

Policyholders Score Win as Another State's High Court Adopts the "Continuous-Trigger" Theory for General Liability Policies

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Commercial general liability insurance policies are often written on an "occurrence" basis. An "occurrence" is typically defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Coverage, therefore, requires generally that the "bodily injury" or "property damage" (or "advertising injury" or "personal injury") happen fortuitously during the effective policy period. Central to this inquiry is knowing when the injury or damage took place.

Learning the moment of injury or damage has proven to be an oft-contested issue between policyholders and insurers. This is especially the case with "long-tail" bodily injury and environmental claims (among others), where the damage or injury is ongoing, progressive or takes years to appear. Recently, the West Virginia Supreme Court held in *Westfield Insurance Company v. Sistersville Tank Works, Inc., et al.* (W.V. Sup. Ct., Nov. 8, 2023), that a "continuous-trigger" theory would apply to lawsuits brought by three workers diagnosed with cancer following alleged toxic exposure to harmful chemicals at a manufacturing facility. As explained by the court, coverage for the claims was triggered by either the initial exposure to the harmful condition, when the disease developed after exposure or when the illness manifested. The decision permitting multiple instances during the progression of exposure to injury to manifestation is a significant victory for policyholders as it will allow for the broad spreading of losses across policy periods that might span many years.

A Brief History of the "Continuous-Trigger" Theory

The "continuous-trigger" theory—also known as the "triple-trigger" or "multiple-trigger" theory—stems from the landmark coverage ruling in *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (DC Cir. 1981). There, Keene Corporation faced millions of dollars in liabilities for asbestos-related lawsuits for which the company sought coverage from various insurers. The insurers disputed the timing of the "occurrence," with some arguing that the triggering event was the date of first exposure to the asbestos ("exposure trigger"), while others argued that the "occurrence" happened when the injuries manifested themselves ("manifestation trigger"). In analyzing the point in time when the asbestos injuries occurred, the DC Court of Appeals rejected the exposure and manifestation theories of trigger and, instead, broadly held that the "inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies." *Id.* at 1047.

Since *Keene*, most courts that have examined the pro-policyholder continuous-trigger theory have expressly adopted it over the exposure and manifestation theories often promoted by the insurers for claims of progressive injury or property damage (*see* footnote 1).

The Westfield v. Sistersville Decision

The *Westfield v. Sistersville* dispute arose from underlying lawsuits brought by three long-time workers diagnosed with cancer in 2014, 2015 and 2016. According to the underlying plaintiffs, the policyholder, Sistersville, “had carelessly manufactured, installed, inspected, repaired, or maintained tanks at a chemical plant in the Mid-Ohio Valley region of West Virginia.” As a result, the underlying plaintiffs claim they were exposed to “cancer-causing chemical liquids, vapors, or fumes that escaped from the tanks.”

Sistersville sought coverage for the lawsuits from Westfield, who had sold commercial general liability policies to Sistersville from 1985 to 2010. Westfield denied coverage for the underlying lawsuits by arguing that its policies provided only occurrence-based or manifestation-based coverage, which the insurer tied to the date when the injuries were diagnosed.

Westfield filed suit against Sistersville in the Northern District of West Virginia. The district court found that Westfield owed Sistersville a defense and indemnity under each policy issued from 1985 through 2010 because the language in the insurer’s policy did not clearly identify when coverage was “triggered” in instances of alleged repeated chemical exposures and the gradual development of a disease over successive policy periods and, as such, was ambiguous. On appeal, the Fourth Circuit certified to the West Virginia Supreme Court whether “[a]t what point in time does bodily injury occur to trigger insurance coverage for claims stemming from chemical exposure or other analogous harm that contributed to the development of a latent illness?”

The West Virginia Supreme Court ruled that the “continuous trigger” theory applied. The court reasoned that the definition of an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions” was ambiguous in the context of a latent or progressive disease. Citing well-settled principles of insurance policy interpretation, the West Virginia Supreme Court held that the ambiguous language would be “strictly construed” against the insurer and in favor of the policyholder such that a “continuous-trigger theory applies to determine when coverage is activated.”

The West Virginia Supreme Court added that the history of the “occurrence” language incorporated into commercial general liability policies showed that it “was designed with the goal of affording coverage for singular, repeated, or continuous exposures to hazardous substances if those exposures cause either a singular or a progressive bodily injury, sickness, or disease.” In addition, the West Virginia Supreme noted that the “majority of courts use the continuous trigger; no court applies the manifestation trigger to bodily injury, sickness, or disease claims.”^[1] Accordingly, the West Virginia Supreme Court held that, in the case of an alleged progressive injury caused by chemical exposure or other analogous harm, “every occurrence-based policy in effect from the initial exposure, through the latency and development period, and up to the manifestation of the bodily injury, sickness, or disease, is triggered and must cover the claim.”

Takeaways

The West Virginia Supreme Court’s decision in *Sistersville* is a significant development for policyholders because it “has the effect of spreading the risk of loss widely to all of the occurrence-based insurance policies in effect during the entire process of injury or damage.” This is particularly significant when long-term exposure results in claims that present during later, more restrictive policy years. In those cases, where coverage may not be available under current policies, coverage may still be available under older policies with broader terms if it can be shown that exposure occurred during the earlier policy years. The *Sistersville* decision reinforces the majority view that continuing injury and exposure claims broadly trigger coverage under policies in effect at any time during the progression of the damage or injury.

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