the policy. Therefore, because this policy protects the insured directly from the damage he incurs, whether a peril has occurred should be determined from the viewpoint of this insured. Thus, until the damage manifests itself, the loss is still a contingency and the insured has not suffered a loss. Once the damage is manifested, however, the risk is no longer contingent; rather, an event has now occurred that triggers coverage, unless such event is excluded under the particular policy. Manifestation, however, must not only include that point in time when the property owner discovered damage, but also that point in time when appreciable


82. Examples of such perils include: fire or lightning, windstorm or hail, explosion, riot or civil commotion, aircraft, vehicles, smoke, vandalism or malicious mischief, theft, falling objects, weight of ice, snow, or sleet, accidental discharge or overflow of water or steam, sudden and accidental tearing apart, cracking, burning or bulging, freezing, sudden and accidental damage from artificially generated electrical current, and volcanic eruption. Sample Homeowners 2—Broad Form, reprinted in McKENZIE & JOHNSON, supra note 8, at app. D, at 1134–36.

83. Examples of exclusion include: loss or damage caused by ordinance or law; earth movement such as earthquakes, landsides, or sinkholes; water damage caused by flood or sewage back up; power failure; neglect; war; nuclear hazard; intentional loss; governmental action. Id. app. D, at 1136–37. See also id. § 324, at 981–83.

84. Montrose, 913 P.2d at 886.


86. Id.
damage has occurred such that a reasonable insured would be aware of the damage.\footnote{Id.}

Application of the manifestation theory in the first party policy context also complies with the loss in progress rule.\footnote{Id.} Once the insured discovers damage, the loss becomes known. Therefore, since an insured cannot insure against a known loss, the manifestation theory triggers coverage simultaneously with a loss becoming known. Thus, the manifestation theory allows subsequent insurers to rely on the loss in progress rule to preclude coverage for this previously manifested damage,\footnote{New Orleans Assets, L.L.C. v. Travelers Prop. Cas. Co., 2002 WL 32121257, at *3 (E.D. La. 2002), rev'd on other grounds, 363 F.3d 372 (5th Cir. 2004).} while at the same time upholding the reasonable expectations of the insured by allowing the first party insured to look to his present carrier for coverage.\footnote{Prudential, 798 P.2d at 1246-47.}

In addition to meeting the expectations of the first party insured, the manifestation theory in this context also makes the underwriting practice of the insurance industry more predictable.\footnote{Id.} Because the insurer is not liable for a loss unless damage manifests itself during the policy, the insurer cannot be liable after its contract expires\footnote{Id.} nor can it be expected to remain a guarantor of the insured’s property indefinitely.\footnote{See Lafayette Ins. Co. v. C.E. Albert Constr. Co., 661 So. 2d 1093, 1096 (La. App. 4th Cir. 1995).} As a result, the manifestation theory allows insurers to gauge the amount of premiums needed to cover potential risks with greater certainty, thereby avoiding needless increases in reserves and presumably reducing costs to insureds.\footnote{Prudential, 798 P.2d at 1246.}

It must also be recognized that a vast majority of potential insureds facing construction defect problems will be unsophisticated homeowners under a standard homeowner's policy. Hence, application of the manifestation theory for property

\footnotesize{\begin{itemize}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{New Orleans Assets, L.L.C. v. Travelers Prop. Cas. Co., 2002 WL 32121257, at *3 (E.D. La. 2002), rev’d on other grounds, 363 F.3d 372 (5th Cir. 2004).}
  \item \footnote{Prudential, 798 P.2d at 1246-47.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{See Lafayette Ins. Co. v. C.E. Albert Constr. Co., 661 So. 2d 1093, 1096 (La. App. 4th Cir. 1995).}
  \item \footnote{Prudential, 798 P.2d at 1246.}
\end{itemize}}
owners prevents these owners from bearing the burden of proving when damages actually resulted instead of when they were discovered.\footnote{95}{James Pest Control, Inc. v. Scottsdale Ins. Co., 765 So. 2d 485, 491 (La. App. 5th Cir. 2000).}

The adoption of the manifestation theory in the first party context makes practical sense from both the standpoint of the insured as well as the insurer. Louisiana jurisprudence recognizes these advantages; however, Louisiana courts fall short in failing to realize the advantages of separating the analysis for third party policies.

\textit{C. Why the Manifestation Theory Does NOT Work for Third Party Policies}

In contrast to first party insurance coverage, third party policies are concerned with establishing negligence on the part of the insured or otherwise assessing tort liability.\footnote{96}{Montrose Chem. Corp. of Cal. v. Admiral Ins. Co., 913 P.2d 878, 886 (Cal. 1995) (citing Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 710 (Cal. 1989)).} The insurer assumes a contractual duty to "pay those sums that the insured becomes legally obligated to pay."\footnote{97}{Sample Policy, \textit{supra} note 8, at 1111.} Thus, it is a damaged third party who initiates the action against the insured.\footnote{98}{Montrose, 913 P.2d at 887.} The insured's right to coverage thereafter depends on whether the insured is at fault as determined by a traditional tort analysis.\footnote{99}{Id. at 886 (citing Garvey, 770 P.2d at 710).} This analysis is in stark contrast to a causation analysis by reference to a covered peril as in first party property insurance; consequently, the analysis of what triggers coverage should also differ.

Typical policy language of a third party liability policy, such as a CGL policy, does not provide support for the manifestation theory. These policies typically state that such "insurance applies to . . . ‘property damage’ only if . . . [the damage] is caused by an ‘occurrence’ . . . [and the property damage] occurs during the policy period."\footnote{100}{Sample Policy, \textit{supra} note 8, at 1111.} "Property damage" is generally defined as
“physical injury to tangible property [wherein] such loss of use shall be deemed to occur at the time of physical injury that caused it.”

“Occurrence” is then defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

When these clauses are read together, the policy clearly distinguishes between the causative event and the resulting property damage. According to this language it is only the damage that must occur during the policy period. There is no requirement, however, that this damage must become manifest during the policy period.

In addition, because CGL policies only require the injury to take place during the policy period, subsequent policy revisions failed to definitively resolve the time the injury occurred, particularly in long term injurious exposure situations. Although the insurance industry knew of the potential for multiple policies to be triggered in such situations, the drafters failed to precisely define the time of injury and also refused to include language incorporating either the exposure theory or the manifestation theory. Therefore, the insurance industry’s recognition that multiple policies could be implicated indicates an implied rejection of the manifestation theory in the third party liability context.

Furthermore, application of the manifestation theory for such an occurrence-based liability policy would have the effect of making such a policy operate more similar to a “claims made”
A claims made policy restricts coverage to the policy in effect when a claim is actually asserted against the insured. Hence, timing of the damage or injury is irrelevant. Such policies limit the insurer's risk, thereby permitting the insurer to more accurately establish reserves while at the same time lowering the premiums to the insured for the corresponding decrease in risk.

Reading a manifestation trigger into the policy would have the same effect, by similarly limiting coverage to only that policy period when damage was discovered, in the same manner as limiting coverage to the period when a claim was made. Such a transformation would therefore fail to give effect to the broader and more expensive occurrence-based coverage. The fact that the insurance industry has introduced the option of claims made policies in lieu of occurrence-based policies for comprehensive general liability insurance for a corresponding lower premium further demonstrates why such a transformation is unwarranted.

As noted earlier, application of the manifestation theory seems to uphold the loss in progress rule. However, even though this rule is still applicable in the third party context, due to the differing nature of liabilities, the loss in progress rule's application must also differ in this context. Because third party policies provide coverage for the insured's liability, the loss in progress rule only

108. Montrose, 913 P.2d at 903–04. This assumes that that the property owner would make the claim in the same policy period as the damage was discovered, which may or may not happen.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id. See also McKenzie & Johnson, supra note 8, § 180, at 482 ("The most significant change [made in replacing the 1973 CGL policy with the 1986 policy] is that the policy was made available on either an 'occurrence' or a 'claims made' basis.").
precludes the procurement of insurance for a known liability.\textsuperscript{116} The absence of risk in such a situation would disallow the insurability of a known liability in a like manner as if the insured knew of property damage in the first party context.\textsuperscript{117}

However, as long as there is uncertainty regarding the "imposition of liability" and no "legal obligation to pay" has been established, then an insurable risk exists in the third party liability context.\textsuperscript{118} Thus, coverage is not precluded per the loss in progress rule as long as the insured's liability has yet to be established prior to entering into the contract of insurance with his carrier.\textsuperscript{119} Consequently, the loss in progress rule does not mandate the use of the manifestation theory for a third party liability policy since the focus is again on liability rather than a covered peril.

\textbf{D. Why the Injury-in-Fact Theory Works for Third Party Policies}

The injury-in-fact theory provides that the policy in effect when the damage \textit{actually} occurred is responsible for coverage.\textsuperscript{120} This trigger, consequently, does not require the damage to manifest itself during the policy period.\textsuperscript{121} However, the injury-in-fact trigger does require proof, in retrospect, that the damage was actually in existence during the applicable policy period.\textsuperscript{122}

By requiring a finding that the damage actually occurred during the policy period, the injury-in-fact theory is the theory of coverage that is most consistent with the language of a commercial general liability policy.\textsuperscript{123} As demonstrated earlier, the language

\begin{itemize}
\item \textsuperscript{116} Montrose, 913 P.2d at 905.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id. at 905–06.
\item \textsuperscript{119} Id. at 906.
\item \textsuperscript{121} Sentinel Ins. Co. v. First Ins. Co. of Haw., 875 P.2d 894, 915 (Haw. 1994).
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\end{itemize}
of a CGL policy clearly distinguishes between the causative event and the resulting property damage in its definition of "occurrence," wherein only the latter must occur during the policy period to trigger coverage. Therefore, the injury-in-fact theory and the CGL policy language are consistent in that they are both concerned only with when the damage actually occurred instead of applying a theory that only provides a benchmark or best guess.

This common sense approach to determining when coverage is triggered is further complimented by the realization that in certain situations, the injury-in-fact theory subsumes both the manifestation theory and exposure theory. For instance, if damage actually occurs simultaneously with manifestation, as in the case of cosmetic damage, then the manifestation theory and the injury-in-fact theory are one and the same. Likewise, if damage occurs simultaneously with exposure to a certain condition, such as in the case of asbestos inhalation or toxic torts, the exposure theory and the injury-in-fact theory are also equivalent. Therefore, since the injury-in-fact theory is only concerned with the reality of when damage actually occurred, it only differs from analysis under the manifestation or exposure theories when the damage occurs somewhere between the exposure to harm and the discovery of resulting damage.

One advantageous application of the manifestation theory is its elimination of the difficult factual finding inherent in the injury-in-fact theory. However, holders of CGL policies are likely to be more sophisticated businesses rather than the typical homeowner with a standard homeowner's policy. Regardless of whether it is an individual or a sophisticated business entity that bears the

125. Sentinel, 875 P.2d at 917.
126. Id. (citing Chemstar, Inc. v. Liberty Mut. Ins. Co., 797 F. Supp. 1541, 1550 (C.D. Cal. 1992)) (reasoning that because plaster pitting on the interior walls is a type of cosmetic damage, the damage did not occur until the pitting manifested itself), aff'd, 41 F.3d 429 (9th Cir. 1994).
128. Id. at 917.
burden of proving when the actual damage occurred, such a fact-intensive determination is not an impossible undertaking.\textsuperscript{129}

To begin with, as mentioned above, there may be situations where the actual damage will be easily pinpointed because the actual injury happens simultaneously with either exposure to the harm or its manifestation.\textsuperscript{130} However, even in situations where the actual damage falls somewhere in between and is more difficult to determine, it is presumable that with the aid of experts, finders of fact will be able to determine when the damage occurred with reasonable accuracy.\textsuperscript{131} Moreover, exactness is not required; rather, "[a]ll that is necessary is reasonably reliable evidence that the injury . . . more likely than not occurred during a period of coverage."\textsuperscript{132}

As indicated earlier, because of the differing nature of liability with a third party policy, application of the injury-in-fact theory is not precluded by the loss in progress rule as long as the insured's liability remains contingent and uncertain.\textsuperscript{133} In addition, although the injury-in-fact theory does not provide the same measure of predictability for the insured as the manifestation theory, it must be recognized that CGL policies were not written to optimize predictability in setting reserves.\textsuperscript{134} Such predictability was instead sought to be achieved by the creation of the "claims made" policy.\textsuperscript{135}

\textit{E. A Notable Exception to the Injury-in-Fact Theory's Application—Progressive Damage}

As demonstrated above, the injury-in-fact theory is the most equitable in the third party context because it is concerned with the

\textsuperscript{129} Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's London, 673 A.2d 164, 169 (Del. 1996).
\textsuperscript{130} Id. at 170 (quoting Am. Home Prod. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1509 (S.D.N.Y. 1983), aff'd as modified, 748 F.2d 760 (2d Cir. 1984)).
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Montrose Chem. Corp. of Cal. v. Admiral Ins. Co., 913 P.2d 878, 905-06 (Cal. 1995); Sentinel, 875 P.2d at 919-20.
\textsuperscript{134} Sentinel, 875 P.2d at 917.
\textsuperscript{135} Montrose, 913 P.2d at 903 n.24.
reality of when the injury actually happened, consistent with policy language. Under this theory, the policy in effect when the damage occurred pays. However, what happens when the actual injury occurs continuously over numerous policy periods, perhaps implicating multiple insurers, as in the case with progressive property damage? In such a case, the continuous injury theory should be utilized in conjunction with the injury-in-fact theory.

The continuous injury theory provides that progressive property damage is covered by all successive policies in effect during the period of progressive damage.\textsuperscript{136} Progressive property damage refers to continuing damage, which occurs over an extended period of time.\textsuperscript{137} Therefore, a pure injury-in-fact analysis would find that the repeated activities of the insured caused property damage during the term of multiple policies. In such a case, the continuous injury trigger may be applied to "equitably apportion liability among insurers" whose policies were in effect at the time damage was actually occurring.\textsuperscript{138}

IV. CONCLUSION

Louisiana is neck deep in a massive rebuilding effort to prove to the rest of the country and the world that New Orleans and other affected areas of the Gulf Coast can rebound and resume business and life. The amount of rebuilding and the speed with which it must be accomplished will unfortunately result in another round of cleanup in the form of construction claim litigation. It is essential that Louisiana provide clear guidance on insurance coverage triggers, which, heretofore, the jurisprudence has lacked.

The confusion surrounding the context in which a Louisiana court should apply the manifestation theory versus the exposure

\textsuperscript{136} Goodman, \textit{supra} note 16, at 267.
\textsuperscript{137} Montrose, 913 P.2d at 882 n.6.
\textsuperscript{138} Sentinel, 875 P.2d at 917. When the injury-in-fact occurs simultaneously with the exposure for progressive property damage, the continuous injury theory operates similar to the exposure theory as applied in \textit{Norfolk S. Corp. v. Cal. Union Ins. Co.}, 859 So. 2d 201, 208 (La. App. 1st Cir. 2003). In that case, the court applied the exposure theory for environmental property damage, triggering multiple policy periods between 1960 and 1986. \textit{Id.} Therefore, the court determined coverage would be allocated among the policies applying a pro rata basis. \textit{Id.}
theory in property damage claims stems from the courts’ failure to draw a preliminary distinction between whether the claim is one involving a homeowner against his homeowner’s insurance policy (a first party policy), or one involving a contractor looking to his CGL carrier for potential liability resulting from his negligence (in a third party liability context). Drawing such a distinction is imperative due to the different nature of risks insured by these two policies. First party policies are concerned with providing coverage for the direct loss incurred by the insured, as opposed to third party liability policies which are concerned with damage caused to a third party due to the insured’s tortious acts. Such a difference in risk results in different policy language and different expectations of the contracting parties, and demands a different analysis to determine whether coverage has been triggered.

When a homeowner initiates a claim against his homeowner’s insurance carrier, coverage should be triggered when the homeowner discovered or reasonably should have discovered the damage. Application of the manifestation theory in this context complies with the policy language of the standard homeowner’s policy and conforms with the expectation a typical homeowner has in looking to the insurer to whom he is paying premiums to cover such damage.

If, however, the homeowner believes such damage is caused by a construction defect resulting from a contractor’s negligence, then the homeowner could bring an action directly against the contractor. In such a case, the contractor’s CGL carrier would be looked to for coverage by the contractor in the event liability was imposed upon him. 139 On the other hand, the homeowner’s first party policy could pay the insured homeowner and thereafter be subrogated 140 to the homeowner’s right to file a negligence claim against the contractor. In either case, because the CGL policy should provide coverage against the contractor’s liability, an

139. Although a commercial general liability policy includes several work and product exclusions to damage to property, if the contractor purchased completed operations coverage, then the “your work” exclusion does not apply to work performed by subcontractors. See Sample Policy, supra note 8, at 1116 exclusion (j). Furthermore, such exclusion does not exclude damage caused to other property due to this defect.

140. See MCKENZIE & JOHNSON, supra note 8, § 333, at 1011.
injury-in-fact analysis should be applied to determine when damage actually occurred, thus triggering coverage. In addition, if the evidence is such that the damage actually occurred and continued to occur, as in the case of water or mold damage, then the continuous injury trigger should be utilized to allocate liability among all third party liability insurers who provided coverage during this period.

The result of such different analyses to the triggering of coverage is to provide clear guidance to courts, as well as to give the insured the most equitable recovery while imposing risk on those who incurred the risk. The homeowner is not at fault and, furthermore, has paid premiums to shift his risk to his carriers. Therefore, the insured homeowner should be provided maximum potential coverage by either requiring his first party policy insurer to provide coverage or look to the negligent contractor's CGL carrier. This allows the expense of repairs to fall on those who have incurred the risk by pursuing profitable businesses in either construction or insurance, rather than the victim of a defectively constructed home.

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