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DEVELOPMENTS IN THE LAW

Appellate Division, Third Department, rules that injury-in-fact triggers insurance coverage under comprehensive general liability policy in New York when property damage is caused by hazardous material leakage

The general rule in New York regarding the triggering event for an "occurrence"-based comprehensive general liability ("CGL") insurance policy¹ is that an occurrence takes place, not at the time of the causative act or omission, but rather at the time when injury or damage occurred.² Injury or damage that falls outside the period during which the policy was in effect is not covered.³ Deter-

¹ The standard comprehensive general liability ("CGL") policy has been "routinely used by the insurance industry in the United States." *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 121 (D.C. Cir. 1986) (applying New York law). It includes definitions, conditions, exclusions, persons insured, liability limitations, and construction guidelines, and "is said to encompass or to exclude from coverage just about every known or unknown risk." 1 WARREN FREEDMAN, *RICHARDS ON THE LAW OF INSURANCE* § 4:7[f], at 325 (6th ed. 1990). It was first formulated in 1940 and has been refined during the past fifty years. See John P. Arness & Randall D. Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 VA. L. REV. 943, 946 (1986). In 1986 the Insurance Services Office revised the standard CGL policy and began distributing two new forms called "commercial" general liability policies, one written on an "occurrence" basis, the other on a "claims made" basis. Kirk A. Pasich, *Insurance Coverage for the Asbestos Building Cases: There's More Than Property Damage*, 24 TORT & INS. L.J. 630, 649 n.7 (1989) (citing D. MALECKI & A. FLITNER, *COMMERCIAL GENERAL LIABILITY* 1 (2d ed. 1986)).

² See 68 N.Y. JUR. 2D *Insurance* § 683 (1988) ("[T]he generally accepted rule is that in absence of specific provisions to the contrary, the time of occurrence of an accident is . . . when the complaining party was actually damaged, and that therefore no coverage under the policy exists if the [accident] occurs after the termination of the policy.") (citations omitted).

³ See *id.* A CGL policy can be written either as a "claims made" or an "occurrence" policy. 2 FREEDMAN, *supra* note 1, § 11:7[a], at 291. Under a claims made policy, sometimes referred to as a "discovery" policy, coverage is triggered upon the filing of a claim by an injured party against the insured. *Id.* Thus, if the claim is not filed during the period in which the policy is in effect, the insured is not covered. *Id.*

Occurrence based CGL policies define an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage neither expected nor intended from the standpoint of the insured . . ." 3 FREEDMAN, *supra* note 1, app. N at 467-68. Property damage is defined as:

(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

mining the point at which injury or damage occurs, and insurance coverage is triggered, has been the source of a great deal of controversy in courts across the United States.⁴ Four distinct trigger theories have emerged out of this controversy:⁵ the exposure theory,⁶ the manifestation or discovery theory,⁷ the injury-in-fact the-

Id. at 468.

While it would seem that the difference between claims made and occurrence policies is clear, this may not be so. "[V]ery few 'claims made' policies are pure claims-made, and some insurers have required that *both* the claim and the occurrence must occur during the policy period, a veritable hybrid that only further complicates the issue." 2 FREEDMAN, *supra* note 1, § 11:7[a], at 291 (emphasis added). In such instances, however, courts generally agree "that insurance policies are to be construed liberally in favor of the insured and strictly against the insurer . . ." *Van Wyck Assoc. v. St. Paul Fire & Marine Ins. Co.*, 115 Misc. 2d 447, 451, 454 N.Y.S.2d 266, 270 (Sup. Ct. Queens County 1982), *aff'd*, 95 A.D.2d 989, 464 N.Y.S.2d 617 (2d Dep't 1983). Furthermore, courts recognize that "[i]nsured parties and insurers alike can be expected to behave according to their perceived self-interest[s] by asserting in any particular litigation the theory that best suits their purposes." *Continental Casualty Co. v. Rapid-American Corp.*, 177 A.D.2d 61, 70, 581 N.Y.S.2d 669, 674 (1st Dep't 1992) (quoting *American Home Prods. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1503 (S.D.N.Y. 1983), *aff'd*, 748 F.2d 760 (2d Cir. 1984)), *aff'd*, 80 N.Y.2d 640, 609 N.E.2d 506, 593 N.Y.S.2d 966 (1993).

⁴ See *Arness & Eliason*, *supra* note 1, at 947. "[P]roperty damage coverage disputes . . . focus on three issues: (1) what was the substance that allegedly caused the injury and exactly what injury was caused; (2) does the fact situation . . . allege property damage under the policy . . . in question; and (3) . . . when did the occurrence of property damage take place?" *Id.* (citation omitted). When making a factual inquiry regarding the time of occurrence, courts must be cognizant of the type of substance that caused the injury. *Id.* "Asbestos in a building behaves very differently from . . . toxic waste gradually leaking from barrels in a landfill onto adjoining property. Courts must recognize that no single rule can apply to all substances or even to all types of injuries from any one substance." *Id.* at 947-48.

⁵ See James E. Scheuermann, *The Injury in Fact Theory as a Solution to the Trigger of Coverage Issue*, 24 *TORR & INS. L.J.* 763, 764 (1989) ("To date, federal and state courts have adopted four distinct solutions to this problem and there is no sign that any one of them will be settled on as authoritative."); accord *Frona M. Powell, Insuring Environmental Cleanup: Triggering Coverage for Environmental Property Damage Under the Terms of a Comprehensive General Liability Insurance Policy*, 71 *NEB. L. REV.* 1194, 1207-22 (1992) (discussing triggering of liability in property damage cases); Jonathan P. Saxton, *Pitting the Insurer Against the Insured: Litigating Insurance Coverage Issues Arising Out of Environmental Claims*, 20 *N. KY. L. REV.* 141, 154-57 (1992) (discussing four types of "triggers of coverage").

⁶ See Saxton, *supra* note 5, at 154. The exposure theory maintains that coverage is triggered when the injured party is first exposed to the cause of the damage. See *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 984 (8th Cir.) (holding that, under Missouri law, environmental damage occurs at moment when hazardous waste is released into environment), *cert. denied*, 488 U.S. 821 (1988); *Insurance Co. of N. Am. v. Forty-Eight Insulations Inc.*, 633 F.2d 1212, 1218-20 (6th Cir. 1980) (holding that, in asbestos cases, insurance coverage is triggered upon inhalation of asbestos fibers), *aff'd on reh'g*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981); *Allstate Ins. Co. v. Colonial Realty Co.*, 121 Misc. 2d 640, 641,

ory,⁸ and the continuous or triple trigger theory.⁹ Recently, in

468 N.Y.S.2d 800, 801-02 (Sup. Ct. Kings County 1983) (holding in lead poisoning case that coverage is triggered upon exposure through ingestion of lead paint chips by infant).

⁷ See Saxton, *supra* note 5, at 155. Under the manifestation theory, coverage is deemed triggered when the injury or damage becomes apparent, that is, when diagnosis is possible in bodily injury cases or when damage is discoverable in property damage cases. See *Eagle-Picher Indus. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 19 (1st Cir. 1982) (holding in asbestos exposure case that "disease resulted [and coverage was triggered] when [the injured person] had symptoms which impaired [his or her] sense of well-being, or when a doctor was able to detect sufficient scarring to make a prognosis that the onset of manifested disease was inevitable"), *cert. denied*, 460 U.S. 1028 (1983); see also *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986) ("[W]e hold that in hazardous waste burial cases . . . the occurrence is judged by the time at which the leakage and damage are first discovered.").

⁸ See Scheuermann, *supra* note 5, at 768. The injury-in-fact theory provides that coverage is triggered when the injury or damage actually occurs, irrespective of whether the injury or damage coincides with the time of initial exposure to the element causing the harm, and regardless of when the injury or damage was discovered or could have been discovered. See *Savoy Medical Supply Co. v. F & H Mfg. Corp.*, 776 F. Supp. 703, 709-10 (E.D.N.Y. 1991) (concluding that plain meaning of policy language and interest of justice require adoption of injury-in-fact rule even though manifestation theory might provide greater certainty in determining exact time of occurrence in hazardous waste cases); *Matychak v. Security Mut. Ins. Co.*, 181 A.D.2d 957, 958, 581 N.Y.S.2d 453, 454 (3d Dep't) ("[B]y its very terms, the policy does not require that a 'loss' occur during the policy period; an 'occurrence' is sufficient."), *appeal denied*, 80 N.Y.2d 758, 602 N.E.2d 1125, 589 N.Y.S.2d 309 (1992).

In *Savoy*, the court acknowledged that the injury-in-fact rule may result in greater insurance coverage. *Savoy*, 776 F. Supp. at 710 ("[A]lthough the insured does not maintain a policy at the time of discovery, the insurer will nevertheless be liable for an occurrence which took place during the period of coverage.") The court, however, found this to be preferable to the alternative:

It may be argued that the manifestation rule of *Mraz* provides increased certainty, and thus decreased administrative costs. Undoubtedly, to some extent, that is true because the actual date of pollution will not necessarily have to be discovered. However, the benefits of certainty do not always override the interests of justice. The parties clearly intended the policy to cover instances when damage occurred. Under *Mraz*, an insured may be forced to pay costs which were truly bargained for in a given policy, and thus reflected in higher premiums

Id. "Courts that adopt the [injury-in-fact] theory rest their holdings squarely on the language of the CGL policy itself. In more emphatic form, a court will declare that the [injury-in-fact] theory is required by the 'plain language' or 'plain meaning' of the CGL policy." Scheuermann, *supra* note 5, at 771 (citations omitted).

⁹ See Saxton, *supra* note 5, at 156. Under the continuous trigger theory, coverage is triggered upon the first instance of exposure to the injurious or damaging agent, injury-in-fact, or manifestation of the injury or damage. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981) (holding in asbestos exposure case that triggering event can be inhalation exposure, development of disease, or manifestation of disease), *cert. denied*, 455 U.S. 1007 (1982); see also *Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 369 (Cal. Ct. App.) ("[I]f . . . the trial court concludes there is a potential for coverage in one or more of the actions under

Cortland Pump & Equipment, Inc. v. Firemen's Insurance Co. of Newark,¹⁰ the Appellate Division, Third Department, held that "injury-in-fact" triggers coverage under CGL policies when property damage results from contamination by hazardous materials.¹¹

In *Cortland*, the plaintiff ("Cortland"), in accordance with its service agreement with Petr-All Petroleum Consulting Corporation ("Petr-All"), was called upon to repair a gasoline pump at a Petr-All gasoline station that was damaged on July 1, 1989 when a Petr-All customer drove his vehicle away from the station while the gasoline pump's nozzle was still inserted in the vehicle's fuel tank.¹² On March 28, 1990, the owners of two homes located next to the gasoline station discovered gas fumes on their properties and thereafter commenced actions against Petr-All for trespass, nuisance, and loss of use of their residences.¹³ Petr-All in turn commenced third-party actions against Cortland in both suits and thereafter instituted a direct action against Cortland for damages.¹⁴ Pursuant to its CGL policy, which was in effect from July 31, 1988 to July 31, 1989, Cortland requested that its insurer, defendant Firemen's Insurance Company of Newark, New Jersey ("Firemen's"), defend and indemnify it with respect to all three of the actions.¹⁵ Firemen's denied coverage, however, on the grounds that the damage was discovered after the policy ex-

one or more of Admiral's policies, then Admiral is obligated to provide a . . . defense to Montrose . . .") (emphasis omitted), *petition for review granted*, 862 P.2d 661 (Cal. 1992); *Gottlieb v. Newark Ins. Co.*, 570 A.2d 443, 446 (N.J. Super. Ct. App. Div. 1990) (holding in pesticide migration case that "where there was a continuing injury, there was also a continuing trigger of coverage to the extent injury occurred during a policy period.").

¹⁰ 194 A.D.2d 117, 604 N.Y.S.2d 633 (3d Dep't 1993), *appeal denied*, 83 N.Y.2d 760, 640 N.E.2d 147, 616 N.Y.S.2d 479 (1994).

¹¹ *Id.* at 121, 604 N.Y.S.2d at 636 ("[T]he injury-in-fact standard should be applied to the property damage, a continuous occurrence resulting from plaintiff's alleged negligence which permits a finding that the property damage occurred during the policy period").

¹² *Id.* at 118, 604 N.Y.S.2d at 635. Cortland's repairman failed to perform a test that would have disclosed a cracked underground joint that allegedly caused gasoline to flow into the ground and onto the property of two adjacent homeowners. *Id.* at 119, 604 N.Y.S.2d at 635.

¹³ *Id.*

¹⁴ *Id.* On April 2, 1990, the Department of Environmental Conservation ("DEC") also notified Petr-All that it considered Petr-All responsible for the seepage and requested that the company take specific measures to contain and remove the hazardous material. *Id.*

¹⁵ *Cortland*, 194 A.D.2d at 119, 604 N.Y.S.2d at 635.

pired.¹⁶ Cortland brought a declaratory judgment action seeking to establish Firemen's duty to defend and indemnify.¹⁷ The trial court granted Firemen's motion for summary judgment, stating that the CGL policy was not in effect when the damage was discovered, and thus, Firemen's had no duty to defend.¹⁸ Cortland appealed this decision.¹⁹

In a four-to-one decision, the Appellate Division, Third Department, held that CGL policy language requires application of the injury-in-fact standard and that the lower court erred in its application of a discovery standard.²⁰ Writing for the court, Justice Mikoll reasoned that in the two cases relied upon by the lower court,²¹ the damage for which the injured party sought compensa-

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Cortland*, 194 A.D.2d at 120, 604 N.Y.S.2d at 635-36. The policy contained standard CGL policy language, providing that only "property damage" which occurs during the policy period" was covered and that "property damage" must be caused by an "occurrence." *Id.* The policy defined "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property; or . . . [l]oss of use of tangible property that is not physically injured." *Id.* The policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*

²¹ In determining that coverage was triggered by discovery of the damage, the trial court relied on *Greenlee v. Sherman*, 142 A.D.2d 472, 536 N.Y.S.2d 877 (3d Dep't 1989) and *Miccio v. National Sur. Corp.*, 170 A.D.2d 937, 566 N.Y.S.2d 760 (3d Dep't 1991). See *Cortland*, 194 A.D.2d at 119, 120, 604 N.Y.S.2d at 635.

In *Greenlee*, the defendant Sherman negligently installed a flue pipe from the furnace in the plaintiff Greenlee's home, causing an adjacent wooden joist to undergo pyrolysis, a chemical process that lowers the ignition temperature of the surrounding wood. *Greenlee*, 142 A.D.2d at 474, 536 N.Y.S.2d at 878. Four years later, as a result of its proximity to the furnace, the damaged wood caught fire. *Id.* Greenlee brought an action for damages against Sherman, and Sherman's insurer, Hanover Insurance Company, sought a declaratory judgment stating that it was no longer under a duty to defend because Sherman's policy had expired before the fire and resulting damage. *Id.* at 474, 536 N.Y.S.2d at 879. The court held that the damage to the wooden joist and the subsequent damage caused by the fire were separate and distinct. *Id.* at 478, 536 N.Y.S.2d at 881. Therefore, although there was clearly damage during the policy period, namely, increased flammability of the wooden joist, the court held that "[h]ad the heat source been removed at any time prior to the fire, no further injury to the wooden joist would have occurred, and there would have been no fire . . ." *Id.* Since the damage caused by the fire occurred outside the policy period, and the policy explicitly covered only damage occurring during the policy period, the insurer was under no duty to defend the action. *Id.* at 477, 536 N.Y.S.2d at 880.

In *Miccio*, a hoisting device was negligently installed in plaintiff Miccio's ice cream store while defendant National Surety Corporation's ("National") liability policy was in effect. *Miccio*, 170 A.D.2d at 937, 566 N.Y.S.2d at 761. Miccio subsequently sold the store to Ehmer and the policy was terminated. *Id.* While Ehmer was in pos-

tion resulted from an intervening cause that occurred outside the period of coverage.²² In *Cortland*, however, there was no intervening cause—the seepage of the gasoline onto the property of the adjacent homeowners was itself property damage; the only question was when that event occurred.²³ The court noted that an insurer's duty to defend is broader than its obligation to indem-

session of the premises, the hoist failed, killing a deliveryman, whose administratrix brought a wrongful death action against Ehmer, who in turn brought a third-party action against Miccio. *Id.* Miccio sought a declaratory judgment against National establishing that the injury was covered under National's policy. *Id.* The court held that the coverage-triggering event was the deliveryman's death, which occurred after the policy had been terminated. The policy language specified that only occurrences during the policy period were covered and, therefore, National was under no obligation to defend in the wrongful death action. *Id.* at 938, 566 N.Y.S.2d at 762.

²² *Cortland*, 194 A.D.2d at 120, 604 N.Y.S.2d at 636. In denying coverage under the policies, *Greenlee* and *Miccio* distinguished damage resulting later from an accident occurring during the period of coverage from damage that results from a condition created during the period of coverage; these courts mandated coverage in the former situation but not the latter. *See Miccio*, 170 A.D.2d at 938, 566 N.Y.S.2d at 762; *Greenlee*, 142 A.D.2d at 478, 536 N.Y.S.2d at 881.

In *Greenlee*, the negligent installation of the flue pipe caused the wood to undergo pyrolysis thereby creating the condition that caused the fire; the fire was the resulting "accident" from the continued exposure to the intense heat of the furnace that constituted the occurrence for purposes of the coverage-triggering event. *Greenlee*, 142 A.D.2d at 478, 536 N.Y.S.2d at 881. "[T]he policy does not provide coverage for injury sustained after the expiration of the policy period as the result of a condition created during the policy period." *Id.*

In *Miccio*, the negligent installation of the hoisting device created the conditions under which an accident could occur, but it was the actual failure of the device that was held to constitute an occurrence for purposes of triggering policy coverage. *Miccio*, 170 A.D.2d at 938, 566 N.Y.S.2d at 762.

²³ *Cortland*, 194 A.D.2d at 120-21, 604 N.Y.S.2d at 636. The court noted that the policy defined an "occurrence" to include "continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 120, 604 N.Y.S.2d at 636 (citing *Matychak v. Security Mut. Ins. Co.*, 181 A.D.2d 957, 958, 581 N.Y.S.2d 453, 454 (3d Dep't) (holding that injury resulting from contamination of drinking water by oil spill on neighboring property need not be discovered during policy period to trigger coverage), *leave denied*, 80 N.Y.2d 758, 602 N.E.2d 1125, 589 N.Y.S.2d 309 (1992)). In contrast, the court in *Van Wyck Assoc. v. St. Paul Fire & Marine Ins. Co.*, 115 Misc. 2d 447, 454 N.Y.S.2d 266 (Sup. Ct. Queens County 1982), *aff'd*, 95 A.D.2d 989, 454 N.Y.S.2d 617 (2d Dep't 1983), stated:

"[B]odily injury" is defined as "bodily injury *sustained by any person which occurs during the policy period.*" . . . It appears that the policy does not include mere exposure to "conditions" existent during the policy period . . . It is true that insurance policies are to be construed liberally in favor of the insured and strictly against the insurer, but when the policy provisions are clear and unambiguous they must be given their plain and ordinary meaning.

Id. at 450-51, 454 N.Y.S.2d at 269-70 (citations omitted).

nify,²⁴ and while the complaint did not specifically allege that injury-in-fact occurred during the coverage period, it did not exclude that possibility.²⁵ Since it was possible that the damage resulting from the seepage of gasoline onto the adjacent property occurred within the period of coverage, the court held that summary judgment for the defendant insurer was improper, and that Firemen's was obligated to defend Cortland against the third-party actions.²⁶

The court's analysis of the occurrence problem and its adoption of the injury-in-fact theory answers satisfactorily the question of whether the insurer has a duty to defend.²⁷ Left unaddressed,

²⁴ *Cortland*, 194 A.D.2d at 121, 604 N.Y.S.2d at 636. The "duty . . . to defend [CGL policies] is exceedingly broad, . . . far broader than any ultimate liability to indemnify." (quoting *Continental Casualty Co. v. Rapid-American Corp.*, 177 A.D.2d 61, 65, 581 N.Y.S.2d 669, 671 (1st Dep't 1992), *aff'd*, 80 N.Y.2d 640, 609 N.E.2d 506, 593 N.Y.S.2d 966 (1993)).

²⁵ *Cortland*, 194 A.D.2d at 121, 604 N.Y.S.2d at 636 (citing *Continental Casualty*, 177 A.D.2d at 65, 581 N.Y.S.2d at 671 (quoting *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 128-29 (D.C. Cir. 1986))). Even if the insured does not specifically allege that the property damage occurred within the policy period, "well-settled principles of New York law" dictate that the insured "is entitled to a defense by the insurance compan[y] if the underlying tort complaints 'permit proof' of the facts establishing coverage, or if the complaints do not exclude the possibility that injury-in-fact occurred during the policy period." *Abex*, 790 F.2d at 128-29 (citation omitted).

²⁶ *Cortland*, 194 A.D.2d at 121, 604 N.Y.S.2d at 636. The majority, however, held that Firemen's was obligated to defend only against the two third-party actions and not in the direct action commenced by Petr-All because the direct action fell within the policy's pollution exclusion. *Id.* at 121-22, 604 N.Y.S.2d at 636-37.

Justice Mercure concurred separately as to Firemen's obligation to defend Cortland against the third-party actions. *See id.* at 122, 604 N.Y.S.2d at 637 (Mercure, J., dissenting in part and concurring in part). Mercure dissented, however, to the application of the policy's pollution exclusion clause in the direct action by Petr-All. *Id.* The general rule in New York is that an insurer has no duty to defend "unless the underlying action is based on both a sudden and accidental discharge of waste materials. . . . [T]he relevant factor is . . . whether the toxic material was discharged into the environment unexpectedly and unintentionally or knowingly and intentionally." 1 FREEDMAN, *supra* note 1, § 5:2[d], at 350-52. The policy in *Cortland* provided that the pollution exclusion clause would not apply if "[a]ny loss, cost or expense incurred as a result of any 'clean-up' of 'pollutants' is not the result of a governmental directive or request." *Cortland*, 194 A.D.2d at 122, 604 N.Y.S.2d at 637 (Mercure, J., dissenting). Petr-All's obligation to investigate and redress any damages from the discharge of gasoline did not necessarily result from the DEC's notice, *see supra* note 14 and accompanying text, but arguably resulted from Petr-All's duties under N.Y. NAV. LAW § 181(1) (McKinney 1989 & Supp. 1994), which imposes strict liability for all cleanup expenses and direct and indirect damages caused by the discharge. *Cortland*, 194 A.D.2d at 122, 604 N.Y.S.2d at 637 (Mercure, J., dissenting). Justice Mercure, therefore, would have found Firemen's obligated to defend in *Cortland*, the direct action by Petr-All, as well as the third-party actions. *Id.* at 122-23, 604 N.Y.S.2d at 637.

²⁷ *Cortland*, 194 A.D.2d at 120, 604 N.Y.S.2d at 635-36.

however, is the issue of whether the insurer is liable to indemnify the insured, because it is still undetermined at what point in time the property damage actually occurred, and thus whether the injury occurred within the policy period. It has been argued that the injury-in-fact theory may not be the ideal solution to every occurrence problem,²⁸ and that the standard applied should reflect the nature of the claim involved and the individual circumstances of the case.²⁹ It is submitted that the injury-in-fact theory is inappropriate when property damage results from leakage of hazardous material from one property to another, because of the difficulties in determining the precise time that the injury actually occurred to the property.

The *Cortland* court acknowledged that there is no controlling authority in New York on the issue of when property damage caused by hazardous material contamination triggers insurance coverage.³⁰ In applying the injury-in-fact theory, the court relied on New York personal injury cases, in which the moment of the

²⁸ See Scheuermann, *supra* note 5, at 779. The injury-in-fact theory can be said to merely restate the issue of when coverage is triggered, because defining injury-in-fact in terms of the point at which property damage actually occurs necessitates a determination of what constitutes property damage. See *id.* at 777. Furthermore, the actual time of injury is not always a simple determination, particularly when the damage or injury was sustained prior to its manifestation. See, e.g., *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1489 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). Although it applied an injury-in-fact standard to a bodily injury action involving DES, the court in *American Home Products* noted that "[d]epending upon the facts of each case, the drug involved, the period and intensity of exposure, and the person affected, an injury may occur . . . upon exposure, at some point in time after exposure but before manifestation of the injury, and at manifestation." *Id.*

In the context of the facts of *Cortland*, an injury-in-fact analysis would require a determination of (1) the point in time at which the gasoline began to leak from the broken joint, (2) the amount of time it took for the gasoline to travel from the broken joint to the adjacent property, as affected by the characteristics of the ground beneath the gas station pumps and the homes, and (3) the amount of time before the leak caused sufficient damage to the property to warrant compensation. Since three separate properties were damaged in *Cortland*, coverage would be triggered at different times for each; coverage for the damage to Petr-All would conceivably be triggered before coverage for the damage to the adjacent properties. The damage sustained by Petr-All most likely occurred immediately upon leakage from the pump, whereas the gasoline had to travel underground before reaching and causing damage to the residential properties.

²⁹ Cf. *Cortland*, 194 A.D.2d at 120, 604 N.Y.S.2d at 636 ("[G]enerally an insurance contract 'must be construed in its entirety with reference to the subject matter and the nature of the risk involved'") (quoting 69 N.Y. JUR. 2D *Insurance* § 699 (1988)).

³⁰ *Cortland*, 194 A.D.2d at 120, 604 N.Y.S.2d at 636.

injury-causing event could be determined.³¹ Recently, in *Maryland Casualty Co. v. W.R. Grace & Co.*,³² which involved property damage to buildings from asbestos exposure, the Second Circuit, applying New York law, adopted a "damage-in-fact" theory to determine when property damage occurred, thereby triggering coverage.³³ That court, however, distinguished asbestos property

³¹ See *id.* at 120-21, 604 N.Y.S.2d at 635. In *Matychak v. Security Mut. Ins. Co.*, 181 A.D.2d 957, 581 N.Y.S.2d 453, (3d Dep't), *leave denied*, 80 N.Y.2d 758, 602 N.E.2d 1125, 589 N.Y.S.2d 309 (1992), the court held that an occurrence took place within the policy period when the injured party drank water that had been contaminated by an oil spill while the policy was in effect, even though the injured party did not discover that she had ingested contaminated water until after the policy expired. *Id.* at 958, 581 N.Y.S. 2d at 454-55. In *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 609 N.E.2d 506, 593 N.Y.S. 2d 966, (1993), an asbestos case, the New York Court of Appeals applied an injury-in-fact standard to hold that the insurer had a duty to defend when it was possible that the injured party contracted the disease during the period of coverage, regardless of when the illness was discovered. *Id.* at 650-52, 609 N.E.2d at 510-12, 593 N.Y.S. 2d at 970-72.

In *National Casualty Ins. Co. v. City of Mount Vernon*, 128 A.D.2d 332, 515 N.Y.S.2d 267 (2d Dep't 1987), the court held that under a "Comprehensive Law Enforcement Liability Policy" the insurer was obligated to defend when the insured police department was sued for false arrest and false imprisonment, even though the arrest was made before coverage began because the party instituting the action had been incarcerated during the period of coverage. *Id.* at 336-37, 515 N.Y.S. 2d at 270. While the *National Casualty* court stated that "the sustaining of specified injuries during the policy period" was the triggering event, it noted that "there is nothing in the policy which requires, as a prerequisite to ascertaining whether there is coverage, that the injury resulting from a causative event be reduced to a single or fixed occurrence in time." *Id.* Justice Mikoll's reliance on the *National Casualty* case in *Cortland*, 194 A.D.2d at 121, 604 N.Y.S.2d at 636, is perplexing because the *National Casualty* court relied in part on *Keene Corp. v. Insurance Co. of N. Am.*, a leading continuous trigger case. See *National Casualty*, 128 A.D.2d at 337, 515 N.Y.S.2d at 270; *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1992).

³² 23 F.3d 617 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 655 (1994). *W.R. Grace & Co.*, a manufacturer of asbestos products, was sued by over seventeen thousand individuals for personal injuries resulting from inhalation of asbestos, and by over two hundred building owners for property damage caused by installation of asbestos products in their buildings. *W.R. Grace*, 23 F.3d at 620.

³³ *Id.* at 626. The court stated that "property damage insurance should be treated the same as insurance for bodily injury, which under New York law is governed by an 'injury-in-fact' trigger," *id.* at 624, and also that New York had adopted an injury-in-fact trigger for property damage cases. *Id.* at 625 (citing *Cortland*, 194 A.D.2d at 121, 604 N.Y.S.2d at 636). In adopting the injury-in-fact standard, the court noted that insurance policies covering liability for property damage and for personal injury defined the term "occurrence" using similar language. *Id.* Additionally, the court rejected a discovery theory for determining at what point damage-in-fact occurred. *Id.* at 627. The court distinguished the measure of damages from the damages themselves; a "reduction in marketability" is an indicator used to assess damages, but does not constitute property damage in itself. *Id.* In *W.R. Grace*, damage, measured by the

damage from the type of property damage at issue in *Cortland* by noting that "asbestos property damage is unlike the gradual leaking of hazardous waste from a landfill Once installed, the damage that asbestos inflicts is complete."³⁴ Similarly, the Eleventh Circuit applied the injury-in-fact rule in deciding a case under New York law, and held that property damage to a home, which resulted from a fire caused by the leakage of gas from a negligently installed gas grill, was distinguishable from "cases involving exposure to harmful chemicals during the policy period."³⁵

reduction in marketability, occurred upon installation of the asbestos in the buildings.
Id.

³⁴ *W.R. Grace*, 23 F.3d at 628. "Some types of property damage—such as the gradual contamination of earth and groundwater by leaking landfills—may be analogous to the slow progression of diseases such as asbestosis and cancer." *Id.* at 627 (citing *New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800, 809 (D. Del. 1989), *rev'd on other grounds sub nom. New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993)). In *New Castle*, the court applied the continuous trigger theory espoused in *Keene* to determine the triggering event in a property damage action based on landfill pollution leakage. 725 F. Supp. at 812-13.

Similarly, in *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986), the Fourth Circuit adopted a manifestation theory in a hazardous waste leakage case, stating that "[d]etermining exactly when [hazardous waste] damage begins can be difficult, if not impossible." *Id.* at 1328. The *W.R. Grace* court distinguished *Mraz*, noting that, in an asbestos property damage case, damage occurs upon installation of the asbestos, and therefore, the exact moment in time when damage occurred is more readily ascertainable. *W.R. Grace*, 23 F.3d at 627-28; *see Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180, 1192 n.29 (8th Cir. 1987) (suggesting that continuous trigger standard may be appropriate where it is impossible to determine when damage occurred), *aff'd as modified*, 842 F.2d 977 (8th Cir. 1988)).

The court in *New Castle* stated that "[c]ourts that have adopted [the injury-in-fact] standard in a continuous injury context have had to abandon a precise determination of when injury in fact did occur because of the evidentiary problems posed." *New Castle*, 725 F. Supp. at 811. As discussed earlier, *see supra* note 28, the precise moment when the homeowners' properties were damaged by the leaking gasoline in *Cortland* would be extremely difficult to ascertain, but would nevertheless be essential to determine liability because the negligent act occurred only one month before the policy expired.

³⁵ *Young v. Insurance Co. of N. Am.*, 870 F.2d 610, 611 (11th Cir. 1989). In *Young*, a real estate developer negligently installed a gas barbecue grill in the rear of a home in 1984, allegedly resulting in a gas leak. *Id.* at 610. Two years later, the homeowner sued the developer claiming that the negligent installation of the gas grill caused a fire in 1986, and the developer sought to have his insurer defend him in the action brought by the homeowner. *Id.* The court determined that the fire was the "occurrence" for which the policy provided coverage. *Id.* at 611-12. The court held that the fire occurred after the policy had expired and therefore the insurer was under no obligation to defend the insured. *Id.* at 611-12. It is submitted that the facts of *Young* are more analogous to those of *Greenlee v. Sherman*, 142 A.D.2d 472, 536 N.Y.S.2d 877 (3d Dep't 1989) and *Miccio v. National Sur. Corp.*, 170 A.D.2d 937, 566 N.Y.S.2d 760

It has been argued that the continuous trigger theory is more appropriate in property damage cases that are factually analogous to progressive injury situations, such as hazardous waste leakage, rather than ordinary property damage cases.³⁶ A suitable comparison to the facts of *Cortland* arose in *Gottlieb v. Newark Insurance Co.*,³⁷ in which the court held that under New Jersey law, a continuous trigger theory was applicable to property damage caused by the migration of pesticides from one part of a home to another.³⁸ The continued migration over a period of years constituted continuous injury which could trigger coverage not only in the first year of exposure and damage, but also in later years under different insurance policies.³⁹ Similarly, in *Montrose Chem-*

(3d Dep't 1991), than to those of *Cortland*, and the *Young* court properly distinguished property damage caused by the fire from the conditions that led to the fire. See *Young*, 870 F.2d at 611-12.

³⁶ Arness & Eliason, *supra* note 1, at 972-73.

[I]n the great majority of cases, property damage is not like a cancerous growth—it does not become worse with time. . . . In a certain class of property damage cases factually more analogous to the progressive bodily injury situation, however, the continuous trigger may be appropriate. When chemicals from an improperly constructed toxic waste landfill leach slowly into adjacent property, for instance, new property may be affected with each passing day, while the damage to already affected property, and the associated costs of remedy, may increase steadily as well.

Id. at 972-73 (footnotes omitted); see also Davis J. Howard, "Continuous Trigger" Liability: Application to Toxic Waste Cases and Impact on the Number of "Occurrences," 22 TORT & INS. L.J. 624, 629-30 (1987) (predicting that courts may use continuous trigger theory in toxic waste cases because "bodily injury and property damage caused by toxic waste develop over time"); *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1581 (1986) (stating that, in cases involving property damage from hazardous waste, "occurrence is continuous, extending from disposal to manifestation of the damage.") (footnote omitted). But see *Savoy Medical Supply Co. v. F & H Mfg. Corp.*, 776 F. Supp. 703, 710 (E.D.N.Y. 1991) (applying New York law and holding that injury-in-fact standard more accurately reflects policy language and expectations of parties regarding insurance coverage than does manifestation theory).

³⁷ 570 A.2d 443 (N.J. Super. Ct. App. Div. 1990).

³⁸ *Id.* at 446. In *Gottlieb*, the homeowners (the "Gottliebs") sued the defendant Apex Pest Control ("Apex") for property damage suffered when toxic chemicals applied to the exterior, basement, and crawl space of the Gottliebs' home in May 1982 by Apex were found to have migrated, in subsequent years, to different rooms in the house. *Id.* at 444. While the court held that "the continuous trigger theory reflects the law in New Jersey," its application is fact sensitive and should be carefully applied. *Id.* at 446.

³⁹ *Id.* at 446. Apex's policy had a liability limit of \$25,000 in 1982, which increased to \$50,000 in 1983 and to \$1,000,000 in 1984 and 1985. *Id.* at 444. Thus, the insured could benefit from the higher policy limits if at trial it was determined that the property damage was sustained in the later policy years. One commentator has noted this benefit of multiple limits, but also recognized the offset of multiple deductibles. See Howard, *supra* note 36, at 631, 636. The court indicated, however, that an

ical Corp. v. Admiral Insurance Co.,⁴⁰ the California Court of Appeal adopted a continuous trigger standard to find all insurers of a chemical manufacturer potentially liable to defend and indemnify for real property damage caused by contamination from hazardous waste.⁴¹ In *Gruol Construction Co. v. Insurance Co. of North America*,⁴² the Washington Court of Appeals held that all insurers of a building contractor during the period of time when the foundation of an apartment building underwent dry rot as a result of defective backfilling during construction were liable to defend and indemnify the insured building contractor.⁴³

Although it has been said that the injury-in-fact trigger theory reflects the plain meaning of the CGL policy language and has been adopted by the New York courts in a variety of situations,⁴⁴ it is not the better alternative when the exact moment in time that damage occurred is prohibitively difficult or impossible to determine.⁴⁵ In these limited situations, the continuous trigger theory,

insured or homeowner whose delay in giving notice of the damage enabled the harm to worsen may be estopped and recovery precluded. *Id.* at 446-47.

⁴⁰ 5 Cal. Rptr. 2d 358 (Cal. Ct. App.), *petition for review granted*, 862 P.2d 661 (Cal. 1992).

⁴¹ *Montrose*, 5 Cal. Rptr. 2d at 369. The court noted that there is a difference between the reasonable expectations of an insured under a third-party liability policy, such as that in *Cortland*, and the expectations of an insured under a first-party policy. *Id.* at 336. First-party coverage is designed to cover the insured's *known* maximum potential loss, whereas the insured in the third-party coverage context is *guessing* at potential losses. *Id.* at 366. Thus, third-party policy holders naturally expect coverage under multiple policies for continuous damage. *Id.*; see also *California Union Ins. Co. v. Landmark Ins. Co.*, 193 Cal. Rptr. 461, 469-70 (Cal. Ct. App. 2d Dist. 1983) (applying continuous trigger theory, court held that property damage caused by leakage from swimming pool over 18 month period triggered coverage under insurance policy in effect at start of leakage and also under policy in effect when leak was discovered).

⁴² 524 P.2d 427 (Wash. Ct. App. 1974).

⁴³ *Id.* at 430. In *Gruol*, the plaintiff building contractor, through its negligence during the construction of an apartment building in 1963, caused the box sills of the building to undergo dry rot, and the building's owner sued for damages discovered in 1968. *Id.* at 429. After the insurers refused to defend against the owner's action, the contractor settled the claim and then brought an action against the insurers for breach of contract. *Id.* The court held that the "occurrence" that each policy covered need not be a single isolated event, but could be a process, and that all insurers during the time period of that process were jointly and severally liable and obligated to defend. *Id.* at 430. Furthermore, the court placed the burden on the insurers of apportioning the loss among themselves. *Id.* at 431.

⁴⁴ See *supra* note 8 and accompanying text (discussing injury-in-fact trigger theory).

⁴⁵ Interestingly, some of the courts that have applied the continuous trigger theory in progressive damage situations acknowledged that the injury-in-fact standard for determining when an occurrence took place was normally utilized. See, e.g., *California Union Ins. Co. v. Landmark Ins. Co.*, 193 Cal. Rptr. 461, 465 (Cal. Ct. App.

while not universally accepted, may best reflect the insured's expectation of coverage in the context of continuous progressive property damage.

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1983) (noting that its use of continuous trigger standard is departure from normal standard of "time when the complaining party is actually damaged"); *Gottlieb v. Newark Ins. Co.*, 570 A.2d 443, 446 (N.J. Super. Ct. App. Div. 1990) (acknowledging that New Jersey courts usually define occurrence as "time when complaining party was damaged"). Thus, the fact that New York courts generally find that injury-in-fact triggers policy coverage should not preclude the application of a different standard in an appropriate case such as *Cortland*.

