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NOTE

TRIGGERING COVERAGE OF PROGRESSIVE PROPERTY LOSS: PRESERVING THE DISTINCTIONS BETWEEN FIRST- AND THIRD-PARTY INSURANCE POLICIES

For years, courts have differed on the proper way to interpret and apply standardized insurance provisions to the complicated and increasingly litigated phenomenon of continuous and progressive property damage.¹ These complex actions involve property damage which progressively worsens over an extended period of time but which is not readily discoverable by the injured party until late in the deterioration process when the damage "manifests."² Delayed manifestation property loss often results in both first-³ and third-party⁴ insurance claims arising in

1. The problem of continuous loss is not confined to property damage. A very thorough body of continuous loss law has also developed to handle bodily injury claims such as asbestosis and silicosis. *See, e.g.,* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (holding that coverage was triggered by inhalation exposure to asbestos, exposure while disease developed, and manifestation of disease); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980) (holding each insurer that issued policies during period of exposure to asbestos liable for its pro rata share), *clarified on reh'g*, 657 F.2d 814 (6th Cir. 1981); Teletronics, Inc. v. United Nat'l Ins. Co., 796 F. Supp. 1382 (D. Colo. 1992) (holding that all product liability policies in effect throughout the course of injury from a defective heart pacemaker were required to share defense costs); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993) (applying multiple trigger to asbestosis claims).

2. Courts generally agree that a damage is "manifest" at that point in time at which "appreciable damage occurs so that a reasonable insured would be on notice of a potentially insured loss." Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230, 1237 (Cal. 1990).

3. First-party insurance policies are designed to indemnify the insured for direct losses resulting from a covered peril. Under such a policy, the insurer will compensate the insured for all covered losses up to the specified policy limit. 1 GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 1:61 (2d ed. 1984); *see also infra* notes 38-46 and accompanying text (discussing relevant first-party policy provisions).

4. Third-party insurance is most commonly found in the form of Comprehensive

connection with construction defects,⁵ environmental contamination,⁶ soil subsidence damage,⁷ and product liability losses.⁸ When an insured has been covered by multiple policy writers throughout the period of loss, parties frequently resort to the courts to determine which policy or policies must indemnify the insured.

General Liability policies. These "CGL" policies are designed to defend and indemnify the insured in liability actions brought against him by a third party. Similar to first-party insurance, discussed *supra* note 3 and *infra* notes 38-46, the CGL policy is designed to cover all liability actions except those specifically excluded. 1 WARREN FREEDMAN, FREEDMAN'S RICHARDS ON INSURANCE § 4:7 (6th ed. 1990); *see also infra* notes 47-53 and accompanying text (discussing relevant third-party policy provisions).

5. *See, e.g., Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663 (Ct. App.), *review granted*, 834 P.2d 1147 (Cal. 1992); *Pines of La Jolla Home-owners Ass'n v. Industrial Indem.*, 7 Cal. Rptr. 2d 53 (Ct. App. 1992); *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249 (Ct. App. 1991); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431 (Ct. App. 1990); *American Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954 (Colo. Ct. App. 1990); *Gruol Constr. Co. v. Insurance Co. of N. Am.*, 524 P.2d 427 (Wash. Ct. App. 1974).

6. *See, e.g., Maryland Casualty Co. v. W.R. Grace & Co.*, No. 91-9322, 1993 WL 335115 (2d Cir. Sept. 1, 1993); *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986); *Dayton Indep. Sch. Dist. v. National Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex. 1988), *rev'd and dismissed for lack of jurisdiction sub nom. W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865 (5th Cir. 1990); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358 (Ct. App. 1992), *review granted*, 862 P.2d 661 (Cal. May 21, 1992) (No. S026013); *Garriott Crop Dusting Co. v. Superior Court*, 270 Cal. Rptr. 678 (Ct. App. 1990); *Harford County v. Harford Mut. Ins. Co.*, 610 A.2d 286 (Md. 1992); *Industrial Steel Container Corp. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156 (Minn. Ct. App. 1987); *Reliance Ins. Co. v. Armstrong World Indus., Inc.*, 614 A.2d 642 (N.J. Super. Ct. Law Div. 1992), *modified*, 625 A.2d 601 (N.J. Super. Ct. Law Div. 1993). *See generally* Stephen D. Marcus, *Fair Solutions for the Future: The Environmental Claim and First Party Coverage*, in ENVIRONMENTAL COVERAGE 193 (1991) (examining first-party contamination and pollution claims).

7. Soil subsidence which is the result of natural forces generally, but not always, is excluded under first-party insurance policies. Many of the claims which are litigated as continuous loss involve some aspect of negligent construction, land compaction, or drainage. *See, e.g., Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (Cal. 1990); *Stonewall*, 9 Cal. Rptr. 2d at 663; *Carty v. American States Ins. Co.*, 9 Cal. Rptr. 2d 1 (Ct. App. 1992); *Mara v. Fire Ins. Exch.*, 271 Cal. Rptr. 620 (Ct. App. 1990); *Stanley v. Fire Ins. Exch.*, 274 Cal. Rptr. 157 (Ct. App. 1990).

8. *See, e.g., Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541 (C.D. Cal. 1992); *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474 (E.D. Mich.), *supplemented*, 727 F. Supp. 1524 (E.D. Mich. 1989); *United States Fidelity & Guaranty Co. v. American Ins. Co.*, 345 N.E.2d 267 (Ind. Ct. App. 1976).

As successful environmental contamination, asbestos-related property damage, and construction defect claims generate larger and larger recoveries, problems of allocating indemnity responsibility among successive insurers increasingly will become a primary focus of continuous loss litigation.⁹ In response to the difficult factual, legal, and public policy questions presented in these types of dilemmas, courts have developed several "trigger of coverage" theories to determine which insurers are liable for the loss. These trigger theories are outgrowths of the interpretation of terms and phrases utilized in the disputed first- or third-party policy, such as "occurrence," "inception of the loss," and "property damage."¹⁰ In adopting a particular coverage trigger, courts frequently struggle to define these broad trigger terms by reference to the reasonable expectations of the insured,¹¹ the intentions of the insurer,¹² public policy concerns,¹³ and other continuing loss precedent.¹⁴

9. Recently, a jury ordered an insurance company to pay \$2.8 million in compensatory damages and \$14 million in punitive damages for their refusal to provide coverage for plaster pitting claims against the insured in *Chemstar, Inc. v. Liberty Mutual Insurance Co.*, 797 F. Supp. 1541 (C.D. Cal. 1992). See *1992 Largest Verdicts*, NAT'L L.J., Jan. 25, 1993, at S8, S8-S9. For a discussion of the case, see *infra* notes 109-16. See also *Maryland Casualty*, 1993 WL 335115, at *1 ("As of May 31, 1989, 17,411 individual lawsuits had been filed against [the asbestos insurer] for personal injuries . . . and building owners had filed another 212 lawsuits for property damage"), *petition for reh'g filed, id.*; *Lac d'Amiante du Que., Ltee. v. American Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1985) (involving an insured facing over 4500 asbestos bodily injury claims involving \$4.5 million in settlement liabilities and \$11 million in defense costs plus property damage claims); John P. Arness & Randall D. Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 VA. L. REV. 943, 943 (1986) (noting that total asbestos liability projections from 1980 to 2015 range from \$7.6 billion to \$87.1 billion).

10. See, e.g., *Maryland Casualty*, 1993 WL 335115, at *7 ("[T]he meaning of the word occurrence is important because how that word is defined will determine what event will trigger the insurers' obligation"); *infra* notes 38-53 (discussing and defining the relevant terms in first- and third-party insurance policies).

11. See *infra* notes 177-97 and accompanying text (discussing the influence of the reasonable expectations doctrine).

12. See *infra* notes 194-97 and 244-56 accompanying text (discussing the role of industry expectations in continuous loss).

13. See *infra* notes 235-72 and accompanying text (discussing the role of public policy concerns in triggering coverage).

14. See, e.g., *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1549-50 (C.D. Cal. 1992); *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230, 1243-46 (Cal. 1990).

Two dominant trends in triggering coverage and apportioning responsibility between successive insurers have developed within the courts. A longstanding approach has been to hold that an insurer on the risk during some period of exposure to the injury causing agent or its damage is responsible for indemnifying the insured. Several variations of this "injury-oriented" approach have been applied to determine exactly which of the insurers throughout the deterioration period should be accountable.¹⁵ In contrast, the second general approach holds that the insurer on the risk at the manifestation of the damage is responsible for the entire loss.¹⁶

Within these two general categories of trigger theories, a multitude of more specific rules have been developed and applied¹⁷ in cases involving continuous loss:

(1) *The Exposure Rule*: coverage is only triggered when the property is first exposed to the injury-causing agent.¹⁸

(2) *The Manifestation Trigger*: coverage is triggered when the damage is discovered, or should have been discovered, by the injured party.¹⁹

15. See *infra* notes 120-36 and notes 137-50 and accompanying text (discussing the continuous and injury-in-fact triggers).

16. See, e.g., *Prudential*, 798 P.2d 1230; see also *infra* note 19 (citing cases adopting the manifestation trigger of coverage).

17. See, e.g., *South Carolina Ins. Co. v. Coody*, 813 F. Supp. 1570, 1576 (M.D. Ga. 1993) (listing several judicial approaches to toxic substance exposure); *Industrial Steel Container Corp. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156, 159 (Minn. Ct. App. 1987) (listing several judicial approaches to continuous injury). At least five triggers of coverage have been utilized by courts confronting continuous loss issues in the bodily injury and property damage contexts. The manifestation, exposure, and continuous triggers, however, are the most frequently encountered triggers. See BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 9.03 (6th ed. 1993) (discussing the exposure, manifestation, triple or continuous, double, and injury-in-fact triggers).

18. See, e.g., *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 984 (8th Cir.) (stating in dicta that Missouri would probably adopt the exposure rule for environmental contamination), *cert. denied*, 488 U.S. 821 (1988); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1216-17 (6th Cir. 1980) (comparing manifestation theory and exposure theory), *clarified on reh'g*, 657 F.2d 814 (6th Cir. 1981).

19. See, e.g., *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1551 (C.D. Cal. 1992) (applying manifestation trigger to construction defects); *Maryland Casualty Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206, 1224-26 (S.D.N.Y. 1991) (envi-

(3) *The Double Trigger*: coverage is triggered when the property is first exposed to the injury-causing agent and at the time the damage becomes manifest to the injured party.

(4) *The Triple or "Continuous" Trigger*: coverage is triggered at first exposure to the injury-causing agent, at the manifestation of damage, and at all points in between.²⁰

(5) *The Injury-in-Fact Rule*: coverage is triggered only at those points actual injury occurred, regardless of whether the damage has become manifest.²¹

ronmental damage), *rev'd*, No. 91-9322, 1993 WL 335115 (2d Cir. Sept. 1, 1993); *Prudential*, 798 P.2d at 1246 (soil subsidence); *Carty v. American States Ins. Co.*, 9 Cal. Rptr. 2d 1 (Ct. App. 1992) (soil subsidence); *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 7 Cal. Rptr. 2d 53, 57 (Ct. App. 1992) (construction defects); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431, 434 (Ct. App. 1990) (construction defects); *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277 (Ct. App. 1988) (construction defects); *Transamerica Ins. Co. v. Safeco Ins. Co. of N. Am.*, 472 N.W.2d 5, 7 (Mich. Ct. App. 1991) (products liability); *Jackson v. State Farm Fire & Casualty Co.*, 835 P.2d 786 (Nev. 1992) (soil subsidence); *Gruol Constr. Co. v. Insurance Co. of N. Am.*, 524 P.2d 427, 430 (Wash. Ct. App. 1974) (construction defects).

20. This trigger is also referred to as the "multiple trigger." *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506 (Pa. 1993); *see also* *Dayton Indep. Sch. Dist. v. National Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex. 1988) (asbestos-related property damage), *rev'd and dismissed for lack of jurisdiction sub nom. W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865 (5th Cir. 1990); *Lac d'Amiante du Que., Ltee. v. American Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1985) (asbestos-related property damage); *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663 (Ct. App.) (property damage claim), *review granted*, 834 P.2d 1147 (Cal. Aug. 27, 1992); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358 (Ct. App.) (applying continuous trigger to hazardous waste contamination claim), *review granted*, 862 P.2d 661 (Cal. 1992); *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249 (Ct. App. 1991) (damage caused by faulty roof); *American Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954 (Colo. Ct. App. 1990) (damage caused by roof collapse), *appeal dismissed per stipulation*, 831 P.2d 887 (Colo. 1991); *Harford County v. Harford Mut. Ins. Co.*, 610 A.2d 286 (Md. 1992) (environmental contamination claim); *Reliance Ins. Co. v. Armstrong World Indus., Inc.*, 614 A.2d 642 (N.J. Super. Ct. Law Div. 1992) (contaminants discharge claim), *modified*, 625 A.2d 601 (N.J. Super. Ct. Law Div. 1993); *Gottlieb v. Newark Ins. Co.*, 570 A.2d 443 (N.J. Super. Ct. App. Div. 1990) (environmental contamination claim); *Gruol*, 524 P.2d 427 (negligent construction claim).

21. *See, e.g., Maryland Casualty*, 1993 WL 335115 (adopting damage-in-fact trigger for third-party asbestos-related property damage); *W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865 (5th Cir. 1990) (stating that the injury-in-fact trigger would be applicable to asbestos-related property damage under New York law), *rev'd* *Dayton Indep. Sch. Dist. v. National Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex.

The body of case law from which these theories have emerged is a morass of difficult to reconcile, inapposite opinions that have juxtaposed first- and third-party insurance precedent and exacerbated problems in a burgeoning area of litigation.²²

Fortunately, a prominent decision by the California Supreme Court in *Prudential-LMI Commercial Insurance v. Superior Court*²³ settled much of the uncertainty surrounding trigger of coverage issues in first-party progressive property loss situations. Influenced by public policy and the insured's reasonable expectations of coverage,²⁴ the court in *Prudential* adopted the manifestation trigger of coverage after an extensive review of previous holdings.²⁵ The *Prudential* decision, however, did not attempt a reconciliation of the variety of coverage triggers adopted in the context of third-party insurance policies.²⁶ As a result, third-party continuous loss case law remains unsettled as courts with differing goals and perceptions continue to reach divergent results.²⁷

1988); *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474 (E.D. Mich.) (applying injury-in-fact trigger to product-related progressive property damage), *supplemented*, 727 F. Supp. 1524 (E.D. Mich. 1989); *Triangle Publications, Inc. v. Liberty Mut. Ins. Co.*, 703 F. Supp. 367 (E.D. Pa. 1989) (adopting injury-in-fact trigger for liability policy); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 197 (W.D. Mo. 1986) (favoring the "damage-in-fact" trigger); *Sandoz, Inc. v. Employer's Liab. Assurance Corp.*, 554 F. Supp. 257 (D.N.J. 1983) (adopting the damage-in-fact trigger for bodily injury); *Industrial Steel Container Corp. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156 (Minn. Ct. App. 1987) (adopting "actual injury" trigger for groundwater contamination); *Keystone Automated Equip. Co. v. Reliance Ins. Co.*, 535 A.2d 648 (Pa. Super. Ct. 1988) (adopting injury-in-fact trigger for liability policy application).

22. See, e.g., *Lac d'Amiante*, 613 F. Supp. at 1551 (noting conflicting decisions and perplexing issues); *Montrose*, 5 Cal. Rptr. 2d at 363 (citing judicial inconsistency); *Gottlieb*, 570 A.2d 445 (noting a "plethora" of cases); see also *supra* note 9 (commenting on the soaring costs of continuous loss litigation).

23. 798 P.2d 1230 (Cal. 1990).

24. Under the reasonable expectations doctrine, courts which find insurance policy language ambiguous will interpret the terms consistent with the "reasonable expectations" of the insured. See *infra* notes 180-90 (discussing the application of the doctrine in continuous loss cases).

25. *Prudential*, 798 P.2d at 1242-48; see also *infra* notes 91-108 and accompanying text (discussing the *Prudential* decision).

26. "Accordingly, and because the issue of whether an allocation or exposure theory should apply in the third party property damage liability context is not before the court, we leave its resolution to another date." *Prudential*, 798 P.2d at 1246.

27. Compare *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 7 Cal.

In an apparent attempt to introduce a greater degree of uniformity in continuous loss holdings, some courts recently have elected to follow the California Supreme Court's lead in *Prudential* by adopting the manifestation trigger in third-party situations as well.²⁸ This development represents a departure from many prior holdings which refused to apply the manifestation trigger to third-party claims.²⁹ Courts that hope to harmonize progressive property loss holdings through the creation of a blanket rule ignore the distinct contractual and circumstantial differences between first and third-party policies.³⁰ Other courts, however, steadfastly have insisted on maintaining a bright-line distinction between policies rather than seeking a uniform trigger rule.³¹

Rptr. 2d 53 (Ct. App. 1992) (applying the "manifestation" trigger to a construction defect claim) *with* *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358 (Ct. App.) (applying the "continuous injury" trigger to a construction defect claim), *review granted*, 862 P.2d 661 (Cal. 1992); *compare also* *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986) (applying the manifestation trigger to environmental contamination claim) *with* *Harford County v. Harford Mut. Ins. Co.*, 610 A.2d 286, 294-95 (Md. 1992) (refusing to follow *Mraz* and concluding that coverage can be triggered at points earlier than manifestation).

28. *See, e.g.*, *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541 (C.D. Cal. 1992) (applying manifestation trigger to product-related property damage under liability policies); *Pines of La Jolla*, 7 Cal. Rptr. 2d 53 (adopting manifestation trigger for construction defect damage under occurrence based liability policy); *Transamerica Ins. Co. v. Safeco Ins. Co. of N. Am.*, 472 N.W.2d 5 (Mich. Ct. App. 1991) (holding that manifestation of injury triggers coverage under comprehensive general liability policy); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431 (Ct. App. 1990) (applying manifestation trigger to third-party construction defect claims); *see also* *Mraz*, 804 F.2d 1325 (applying manifestation trigger to environmental contamination claim under liability policy); *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267 (Ind. Ct. App. 1976) (applying manifestation trigger to third-party claim for brick spalling damage).

29. *See infra* notes 120-36 (citing continuous trigger precedent) and *supra* notes 15-22 (discussing the divergent court holdings in third-party loss situations).

30. *See, e.g.*, *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249, 257 (Ct. App. 1991) (Huffman, J., dissenting); *Fireman's Fund*, 273 Cal. Rptr. at 433.

31. *See, e.g.*, *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704 (Cal. 1989) (en banc) (holding that separate rules for concurrent causation analysis in first- and third-party insurance disputes should be maintained); *Chu v. Canadian Indem. Co.*, 274 Cal. Rptr. 20, 25 (Ct. App. 1990) (distinguishing first- and third-party insurance analysis); *Montrose*, 5 Cal. Rptr. 2d at 363-64 (suggesting different interpretations are necessary for different policies). One commentator has noted that:

The whirlwind of issues that courts must reconcile when dealing with progressive property damage claims simply cannot be reduced to one basic trigger for any given loss situation. Though the manifestation trigger may be appropriate for first-party progressive loss situations, as demonstrated in *Prudential*,³² distinct policy differences make injury-oriented triggers more applicable to third-party claims.³³ This Note will examine the many issues surrounding continuous loss litigation and developments since the *Prudential* decision. First, this Note analyzes the express contractual distinctions between first-party property and third-party liability policies and the importance of those distinctions to continuous loss litigation. Next, the various trigger of coverage theories and representative case holdings in first- and third-party disputes are addressed. After introducing the confusion and divergence of opinion surrounding third-party holdings, recent case law is analyzed to determine common themes and motivations surrounding the application of the manifestation and continuous triggers. Concurrently, this Note suggests that rules appropriately developed for first-party continuous loss disputes are not transferable to third-party liability claims. In conclusion, this Note argues that the continuous trigger, which holds responsible those insurers on the risk while damage occurred, most clearly harmonizes the goals and provisions of third-party comprehensive general liability policies.

THE CONTRACTUAL DISTINCTIONS BETWEEN FIRST- AND THIRD-PARTY INSURANCE POLICIES

Because insurance is fundamentally a contract between two or more parties, a court's determination of which trigger of cover-

"Environmental" subject matter should not be the signal to obliterate all the previously discussed distinctions which we all accepted readily. To abandon the distinctions of vocabulary, underlying policy purpose and historic case law development between third-party liability and first-party property coverage . . . involves a fundamental unfairness.

Marcus, *supra* note 6, at 219-20.

32. *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230, 1242-48 (Cal. 1990).

33. See *infra* notes 117-19 and 265-72 accompanying text (discussing the ramifications of applying a manifestation trigger to third-party progressive loss scenarios).

age theory should be applied generally is influenced by the type of insurance policy at issue and its relevant provisions.³⁴ Interpretation of the insurance policy, however, is not an isolated element of continuous loss litigation. The process of defining and applying particular policy terms is highly influenced by public policy considerations, the unique factual circumstances of the case before a court, the parties to the litigation, and general principles of insurance coverage.³⁵ How a court interprets, or fails to interpret, certain key terms in a policy can dictate the outcome of a case. Nevertheless, because the policy defines the indemnity relationship between the insured and the insurer, it should and must be the central focus of a court's analysis in any coverage dispute.

Consequently, the terminology utilized in insurance policies is pivotal in continuous loss litigation and courts must be cautious when applying precedent based on different contractual language. Frequently, courts have been guilty of indiscriminately applying precedent established for one type of indemnity relationship to another.³⁶ Recent decisions suggest that such overlap may be more common in the future as more courts adopt first-party holdings and reasoning in the third-party context.³⁷ Understanding the distinction in first- and third-party coverage

34. See, e.g., *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1548-49 (C.D. Cal. 1992); *Harford County v. Harford Mut. Ins. Co.*, 610 A.2d 286, 287 (Md. 1992); *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249, 253-56 (Ct. App. 1991).

35. See *infra* notes 151-272 and accompanying text (discussing various influences on courts confronting continuous loss cases).

36. See, e.g., *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 363 (Ct. App.) (finding a failure by courts to differentiate between first- and third-party precedents and policy provisions), *review granted*, 862 P.2d 661 (Cal. 1992); *Stanley v. Fire Ins. Exch.*, 274 Cal. Rptr. 157 (Ct. App. 1990) (using liability policy definitions to resolve first-party policy claim); *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277 (Ct. App. 1988) (applying both first- and third-party continuous loss precedent to resolve third-party claim).

37. E.g., *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1548-51 (C.D. Cal. 1992) (finding the *Prudential* decision "compelling"); *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 7 Cal. Rptr. 2d 53, 57 (Ct. App. 1992) (citing to first-party precedent and following *Fireman's Fund*); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431, 433 (Ct. App. 1990) (stating that first- and third-party distinctions were not relevant to the case at bar).

provisions is crucial to the development of a well-reasoned and effective body of continuous loss case law.

First-Party Property Policies

First-party property insurance provisions are fairly standardized. These policies cover the insured's interest in a particular property and are primarily designed to directly indemnify for loss or damage sustained by the insured.³⁸ Typically, first-party policies narrowly delineate the events and perils that are insured risks.³⁹ In general, most states require that insurers underwriting named peril policies use the language contained in the New York Standard Fire Policy of 1943.⁴⁰

Unlike third-party insurance, first-party insurance policies contain notice and suit limitation provisions that are quite specific:

*Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss . . . and within 60 days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss . . . stating the knowledge and belief of the insured as to the following: the time and origin of the loss . . .*⁴¹

38. Chris M. Kallianos, *Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra Contract Damages*, 64 N.C. L. REV. 1421, 1421 n.3 (1986).

39. There are two main types of first-party property policies: "all-risk" and "named perils." Homeowner's insurance is generally of the all-risk variety. It combines property, casualty and personal liability coverage in a single policy package. These policies largely are based on the New York Standard Fire Insurance Policy of 1943. EMMETT J. VAUGHAN & CURTIS M. ELLIOTT, *FUNDAMENTALS OF RISK AND INSURANCE* 355-56 (2d ed. 1978). Named peril policies insure only those losses specifically contemplated and included within the policy. 1 COUCH, *supra* note 3, § 1:61.

40. 1943 New York Standard Fire Insurance Policy, in 3 FREEDMAN, *supra* note 4, § 17:3 [hereinafter Standard Fire Insurance Policy]. Attachments to the Standard Policy tailor coverage to suit the needs of a particular insured. California, Florida, Georgia, Hawaii, Indiana, Kansas, Maine, Missouri, New Mexico, North Dakota, South Carolina, and Utah have all adopted the Standard Policy with insignificant variations. Only Texas, Minnesota, and Massachusetts require the use of different forms. VAUGHAN & ELLIOTT, *supra* note 39, at 355-56; see also Richard L. Antognini, *When Will My Troubles End? The Loss in Progress Defense in Progressive Loss Insurance Cases*, 25 LOY. L.A. L. REV. 419, 425 (1992).

41. Standard Fire Insurance Policy, *supra* note 40, § 17.3 n.40 (second emphasis

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless . . . commenced within twelve months next after inception of the loss.⁴²

These provisions indicate that coverage under a first-party policy should be triggered at the "inception of the loss."⁴³ The policy language also requires that there be some degree of "knowledge and belief" on behalf of the insured as to the time and origin of the loss when submitting a claim for indemnification.⁴⁴ As a result, to bring a claim under a first-party policy the insured must have knowledge of the loss and a reasonable belief as to the time and origin of the loss. In addition, the insured must be prepared to bring suit on any coverage disputes regarding that loss within twelve months of its inception.⁴⁵ These provisions and their corresponding limitations and public policy ramifications have encouraged many courts to apply the manifestation trigger as the trigger that best harmonizes the policy intentions.⁴⁶ By doing so, the preclusive effect of an untimely claim by the insured is minimized.

added).

42. *Id.* (emphasis added).

43. *Id.* The policy does not state expressly that coverage is triggered at the "inception of the loss." Rather, coverage is triggered upon the happening of any insured peril. In light of the suit limitations provision, however, courts have made a policy decision to trigger coverage at the inception of the loss. *See infra* notes 91-108 and accompanying text (discussing the *Prudential* decision) and *infra* notes 186-88 and 206-08 and accompanying text (discussing public policy ramifications of first-party policies).

44. Standard Fire Insurance Policy, *supra* note 40, § 17.3 n.40; *see supra* text accompanying note 41.

45. *See, e.g.,* CAL. INS. CODE § 2071 (Deering 1992) (requiring suit to be brought within 12 months of "inception of the loss"). *But see* Port Arthur Towing Co. v. Mission Ins. Co., 623 F.2d 367, 368-69 (5th Cir. 1980) (invalidating under Texas law a provision in an insurance policy requiring suit to be brought within 12 months).

46. *See, e.g.,* Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230, 1246 (Cal. 1990); Carty v. American States Ins. Co., 9 Cal. Rptr. 2d 1, 4-5 (Ct. App. 1992); Jackson v. State Farm Fire & Casualty Co., 835 P.2d 786, 789-90 (Nev. 1992).

Third-Party Liability Policies

In the third-party context, the insured generally seeks indemnification and legal defense by the insurer from liability to a third-party claimant rather than for a loss personally sustained. Typically, the insurer assumes a duty to pay judgments resulting from an "occurrence" within the policy period. The most frequently encountered third-party insurance policy in continuous loss litigation is the standardized Comprehensive General Liability policy, as revised in 1966 and 1973.⁴⁷

The relevant policy definitions in the 1966 version of the CGL provide that:

"occurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in . . . *property damage* neither expected nor intended from the point of the *insured*;

"*property damage*" means injury to or destruction of tangible property.⁴⁸

Prior to 1966, coverage was triggered by "accidents" which occurred during the policy period. Problems encountered with the early policy, however, prompted changes in the 1966 version to clarify that coverage was triggered by any "occurrence" resulting in property damage rather than simply an "accident."⁴⁹ Several modifications were again made in 1973:

"occurrence" means an accident, including continuous or repeated exposure to conditions, which results in . . . *property damage* neither expected nor intended from the standpoint of the *insured*; . . .⁵⁰

47. Arness & Eliason, *supra* note 9, at 946.

48. *Id.*

49. Under the 1966 policy version, courts tended to limit the meaning of "accident" to events which were sudden and identifiable. The language of the policy had created confusion over the scope of the term "occurrence" and in determining when an "accident" had occurred for coverage purposes. See Marcy L. Kahn, *Looking for "Bodily Injury": What Triggers Coverage Under a Standard Comprehensive General Liability Insurance Policy?*, in *THE COMPREHENSIVE GENERAL LIABILITY POLICY: A CRITIQUE OF SELECTED PROVISIONS* 23, 24-28 (Arthur J. Liederman ed., 1985).

50. 3 FREEDMAN, *supra* note 4, at 467-68 (emphasis added).

"property damage" means (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;⁵¹

The most significant of these changes was the substitution of "including continuous or repeated exposure" for "injurious exposure to conditions" in the definition of "occurrence." This revision did not change the substantive policy of providing coverage for occurrences within the policy period but provided further guidance and clarification.⁵² The clarification is important, however, as it reflects industry awareness of the problems present in coverage of continuous loss.⁵³

The Significance of the Distinctions to Continuous Loss

Unlike first-party policies, coverage in the third-party context is triggered by "property damage" occurring during the policy period rather than at the "inception of the loss." As a result, the same fact pattern pursued under different policies could lead to dramatically different results. A situation that reasonably could be interpreted as "property damage" within the policy period of a third-party policy may not qualify as the "inception of the loss" under a first-party policy. For example, progressive corrosion may be within the definition of "property damage," but it is difficult to pinpoint such damage as the "inception of loss." As commonly used, an "inception" would occur at either the commencement or the ultimate manifestation of damage.⁵⁴

51. *Id.* at 468 (emphasis added).

52. Kahn, *supra* note 49, at 26.

53. The limiting words "during the policy period" were also moved from the definition of occurrence to the definition of property damage. Arness & Eliason, *supra* note 9, at 946. Courts do not seem to distinguish the revisions on this basis, however. The expansion of the property damage definition to include loss of use has few ramifications in situations of tangible physical damage such as progressive property damage, although it is indicative of the expansive coverage contemplated by Comprehensive General Liability policies.

54. See *infra* notes 152-76 and accompanying text (discussing the interpretation of

Another important difference between the two policies involves the imposition of a strict suit limitation and notice provision in first-party insurance.⁵⁵ This restriction has inspired some courts to maximize an insured's recovery under first-party policies by triggering coverage at a later date using the manifestation trigger.⁵⁶ Such a decision is largely driven by public policy favoring coverage. In this way, damage is defined at the latest possible moment and the preclusive effect of the suit limitations provision is minimized.⁵⁷ This policy incentive, however, is absent in the third-party context.

First- and third-party insurance policies have substantively distinct goals. Third-party coverage insures against liability to a third party that has suffered loss as a result of the insured's actions. In contrast, first-party policies seek to indemnify for losses personally suffered by the insured. In general, a first-party insured is able to predict his maximum losses and potential risks during a particular policy period. An insured protected by a liability policy, however, can at best make an educated guess as to potential losses and risks.⁵⁸ Whereas direct damage losses can never exceed the value of the insured property, liability claims can be virtually unlimited.⁵⁹ As a result, the spectrum of risks and degree of uncertainty is much greater in the context of third-party insurance coverage.

As a result of these contractual differences and policy considerations, courts historically have drawn more distinctions than parallels between the two types of insurance. The California Supreme Court's reasoning in *Garvey v. State Farm Fire & Ca-*

policy terms and its ramifications). For example, the progressive deterioration of a negligently constructed roof could be labeled an "occurrence" at any point in the deterioration process. In contrast, "inception of the loss" contemplates a starting point—either the commencement of damage (presumably the roof's construction or initial deterioration) or the first discovery of damage (manifestation).

55. See *supra* notes 48-51 and accompanying text (quoting the relevant policy provisions).

56. See, e.g., *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (Cal. 1990).

57. See *infra* notes 235-72 and accompanying text (discussing public policy).

58. See, e.g., *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 366 (Ct. App.), *review granted*, 862 P.2d 661 (Cal. 1992).

59. SOLOMON S. HUEBNER ET AL., *PROPERTY & LIABILITY INSURANCE* 414 (2d ed. 1976).

*sualty Company*⁶⁰ most notably exemplifies the judicial tendency to distinguish first- and third-party policy analysis. In *Garvey*, the court confronted the difficult issue of determining coverage in concurrent causation cases where one cause is a covered peril and the other is expressly excluded by the policy provisions.⁶¹ The court found that the operation of exclusionary provisions and the analysis of causation were different under first- and third-party policies because "the 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy."⁶² The court emphasized that third-party coverage analysis involved traditional tort concepts of fault and proximate cause and the insured's corresponding liability.⁶³ In contrast, first-party coverage only required a determination that the loss was caused by a covered peril. Consequently, the court concluded that substantive policy differences required that prior holdings in the third-party context be limited to such policies and that the distinct rule established for first-party concurrent causation coverage disputes be preserved.⁶⁴

60. 770 P.2d 704 (Cal. 1989); see also *Chu v. Canadian Indemnity Co.*, 274 Cal. Rptr. 201 (Ct. App. 1990). For a general discussion of the *Garvey* decision, see Otto F. Becker et al., *Concurrent Causation: Garvey v. State Farm and Where It Will Lead*, in TORT AND INSURANCE PRACTICE SECTION, AMERICAN BAR ASSOCIATION, PAPERS PRESENTED AT THE JOINT MEETING OF THE PROPERTY INSURANCE LAW COMMITTEE AND THE EXCESS, SURPLUS LINES, AND REINSURANCE COMMITTEE (1984).

61. *Garvey*, 770 P.2d at 706 (excluding losses caused or aggravated by earth movement, but not losses resulting from contractor negligence).

62. *Id.* at 710 (quoting Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 386-87 (1985)). The opinion of the court elaborated on this point:

For these reasons it is important to separate the causation analysis necessary in a first-party property loss case from that which must be undertaken in a third-party tort liability case . . . "[T]he 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy"

[T]he right to coverage in the third-party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract.

Id. (quoting Michael E. Bragg, *Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers*, 20 FORUM 385, 386-87 (1985)).

63. *Id.*

64. *Id.* at 713 n.9. The court in *Garvey* found that the appellate court had mis-

The majority's reasoning in *Garvey* is equally applicable to continuous loss disputes. The underlying nature of the claims and the right to coverage has implications for continuous loss issues.⁶⁵ Differences in policy terms and provisions should dictate different analysis and outcomes for each.⁶⁶ Superimposing case law developed in one area onto another disregards these and other differences and undermines the expectations of the insured.⁶⁷

JUDICIAL INDIFFERENCE TO POLICY DISTINCTIONS

Courts that recently have attempted to establish a uniform rule for triggering coverage under both first- and third-party policies have minimized the *Garvey* holding and ignored contractual distinctions.⁶⁸ Consequently, both first- and third-party policy disputes have been evaluated similarly in some cases. Ignoring the distinct characteristics of each type of policy, however, compels inappropriate outcomes in third-party situations.

applied the third-party analysis of *State Farm Mutual Auto Insurance Co. v. Partridge*, 514 P.2d 123 (Cal. 1973), and that the first-party analysis of *Sabella v. Wisler*, 37 P.2d 889 (Cal. 1963) should dictate the case's outcome. *Garvey*, 770 P.2d at 705. Separate opinions in *Garvey*, however, argued that distinctions between first- and third-party policies did not compel entirely different rules for determining causation coverage. The concurrence recognized several substantive differences between property and liability policies, including the reasonable expectations of the insured and third-party public policy considerations, but concluded they were not relevant to the case at bar. *Id.* at 715 (Kaufman, J., concurring). Similarly, the dissent argued that neither prior case law nor policy differences mandated different treatment for first- and third-party concurrent causation litigation. *Id.* at 725 (Mosk, J., dissenting).

65. See *infra* notes 68-85 and accompanying text (discussing the need to maintain distinct rules for first and third party continuous loss cases) and *infra* notes 198-234 and accompanying text (discussing fortuity distinctions between the policies).

66. See *infra* notes 152-76 and accompanying text (discussing contractual interpretation) and Marcus, *supra* note 6, at 223-28 (suggesting courts must not look to liability precedent to resolve first-party issues).

67. See *infra* notes 277-97 and accompanying text (discussing public policy concerns and the reasonable expectations of the insured).

68. See, e.g., *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249, 257 (Ct. App. 1991) (Huffman, J., dissenting); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431, 433 (Ct. App. 1990).

Since the decision in *Prudential*,⁶⁹ many courts have adopted first-party precedent to resolve third-party coverage disputes and vice versa.⁷⁰ As a result, the distinction between first- and third-party property damage insurance is becoming increasingly murky as courts interchange analytical frameworks and policy rationales. Whereas this misapplication of precedent was more indiscriminate previously,⁷¹ courts have begun to affirmatively recognize the substantive differences between first- and third-party policies, yet nevertheless advocate a blanket rule.⁷² For example, courts which have recently adopted the manifestation trigger in the third-party context find no, or limited, significant legal distinctions between first- and third-party policies.⁷³ These courts suggest that any benefits from maintaining different triggers for first- and third-party policies are outweighed by public policy gains such as the creation of a bright line rule and certainty in the insurance industry.⁷⁴ In *Fireman's Fund Insurance Co. v. Aetna Casualty & Surety Co.*,⁷⁵ the court relied heavily on a first-party continuous loss holding in *Home Insurance Co. v. Landmark Insurance Co.*⁷⁶ when interpreting a

69. *Prudential-LMI Commercial Ins. Co. v. Superior Court*, 798 P.2d 1230 (Cal. 1990).

70. *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541 (C.D. Cal. 1992); *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663 (Ct. App. 1992), review granted, 834 P.2d 1147 (Cal. Aug. 27, 1992) (No. S027319); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431 (Ct. App. 1990).

71. See, e.g., *Stanley v. Fire Ins. Exch.*, 274 Cal. Rptr. 157 (Ct. App. 1990) (using third-party liability provisions to resolve a first-party claim by the insured); *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277, 278 (Ct. App. 1988) (applying liability policy provisions to first-party claim analysis).

72. See, e.g., *Fireman's Fund*, 273 Cal. Rptr. at 434.

73. "[D]istinguishing facts should not lead to a different result unless such facts have legal significance There are several reasons why the distinction between first- and third-party coverage is not legally significant" *Id.* at 433.

74. *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1551 (C.D. Cal. 1992); *Stonewall*, 9 Cal. Rptr. 2d at 673; *U.S. Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267, 272 (Ind. Ct. App. 1976).

75. 273 Cal. Rptr. 431 (Ct. App. 1990).

76. 253 Cal. Rptr. 277 (Ct. App. 1988). *Home* involved an insured's claim against two first-party insurers for continuous brick spalling damage. *Id.* at 279. One insurer was on the risk during the spalling, and the other on the risk after the first manifestation of the damage. *Id.* The court applied the manifestation trigger, holding that the insurer on the risk when the loss first visibly manifests itself must provide indemnity for the insured. *Id.* at 280. Similarly, *Fireman's Fund* involved a claim

third-party liability policy. In emphasizing that any distinctions between the policies were not legally significant, the court stated that "no one would contend an automobile accident case involving a blue car should not be applied simply because the car now at issue was green."⁷⁷ The court in *Fireman's Fund* emphasized *Home's* reliance on the third-party liability provisions rather than the first-party property damage provisions of the disputed policy to reach their decision, stating that they could discern no meaningful difference between the terminology utilized.⁷⁸ Unfortunately, two wrongs do not make a right.⁷⁹ Implicit in the *Fireman's Fund* holding is the notion that contractual distinctions between first- and third-party policies only should influence the court if overriding public policy considerations, such as the compensation of an innocent third-party or indemnification of the insured, exist.⁸⁰

In contrast, other courts have drawn bright lines between first- and third-party liability policies and suggest that the confusion and uncertainty surrounding continuous loss litigation

against two insurers, one on the risk at discovery and a later one on the risk when the cause of damage became known. *Fireman's Fund*, 273 Cal. Rptr. at 281. These situations, involving post-manifestation liability, are slightly different than the primary cases discussed in this Note, which involve pre-manifestation insurer liability.

77. *Fireman's Fund*, 273 Cal. Rptr. at 433.

78. *Id.* In *Home* both the court and the parties relied on the definitions of "occurrence" and "property damage" found in the liability portion of the disputed policies, rather than the first-party property damage provisions. *Home*, 253 Cal. Rptr. at 280. In doing so, the court stated:

Courts frequently use the terms "loss" and "damage" interchangeably to describe events that trigger coverage. A property insurer decides whether there has been a "loss to property" during the policy period. Similarly, the liability insurer determines if there has been an "occurrence . . . resulting in property damage" while it was on the risk.

Id. at 278 n.2. As discussed throughout this Note, however, equating first- and third-party triggers is inappropriate.

79. See *infra* notes 151-272 and accompanying text (discussing the need to avoid indiscriminate application of precedent and the use of a blanket rule for first- and third-party policies).

80. The court also noted that the statutory codification of the "loss-in-progress doctrine" which *Home* emphasized was also applicable in the third-party context. *Fireman's Fund*, 273 Cal. Rptr. at 433-34. Given these important parallels, the court in *Fireman's Fund* stated that the only relevant distinctions to be drawn between holdings is whether the action involves allocation between insurers or a claim by the insured against their insurer. *Id.* at 434.

are a result of judicial failures to draw necessary distinctions.⁸¹ Courts with this view place great emphasis on the plain meaning of the policy language, its reasonable contractual interpretation based on the insured's expectations of coverage,⁸² the respective goals of each policy, and the specific context of important terms within the policies.⁸³ In distinguishing third-party from first-party policies, courts stress that third-party policies do not contain twelve month suit limitation provisions.⁸⁴ As a result, third-party cases can be analyzed without considering the preclusive effect that an insured's untimely suit might have on recovery.⁸⁵

Similarly, courts distinguish the types of policies and the need to avoid a uniform rule by presenting the distinct public policy considerations which attach to third-party situations. The most prominent of these considerations is the need to assure that third parties are compensated for their losses.⁸⁶ Whereas first-party policies directly indemnify the insured, the principal beneficiaries of liability policies tend to be innocent third persons with no control over the insured or insurer. As a result, additional equity interests may need to be appraised in third-party litigation.

81. One court stated the problem as follows:

Virtually uniform reliance on this [policy] language has not, unfortunately, resulted in consistent construction or application.

....

To begin with, some courts are oblivious to the distinction between first and third party policies, applying rules developed under the language of one indiscriminately to the other.

Montrose Chem. Corp. v. Admiral Ins. Co., 5 Cal. Rptr. 2d 358, 363 (Ct. App.), *review granted*, 862 P.2d 661 (Cal. 1992) (citation and footnote omitted).

82. *See infra* notes 146-225 and accompanying text (discussing contractual interpretation and related concerns).

83. *See infra* notes 146-90 and accompanying text (discussing contractual interpretation) and *supra* notes 51-63 and accompanying text (comparing relevant policy provisions).

84. *See, e.g., Montrose*, 5 Cal. Rptr. 2d at 367 ("There is no 'inception of the loss' language in a standard CGL policy and no corollary need to apply the definition of 'loss' articulated in *Prudential-LMI*.").

85. *See supra* notes 41-44 and *infra* notes 206-08 and accompanying text (discussing the limiting effect of the suit limitations provision).

86. *See infra* notes 226-60 and accompanying text (discussing public policy considerations in the third-party context).

The discord over the establishment of a bright line rule or bright line distinction is a consuming element of continuous loss litigation. Clearly, insurers and insureds alike benefit from the creation of easily ascertained, concrete rules for applying triggers of coverage. Nevertheless, the important differences and attendant policy considerations between first- and third-party policies demand that such rules be tailored to each policy rather than indiscriminately and universally applied.

APPLICATION OF THE TRIGGER OF COVERAGE THEORIES⁸⁷

Despite contractual differences and distinct public policy considerations, in litigation an insured party generally seeks a broad and inclusive trigger of coverage in order to maximize his compensation while insurers tend to advocate whichever theory places the burden of indemnification in another insurer's policy period. Obviously, the insured, the insurers, and any third parties to the action have very significant interests in convincing the court to adopt the trigger most beneficial to them. Consequently, trigger theories have been developed by courts through case-by-case analysis of particular equity considerations at issue in each action. As a result, the trigger theories suffer from a lack of consistency and systematic application.

The Manifestation Trigger

Application of the manifestation theory triggers insurance coverage at the time the damage becomes known or should have become known to the insured or interested third-party claimant.⁸⁸ Most often, manifestation corresponds with the insured's or a third party's actual discovery of loss. Since its use by the California Supreme Court in *Prudential*,⁸⁹ this trigger has seen

87. See, e.g., OSTRAGER & NEWMAN, *supra* note 17, § 9.03; Barry S. Levin & William J. Gorham, III, *Important Issues in Occurrence Policies*, in INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES 1991, at 9 (Barry R. Ostrager & Thomas R. Newman eds., PLI Litig. & Admin. Practice Course Handbook Series No. 405, 1991). Only the manifestation, continuous, and injury-in-fact triggers will be discussed in detail in this Note.

88. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 364-65 (Ct. App.), *review granted*, 862 P.2d 661 (Cal. 1992).

89. *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230, 1246 (Cal.

aggressive application in both first- and third-party loss situations.⁹⁰

In *Prudential*, the California Supreme Court reviewed a history of conflicting judicial opinions to establish the manifestation theory as the appropriate trigger of coverage for first-party progressive loss situations.⁹¹ Appellant Prudential was one of four successive insurers on the risk for the insureds' apartment complex during and after its construction in 1970.⁹² In November of 1985, after Prudential's coverage period, the insureds discovered a crack in the foundation of the complex and promptly filed a claim for coverage in December of 1985.⁹³ More than a year and a half later, but prior to Prudential's denial of coverage, the insureds filed suit against Prudential and the other insurers of the complex.⁹⁴ In response, Prudential moved for summary judgment, contending that there was no evidence any loss was suffered during its policy period and that the one year suit limitation provision barred the insureds' claim.⁹⁵ The insureds argued that they were excused from compliance with the limitations provision as the loss could not have been reasonably discovered within the policy period. Thus, they argued, the "inception of the loss" had not yet taken place.⁹⁶

Prudential's summary judgment motion was denied by the trial court⁹⁷ and both parties subsequently appealed to the California Supreme Court.⁹⁸ After review, the supreme court held that the inception of the loss "should be determined by reference to reasonable discovery of the loss and not necessarily turn on the occurrence of the physical event causing the loss."⁹⁹ The

1990).

90. See *supra* note 19 (citing manifestation holdings).

91. *Id.* at 1246. For an analysis of important precedents prior to *Prudential*, see Michael J. Brady et al., *Insurance Coverage Concerns in California Continuous Property Loss Cases After Prudential-LMI*, 31 SANTA CLARA L. REV. 851 (1991).

92. *Prudential*, 798 P.2d at 1233.

93. *Id.*

94. *Id.* at 1233-34.

95. *Id.* at 1234.

96. *Id.* at 1236-38.

97. *Id.* at 1234.

98. *Id.*

99. *Id.* at 1238.

court defined the "inception of the loss" as that point in time when appreciable damage occurs and is, or should be, known to the insured such that a reasonable person would realize that his duty to notify the insurer had been triggered.¹⁰⁰ Consequently, the court held that in a first-party property damage case, the carrier on the risk when damage manifests is solely responsible for indemnification if the loss is a covered peril under the policy.¹⁰¹ Prior to the manifestation of damage to the insured, the loss was still an insurable contingency. Once discovered, the risk was no longer contingent and the duty to indemnify was triggered.¹⁰² Injury-oriented triggers, the court found, were only appropriate when damages slowly accumulate, as in bodily injury cases.¹⁰³

In adopting the manifestation rule, the court hoped to promote the interests of both the insurer and the insured by promoting certainty in the insurance industry.¹⁰⁴ In addition, the court determined that the manifestation rule corresponded with the "loss-in-progress" doctrine in that insurers who held policies after manifestation to the insured would not be held liable.¹⁰⁵ The court also noted that the insured's reasonable expectations of coverage under the policy in effect at the time of the loss' discovery were adequately met.¹⁰⁶ Limiting its holding to first-party progressive loss cases, the court cited to *Garvey*¹⁰⁷ and the substantial analytical differences between first-party property and third-party liability policies.¹⁰⁸

In spite of the court's attempt to limit its manifestation holding to first-party loss situations, some courts recently have ap-

100. *Id.*

101. *Id.* at 1246.

102. *Id.*

103. "[I]n first party cases applying the rule finding coverage only on actual occurrence of injury, no damage or injury of any kind has taken place until manifestation; the cause instead lies dormant until it later causes appreciable injury." *Id.*

104. *Id.* at 1247.

105. The "loss-in-progress" doctrine is used by courts to ascertain that only risks, and not certainties, are insured. See *infra* notes 198-205 and accompanying text (discussing fortuity and the "loss-in-progress" doctrine in continuous loss cases).

106. *Prudential*, 798 P.2d at 1247.

107. *Garvey v. State Farm Fire & Casualty Co.*, 770 P.2d 704 (Cal. 1989).

108. *Prudential*, 798 P.2d at 1245 n.8.

plied the manifestation rule to third-party claims under Comprehensive General Liability policies as well.¹⁰⁹ This crossover application of the manifestation rule is well demonstrated in the recent case of *Chemstar, Inc. v. Liberty Mutual Insurance Co.*¹¹⁰ *Chemstar* involved twenty-eight liability claims against the insured for property damage resulting from negligently manufactured plaster which was unsuitable for interior use.¹¹¹ After installation, the plaster pitted and created an unsightly wall surface in the claimants' homes.¹¹² After review, the court embraced *Prudential's* finding that trigger rules that focus on exposure to damage causing conditions are only useful in limited circumstances, such as bodily harm caused by asbestos.¹¹³ Here, the court reasoned, damage only occurred in some homes despite the presence of tainted plaster in many others.¹¹⁴ In addition, because damage was only cosmetic, it did not occur until pitting manifested, regardless of the progressive deterioration that occurred prior to discovery.¹¹⁵ Ultimately, the court held that, based on the reasoning and policy of *Prudential*, the

109. See, e.g., *Chemstar, Inc. v. Liberty Mutual Ins. Co.*, 797 F. Supp. 1541 (C.D. Cal. 1992); *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 7 Cal. Rptr. 2d 53 (Ct. App. 1992); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431 (Ct. App. 1990); *Transamerica Ins. Co. v. Safeco Ins. Co. of N. Am.*, 472 N.W.2d 5 (Mich. Ct. App. 1991).

110. 797 F. Supp. 1541 (C.D. Cal. 1992). The dispute in *Chemstar* centered on both comprehensive general liability policies and public liability policies. Nevertheless, the court found that all the policies were substantially the same in that all were adopted from the industry's standard CGL form policy. *Id.* at 1546 n.10.

111. *Id.* at 1545.

112. *Id.* at 1544.

113. *Id.* at 1549.

114. *Id.* at 1550.

115. The court explained:

[T]he property damage here is distinct from the damage in asbestos bodily injury cases or toxic property damage cases such as *Montrose*, where damage allegedly occurred upon first exposure to the DDT. In this case, as in *Fireman's Fund* and *Pines*, property damage did not occur until the plaster-pitting actually manifested, so the manifestation trigger ought to determine which insurer's policies must afford coverage

Id. at 1551; see also *Jackson v. Welco Mfg.*, 612 So. 2d 743, 744 (La. App. 1992) (finding, similarly, that discoloration from defective sheetrock was merely aesthetic damage meriting application of a discovery trigger).

California Supreme Court would choose to apply the manifestation trigger to third-party progressive loss claims as well.¹¹⁶

Problems arise, however, in determining when the damage is "manifest" in third-party situations when there is no close temporal proximity between the third party's discovery of damage and the insured's notice of loss.¹¹⁷ If a new insurer comes on the risk between discovery of the damage and the insured's notice of liability, manifestation can be defined as either the third-party's discovery of loss or the insured's notice of liability.¹¹⁸ Consequently, courts which adopt the manifestation trigger in third-party situations must be prepared to explicitly identify the "discovery" contemplated by the policy language.¹¹⁹

The Continuous Trigger

Eschewing the trend to apply the manifestation rule to third-party "occurrence"-type policies, some courts have opted to base coverage on the ongoing nature and continuous process of progressive property damage rather than looking to its observable manifestation.¹²⁰ Using the continuous trigger theory, these courts find coverage under all policies in effect from first exposure to the injury causing condition through the manifestation of

116. *Chemstar*, 797 F. Supp. at 1550.

117. See *infra* notes 222-31 and accompanying text (discussing *Great Southwest Fire Insurance Co. v. Watt Industries, Inc.*, 280 Cal. Rptr. 249 (Ct. App. 1991)). Similar problems in pinpointing "manifestation" can arise in the first-party context as well. For example, an insured may know of property damage in one period but not discover the cause of the loss until another. Some courts have held that manifestation requires knowledge of the cause of the loss, not just knowledge of damage.

118. See *infra* notes 210-11 and 219-221 and accompanying text (discussing courts which have held that manifestation occurs at the time insured is given notice); see also *infra* notes 2212-18 and accompanying text (discussing cases in which manifestation occurs at the third party's discovery).

119. To maintain coherence with the express language and general goals of third-party policies, however, "manifestation" would need to be defined as the insured's notice of liability. See *infra* notes 222-34 and accompanying text (discussing fortuity in third-party scenarios).

120. See, e.g., *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358 (Ct. App.), review granted, 862 P.2d 661 (Cal. 1992); *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249 (Ct. App. 1991); *Harford County v. Harford Mutual Ins. Co.*, 610 A.2d 286 (Md. 1992); *Reliance Ins. Co. v. Armstrong World Indus., Inc.*, 614 A.2d 642 (N.J. Super. Ct. Law Div. 1992), modified, 625 A.2d 601 (N.J. Super. Ct. Law Div. 1993).

damage. In *Gruol Construction Co. v. Insurance Co. of North America*,¹²¹ the court applied a continuous trigger to find coverage under all third-party policies that were on the risk as dry rot damage progressed undetected for six years.¹²² This trigger involves a virtual "presumption" that damage in progressive property loss situations occurs continuously in all policies from the time of first exposure through the time of discovery.¹²³

In contrast to *Chemstar*, which adopted the manifestation trigger for third-party losses, some courts have heeded *Prudential's* limited holding and instead have applied the continuous trigger to third-party claims.¹²⁴ For example, faced with a claim over ongoing erosion and destruction of property in *Stonewall Insurance Co. v. City of Palos Verdes Estates*,¹²⁵ a California court of appeal held that all insurers on the risk throughout the period of damage were obligated to indemnify under a standard 1966 Comprehensive General Liability policy.¹²⁶ In *Stonewall*, defective maintenance and construction of a city storm

121. 524 P.2d 427 (Wash. Ct. App. 1974).

122. *Id.* at 430. In *Gruol*, the insured constructed an apartment building in 1963. Five years later, the purchaser sued the insured for dry rot damage caused by dirt which was negligently piled against the building's box sills during construction. *Id.* at 429. The court found that the dry rot constituted an "occurrence" during the policy period and that the continuous nature of the damage required coverage under both policies in effect as it progressed. *Id.* at 429-30.

123. In application, as in theory, the continuous trigger assumes that progressive loss occurs as an ever-deteriorating continuum rather than in an intermittent fashion. Property damage must actually be related to or result from a continuous process to be considered continuous loss. For example, before allowing continuous trigger liability, New Jersey law requires the insured to establish (1) that property damage occurred during each policy period and (2) that damage was a part of a continuous and indivisible process of injury. *Chemical Leaman Tank Lines v. Aetna Casualty & Sur. Ins. Co.*, 817 F. Supp. 1136, 1153-54 (D.N.J. 1993); see also *Villella v. Public Employees Mut. Ins. Co.*, 725 P.2d 957 (Wash. 1986).

124. *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663, 672 (Ct. App.) (applying the concern and analysis of *Prudential* to find the continuous trigger appropriate for third-party claims), review granted, 834 P.2d 1147 (Cal. 1992); *Montrose*, 5 Cal. Rptr. 2d at 365-67 (distinguishing *Prudential* because of the differences between first- and third-party coverage); *Great Southwest Fire*, 280 Cal. Rptr. at 250 (finding that the *Prudential* decision suggested a different rule for third-party cases).

125. 9 Cal. Rptr. 2d 663 (Ct. App.), review granted, 934 P.2d 1147 (Cal. 1992).

126. *Id.* at 672. The court's analysis of the 1966 standardized policy should vary little from the analysis of the revised 1973 standardized policy. Both policies are substantially similar in all relevant portions, as discussed *supra* notes 47-53.

drain "periodically and consistently" contributed to the erosion and destruction of a third party's property.¹²⁷ Though it rejected the manifestation rule, the court adopted the analytical framework of the first-party policy decision in *Prudential* to reach its holding.¹²⁸

First, the court looked to the reasonable expectations of the insured and found that the inclusion of "occurrence" and "continuous exposure" in the liability policies would reasonably lead the insured to expect coverage under all policies.¹²⁹ Next, the court emphasized that the insurance industry was aware of these potential ramifications of an "occurrence" based policy and had established corresponding reserves.¹³⁰ In so holding, the court framed the definition of contingency in terms of the insured's knowledge of liability: if the loss is unknown to the insured, it is still contingent and insurable.¹³¹

In a similar case just prior to *Stonewall*, a separate division of the same California appeals district also adopted the continuous trigger. In *Montrose Chemical Corp. v. Admiral Insurance Co.*,¹³² the court held that when "damage is continuous or progressive throughout successive policy periods, coverage is triggered under the policies in effect for all periods."¹³³ *Montrose* involved liability for property contamination resulting from the insured's operation of a hazardous waste disposal facility.¹³⁴ The court noted that triggering coverage under a liability policy

127. *Stonewall*, 9 Cal. Rptr. at 670.

128. *Id.* at 673.

129. *Id.* at 672.

130. *Id.* at 672-73.

131. As the court explained,

the risk of the Papworth claim was contingent or unknown at least until . . . Papworth filed his government claim against the city [As stated in *Prudential*], 'Determining when appreciable damage occurs such that a reasonable insured would be on notice of a potentially insured loss is a factual matter for the trier of fact.' While enunciated in the context of first-party/property damage insurance, this proposition appears equally applicable to the question of contingency in third-party/liability insurance.

Id. at 678 (citation omitted); see *infra* notes 197-234 and accompanying text (discussing the "loss-in-progress" doctrine) and notes 177-97 (discussing reasonable expectations).

132. 5 Cal Rptr. 2d 358 (Ct. App. 1992).

133. *Id.* at 364.

134. *Id.* at 360.

did not hinge on the timing of the cause or discovery of the injury, but rather focused solely on the damaging effect.¹³⁵ In applying this trigger, the court emphasized the distinctions between first- and third-party liability policies, differing public policy concerns in disputes between insurers and those between an insured and the insurer, and also the fundamental factual differences encountered in continuous loss.¹³⁶

*The Injury-in-Fact Trigger*¹³⁷

Several courts have applied a more flexible and fact-specific approach recognized as the "injury-in-fact" trigger.¹³⁸ Application of this trigger requires protracted evidentiary proceedings and tends to increase the expense of litigation, as the court must ascertain when "in fact" injury occurred.¹³⁹ Damage could be found to have occurred at either discrete points in time or continuously over many years. As a result, coverage is not limited to any particular point, such as manifestation, but is triggered whenever damage can be proven to have occurred. Because of

135. *Id.* at 364.

136. The court set forth its reasoning as follows:

To begin with, some courts are oblivious to the distinction between first- and third-party policies, applying rules developed under the language of one indiscriminately to the other. Some courts fail to distinguish between the rules of interpretation applicable to a dispute between insured and insurer and those controlling a dispute between carriers to allocate a loss already paid to the insured. The interpretation may also differ depending upon whether the issue concerns coverage for bodily injury or property damage or both, and depending upon whether the court is addressing a single event resulting in immediate injury (an explosion), a single event resulting in delayed or continuing injury (a chemical spill), or a continuing event resulting in single or multiple injuries (exposure to asbestos or toxic wastes).

Id. at 363-64 (citations and footnote omitted).

137. One court, when recently applying this trigger to property damage rather than bodily injury claims, found the phrase "damage-in-fact" to be more appropriate. *Maryland Casualty Co. v. W.R. Grace & Co.*, No. 91-9322, 1993 WL 335115 (2d Cir. Sept. 1, 1993).

138. *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 764-65 (2d Cir. 1984); *W.R. Grace & Co.*, 4 F.3d at 162; *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474, 478 (E.D. Mich.), *supplemented*, 727 F. Supp. 1524 (E.D. Mich. 1989); *United States v. Conservation Chem.*, 653 F. Supp. 152 (W.D. Mo. 1986);

139. *See Levin & Gorham, supra* note 87, at 17.

the technical difficulties in ascertaining when damage actually occurs in long-term damage cases such as environmental contamination, this trigger can be very difficult to apply with precision.¹⁴⁰

In *Dow Chemical Co. v. Associated Indemnity Corp.*,¹⁴¹ a Michigan District Court analyzed a series of product-related property damage claims and concluded that the injury-in-fact trigger was most appropriate.¹⁴² The *Dow* claims involved a defective mortar additive that promoted the accumulation of rust and eventually led to expansion and cracking.¹⁴³ The court found that the language of the comprehensive general liability policy at issue clearly supported the injury-in-fact trigger:

Absolutely nothing in the policy language suggests that an event can trigger coverage prior to the time that the event results in property damage. By the same token, nothing suggests that exposure to conditions triggers coverage prior to the time that property damage results from such exposure. Moreover, the policy language does not even hint that property damage must be known to anyone in order to trigger coverage. Likewise, nothing in the policy language indicates that property damage does not exist unless someone knows about it.¹⁴⁴

The court concluded that the only appropriate trigger is one that corresponds to the factual record detailing the actual progression of property damage.¹⁴⁵

Similarly, in *Maryland Casualty Co. v. W.R. Grace & Co.*,¹⁴⁶ the Second Circuit applied a "damage-in-fact" trigger to a third-party dispute regarding property damage caused by the presence and removal of asbestos.¹⁴⁷ To trigger coverage, the court stated that the insured must prove "the cause of the occurrence, the result, and that the result occurred during the policy period."¹⁴⁸

140. See *id.* at 13-14.

141. 724 F. Supp. 474 (E.D. Mich. 1989).

142. *Id.* at 486.

143. *Id.* at 477.

144. *Id.* at 481.

145. *Id.* at 487.

146. No. 91-9322, 1993 WL 335115 (2d Cir. Sept. 1, 1993).

147. *Id.* at *6.

148. *Id.* at *12 (citing *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748

When damage occurs in a continuum, multiple policies can correspondingly be triggered, independent of discovery.¹⁴⁹ Similar to bodily injury precedent, the court held that "the [r]elevant language in the insurance policies supports a damage-in-fact trigger for property damage claims."¹⁵⁰

REACHING AN APPROPRIATE RECONCILIATION FOR THIRD-PARTY LOSSES

Theoretically, the trigger of coverage rules appear to create a suitable guide for courts and lawyers involved with continuous loss litigation. In reality, however, their existence adds very little certainty in predicting how a particular court will hold. As one judge has noted,

reference to trigger theories is more useful in describing what has been decided than in determining what the decision should be in a given case. The Court can discern no consistent pattern in the myriad trigger cases that prescribes the specific trigger theory to apply in a specific type of case.¹⁵¹

The array of holdings in third-party continuous loss cases, however, are not necessarily irreconcilable. Analysis of third-party holdings reveals distinct trends that can help clarify how courts have reached their respective decisions. Such an analysis is also crucial for determining the appropriate trigger for future third-party continuous loss cases.

The Importance of Policy Interpretation

Because an insurance policy is, at its base level, a contract between two parties, interpretation of the policy language must be the first guide in resolution of continuous loss coverage issues. Given the standardized nature of insurance policies, an

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

149. *Id.* at *11.

150. *Id.* at *6. The court in *Grace* was interpreting New York law, which has a well developed body of continuous bodily injury case law adopting the injury-in-fact trigger. *See generally* *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119 (D.C. Cir. 1986) (applying New York law); *American Home Prods.*, 748 F.2d 760.

151. *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474, 479 (E.D. Mich.), *supplemented*, 727 F. Supp. 1524 (E.D. Mich. 1989).

explanation for the wide disparity in third-party holdings would seem elusive. However, the terms within third-party policies, most notably "occurrence" and "property damage," lend themselves to a wide variety of interpretations.

Defining the "Occurrence"

Because a liability policy provides coverage only for occurrences during the policy period which result in property damage, determining whether there has been an "occurrence" is of paramount importance.¹⁵² Because an "occurrence" as defined in a liability policy eventually must result in "property damage," interpretation of these terms is highly interrelated and often virtually synonymous.¹⁵³ Even so, the policy requires only that an occurrence, and not necessarily actual property damage, happen during the policy period. Frequently, the result-oriented nature of insurance litigation encourages courts to interpret the relevant provisions in light of the equity considerations of the case at bar rather than developing a consistent or predictable approach to continuous loss issues.¹⁵⁴ Independent evaluation of these policy terms, however, can also result in an equitable interpretation.

Courts adopting the continuous and injury-in-fact triggers tend to tackle the interpretation of "occurrence" with a careful emphasis on the wording and context of other relevant provisions within the insurance policy.¹⁵⁵ Most frequently, these

152. For the language of the standard comprehensive general liability policy, see *supra* notes 50-51 and accompanying text.

153. See *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1547 n.11 (C.D. Cal. 1992). Disputes regarding the interpretation of "occurrence" also arise when applying "per occurrence" policy limits to determine an insurer's total liability after coverage is triggered. For a discussion of these issues, see Michael P. Sullivan, Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount Per Accident or Occurrence?*, 64 A.L.R.4th 668 (1988).

154. *Standard Asbestos Mfg. & Insulating Co. v. Royal Indem. Co.*, No. CV-80-14909, slip op. at 9 (Mo. Cir. Ct. Apr. 3, 1986); see, e.g., *Dayton Indep. Sch. Dist. v. National Gypsum Co.*, 682 F. Supp. 1403, 1409 (E.D. Tex. 1988), *rev'd and dismissed for lack of jurisdiction sub nom. W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865 (8th Cir. 1990).

155. See, e.g., *American Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954, 955 (Colo. Ct. App. 1990).

courts emphasize that the policy language does not contain any requirements, implicit or explicit, that property damage be "manifest" at any particular point in time in order to effectuate a claim.¹⁵⁶ Rather, all that is required for an occurrence to trigger coverage is that property damage occur within the policy period. In *Montrose*, for example, the court stated that "[n]othing about this language suggests a manifestation or discovery requirement and nothing about it persuades that an expectation of coverage for a continuing injury under successive policies is unreasonable."¹⁵⁷

In the absence of such a requirement, these courts conclude that confining coverage to the insurer on the risk at manifestation would be an unjustified limitation of the liability policy.¹⁵⁸ Consequently, because progressive property loss, regardless of whether it is manifest, occurs during multiple policy periods, a continuous or injury-in-fact trigger theory is applicable.¹⁵⁹

In defining "occurrence" as actual injury within a policy period and not simply the ultimate manifestation of damage, courts that adopt injury-oriented triggers also note the availability of "claims-made" liability policies.¹⁶⁰ "Claims-made," or "discov-

156. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 366 (Ct. App.), review granted, 862 P.2d 661 (Cal. 1992); *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249, 254 (Ct. App. 1991); *Garriott Crop Dusting Co. v. Superior Court*, 270 Cal. Rptr. 678, 682-83 (Ct. App. 1990); *Pinkard*, 806 P.2d at 955-56; *Harford County v. Harford Mut. Ins. Co.*, 610 A.2d 286, 294-95, (Md. 1992).

157. *Montrose*, 5 Cal. Rptr. 2d at 366.

158. See *infra* notes 177-97 and accompanying text (discussing analysis of insurance contract language by the courts).

159. The court in *Harford*, for instance, defended this outcome:

Nothing in the language of the policies, affording words their ordinary and accepted meanings, requires that the claimed property damage actually be discovered or manifested during the policy period; rather, it is whether property damage, as defined in the policies, "occurred" within the policy period and within the meaning of the word "occurrence" in the policies.

Harford, 610 A.2d at 294. "Rather, coverage is provided if property damage occurs during the policy period. Property damage here triggers coverage when actual damages are sustained." *Pinkard*, 806 P.2d at 955-56.

160. See, e.g., *Montrose*, 5 Cal. Rptr. 2d at 367; *Stanley v. Fire Ins. Exch.*, 274 Cal. Rptr. 157, 161 (Ct. App. 1990) (distinguishing claims-made policies from policies covering losses that "happen" during the policy period); *Pinkard*, 806 P.2d at 955 (applying an injury-in-fact trigger to an action involving the continuous corrosion of a roof instead of the more confined "claims-made" policy).

ery," policies are generally less expensive than the "occurrence" based counterparts at issue in continuous loss litigation. A claims-made policy indemnifies for only those liability claims brought against the insured during the policy period.¹⁶¹ Application of the manifestation trigger to an "occurrence" based policy, many courts have reasoned, would unjustly transform it into the cheaper, claims-made variety insurance policy by limiting coverage to the insurer on the risk at the time of discovery.¹⁶²

In contrast, courts that adopt the manifestation trigger in the third-party context construe the insured "occurrence" as synonymous with the manifestation or discovery of actual loss.¹⁶³ These holdings suggest that, unlike bodily injury claims, property damage occurs only when it becomes appreciable and results in loss of value.¹⁶⁴ In addition, these cases note that the difficulty in determining when damage begins and progresses can be avoided through use of the manifestation trigger.¹⁶⁵ Courts adopting this position cite to the longstanding holding of *Remmer v. Glens Falls Indemnity Co.*¹⁶⁶ and the more recent first-party manifestation holding in *Prudential*¹⁶⁷ as support

161. 2 FREEDMAN, *supra* note 4, § 11:7.

162. "[A]pplication of the 'manifestation of loss' rule to a CGL 'occurrence' policy would transform it into a 'claims made' policy." *Montrose*, 5 Cal. Rptr. 2d at 367; see also *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663, 672-73 (Ct. App.) (rejecting a manifestation-based coverage for a "continuous trigger" to avoid providing the insurance companies with a windfall), *review granted*, 834 P.2d 1147 (Cal. 1992). But see *Jackson v. Welco Mfg.*, 612 So. 2d 743, 745 (La. Ct. App. 1992) (rejecting the argument that a manifestation trigger converts into a claims-made policy).

163. See, e.g., *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986) (determining in a claim for damage from hazardous waste leakage that occurrence takes place when injuries manifest themselves); *American Home Ins. Co. v. Libbey-Owens-Ford Co.*, 786 F.2d 22, 31 (1st Cir. 1986); *Bartholomew v. Ins. Co. of N. Am.*, 502 F. Supp. 246, (D.R.I. 1980), *aff'd sub nom. Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27 (1st Cir. 1981); *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267 (Ind. Ct. App. 1976); *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 7 Cal. Rptr. 2d 53, 56 (Ct. App. 1992) (stating that an occurrence is not necessarily when the wrong was committed, but when appreciable loss is suffered).

164. See, e.g., *Mraz*, 804 F.2d at 1328; *Pines of La Jolla*, 7 Cal. Rptr. 2d at 56.

165. *Mraz*, 804 F.2d at 1328 ("In [delayed discovery] cases we believe the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves.")

166. 295 P.2d 19 (Cal. Ct. App. 1956).

167. *Prudential-LMI Commercial Ins. Co. v. Superior Court*, 798 P.2d 1230 (Cal.

for the proposition that coverage should be triggered when appreciable damage occurs.¹⁶⁸

In *Remmer*, large quantities of rock and soil slid from the plaintiff's land onto a neighbor's property several years after the soil had been graded and filled.¹⁶⁹ At issue was a comprehensive personal liability policy in effect when the property was filled but not at the time of the damage.¹⁷⁰ The California Court of Appeals held that the covered occurrence transpired when the soil actually slid, stating "[t]he general rule is that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed, but the time when the complaining party was actually damaged."¹⁷¹ Reliance on the *Remmer* holding in continuous loss litigation, however, is misplaced. On its face, *Remmer* stands for no more than the proposition that an "occurrence" is defined not as the time of the wrongful and ultimately injurious act, but rather whenever damage actually results. For example, when damage is caused by a defectively constructed roof, the insured "occurrence" is not the time of defective construction but at some later point when damage results. Consequently, the holding in *Remmer* supports the continuous trigger as well. Even so, *Remmer* did not involve continuous and progressive loss, but instead involved damage confined to a discrete and identifiable incident. As a result, its fact-oriented equation of damage with "manifestation" does not readily translate to progressive property loss situations.¹⁷²

1990).

168. See, e.g., *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541 (C.D. Cal. 1992); *Pines of La Jolla*, 7 Cal. Rptr. 2d 53; *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431 (Ct. App. 1990); *Transamerica Ins. Co. v. Safeco Ins. Co. of N. Am.*, 472 N.W.2d 5 (Mich. Ct. App. 1991).

169. *Remmer*, 295 P.2d at 19.

170. *Id.* The comprehensive personal liability policy in dispute was issued to the plaintiffs in 1945. *Id.* at 20. The term "occurrence" was defined in the policy as "an accident, or a continuous or repeated exposure to conditions, which results in injury during the policy period, provided the injury is accidentally caused." *Id.*

171. *Id.* at 21; see also *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267, 270 (1976) (holding that the party insuring at the time the damage becomes apparent is responsible for all of the injury, even if that party was not the insurer when the wrongful act occurred).

172. See, e.g., *California Union Ins. Co. v. Landmark Ins. Co.*, 193 Cal. Rptr. 461

Application of the first-party manifestation holding in *Prudential*¹⁷³ is also inapposite. Equating "property damage" in third-party policies with the "inception of the loss" in first-party policies negates the express differences in the terminology and goals of each policy. As generally understood, "property damage" is not limited in scope to the beginning or completion of a particular happening, but instead can encompass the entire progression or parts thereof.¹⁷⁴ "Inception," however, clearly contemplates the commencement of a particular event.¹⁷⁵ Thus, "inception" would need to be limited to some starting point relative to the damage, such as the beginning of the damage itself or its appreciable manifestation. Most importantly, in defining the "inception of the loss" as the manifestation of damage in first-party holdings, courts have made a policy choice to increase the likelihood of an insured's recovery in spite of the twelve-month suit limitations provision.¹⁷⁶ Because third-party liability policies do not contain a similar restriction or its attendant concerns, however, "property damage" should not be interpreted so narrowly.

Doctrine of Reasonable Expectations

When the policy language of an insurance contract is unclear, it is well established that lingering ambiguity or uncertainty should be resolved against the insurer and, where possible, in accordance with the reasonable expectations of the insured.¹⁷⁷

(Ct. App. 1983) (stating that *Remmer* was "inapposite" to the continuous loss case at bar). It should be noted that the *Remmer* decision also predates the change in CGL policy language from "accident" to "occurrence."

173. *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (Cal. 1990).

174. *Webster's Dictionary* defines "occur" as "to be found or met with . . . to come into existence: HAPPEN." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 817 (9th college ed. 1991). An "occurrence" is defined as "the action or instance of occurring." *Id.*

175. *Webster's Dictionary* defines "inception" as "an act of process, or instance of beginning: COMMENCEMENT." *Id.* at 608.

176. *See, e.g., Prudential*, 798 P.2d at 1246 (finding that, as between two first-party insurers, the party on the risk when the damage first manifests itself must pay the entire claim); *see also infra* notes 235-72 and accompanying text (discussing the role of public policy).

177. Justification for this doctrine stems from the notion that insurance policies are essentially adhesion contracts which result from a purported inequality in the bargaining process. *See* 2 FREEDMAN, *supra* note 4, § 11:2; *Harman v. American Casual-*

Consequently, a court's initial impression of the applicable policy language can have a significant influence on the outcome of a case. In continuous loss cases, courts that initially label the policy terms as ambiguous when applied to progressive property damage are more likely to apply the continuous trigger to find broad coverage and advance the interests of the insured.¹⁷⁸ In contrast, advocates of the manifestation trigger suggest that the policy terms are clearly defined and easily applied.¹⁷⁹

In both *Great Southwest Fire* and *Montrose*, the courts respectively defined the terms "property damage" and "occurrence" as ambiguous.¹⁸⁰ Use of the reasonable expectations doctrine to resolve these ambiguities led both courts to apply the continuous injury trigger.¹⁸¹ These courts noted that the "occurrence" oriented nature of third-party policies makes it reasonable for the insured to expect coverage under more than one policy for an ongoing loss.¹⁸² In both cases, the courts emphasized that the

ty Co., 155 F. Supp. 612, 614 (S.D. Cal. 1957) (stating that the reasonable expectations doctrine is used to prevent insurers from taking advantage of insureds and to prevent the weakening of policy purposes); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358 (Ct. App.), *review granted*, 862 P.2d 661 (Cal. 1992); *see also Stanley v. Fire Ins. Exch.*, 274 Cal. Rptr. 157, 160 (Ct. App. 1990) (applying reasonable expectations doctrine to a first-party homeowner's policy); *Mara v. Fire Ins. Exch.*, 271 Cal. Rptr. 620, 622 (Ct. App. 1990) (applying this doctrine to a first-party policy).

178. *See infra* notes 180-89 and accompanying text (discussing the influence of ambiguous policy terms on contract interpretation); *see, e.g., Montrose*, 5 Cal. Rptr. 2d at 366; *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249 (Ct. App. 1991); *Reliance Ins. Co. v. Armstrong World Indus.*, 614 A.2d 642 (N.J. Super. Ct. Law Div. 1992), *modified*, 625 A.2d 601 (N.J. Super. Ct. Law Div. 1993); *Gottlieb v. Newark Ins. Co.*, 570 A.2d 443 (N.J. App. Div. 1990); *Wisconsin Elec. Power Co. v. California Union Ins. Co.*, 419 N.W.2d 255 (Wis. Ct. App. 1987).

179. *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 7 Cal. Rptr. 2d 53 (Ct. App. 1992); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431 (Ct. App. 1990).

180. *Great Southwest Fire*, 280 Cal. Rptr. at 253; *Montrose*, 5 Cal. Rptr. 2d at 365 ("The dozens of judicial definitions attributed to 'occurrence' leave little room for argument about whether we are dealing with an ambiguity."); *Wisconsin Elec.*, 419 N.W.2d at 258 ("[W]ith this type of injury, there is considerable dispute as to when the injury is deemed to occur. It is therefore our duty to determine what a reasonable person in the position of the insured would have understood the words to mean.").

181. *Montrose*, 5 Cal. Rptr. 2d at 369; *Great Southwest Fire*, 280 Cal. Rptr. at 253-54.

182. *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 62 (3d Cir. 1982);

only limitation in the language of the contract was that property damage must occur during the policy period.¹⁸³ Because no greater limitations existed, the courts concluded that it would not be unreasonable for insureds to contemplate coverage under multiple policies in cases of continuous damage.¹⁸⁴

The court in *Montrose* went on to emphasize the distinctions between first- and third-party policies and their effect on a reasonable insured.¹⁸⁵ Unlike first-party insurance situations in which an insured can predict his maximum potential loss, the purchaser of a liability policy can only estimate the cost of potential adverse claims.¹⁸⁶ The danger of inadequate coverage, the court reasoned, added to an insured's expectation of coverage under successive policies in progressive loss situations.¹⁸⁷ Additionally, a twelve month limitation of suit provision, which might prompt an insured to expect a discovery requirement, does not exist in liability policies.¹⁸⁸ When considered with the operative language of the policy, the court concluded, the expectation of coverage under multiple policies was reasonable and consistent with the application of a continuous trigger.¹⁸⁹ Harmonizing the continuous or injury-in-fact triggers with the language of liability policies does not necessarily require that such language be interpreted as ambiguous.¹⁹⁰ In fact, the

Montrose, 5 Cal. Rptr. 2d 358; *Great Southwest Fire*, 280 Cal. Rptr. 249.

183. *Montrose*, 5 Cal. Rptr. 2d at 366; *Great Southwest Fire*, 280 Cal. Rptr. at 253. *Great Southwest Fire* also looked to the two-prong definition of property damage to find that insurers would have limited both prongs if such a limitation had been contemplated. See *supra* text accompanying note 51 (providing the standard property damage definition found in comprehensive general liability policies). The court in *Great Southwest Fire* found that "if the first prong was similarly limited, there would have been no need to include a special limitation applicable only to the second prong." *Great Southwest Fire*, 280 Cal. Rptr. at 254.

184. *Montrose*, 5 Cal. Rptr. 2d at 366-67; *Great Southwest Fire*, 280 Cal. Rptr. at 253.

185. *Montrose*, 5 Cal. Rptr. 2d at 365-67.

186. *Id.* at 366.

187. *Id.*

188. *Id.* at 367.

189. *Id.* at 367-68.

190. See *Maryland Casualty v. W.R. Grace & Co.*, No. 91-9322, 1993 WL 335115 (2d Cir. Sept. 1, 1993) (finding the term "occurrence" to be unambiguous and applying the injury-in-fact trigger to asbestos-related property damage); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 196 (W.D. Mo. 1986) (finding the terms

plain meaning of the relevant policy terms, independent of an insured's reasonable expectations, demands the application of injury-oriented triggers. As emphasized throughout this Note, the policies clearly delineate that coverage is contingent on an "occurrence" resulting in "injury to or destruction of property" within the policy period. Nothing else is required to happen during the policy period for coverage to be triggered. Thus, progressive deterioration as typified by continuous loss is sufficient.

Nevertheless, courts that apply the manifestation trigger also have found the policy language to be straightforward and unambiguous. For example, in *Pines of La Jolla Homeowners Association v. Industrial Indemnity*,¹⁹¹ the court found that the language of the disputed policy was "clear."¹⁹² Accordingly, the court determined the policy only contemplated coverage of damage which materialized during the policy period.¹⁹³ Some manifestation advocates in third-party situations have even applied a deviation of the reasonable expectations doctrine when interpreting the contract and have looked to the expectations of the insurer as well.¹⁹⁴ Because insurance policies are largely contracts of adhesion, however, this approach undermines the goal of guarding the "reasonable expectations" of the insured.¹⁹⁵ Looking to the expectations of the insurer not only allows in-

unambiguous and applying the injury-in-fact trigger); *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663, 671 (Ct. App.), review granted, 834 P.2d 1147 (Cal. 1992); *Harford County v. Harford Mut. Ins. Co.*, 610 A.2d 286, 287 (Md. 1992) (applying the terms of the insurance contract).

191. 7 Cal. Rptr. 2d 53 (Ct. App. 1992)

192. *Id.* at 56; see also *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431 (Ct. App. 1990).

193. *Pines*, 7 Cal. Rptr. 2d at 57.

194. The court in *Firemen's Fund*, for instance, argued that industry interpretation became especially relevant in disputes between insurers:

The general principal that ambiguities . . . must be interpreted in favor of coverage is inapplicable where, as here, the case concerns only the respective liabilities of two insurers [W]here two insurers dispute the meaning of identical standard form policy language—the meaning attached to the provisions by the insurance industry is, at minimum, relevant.

Fireman's Fund, 275 Cal. Rptr. at 434-35 (citation omitted); see also *Pines*, 761 Cal. Rptr. at 57.

195. See *supra* note 177 (discussing the justifications for the reasonable expectations doctrine).

equality in the bargaining process but also transfers it to the courtroom. Fortunately, this approach has been confined to indemnity actions between insurers.¹⁹⁶ In these actions, courts are ultimately more focused on the ramifications of their decision on the insurance industry rather than its indirect impact on future insureds.¹⁹⁷

Because the insurance contract defines the indemnity relationship between the insured and the insurer, it must be the primary focus of courts and litigants confronting progressive property damage claims. Though the loss at issue is unique, there is rarely anything unusual about the third-party insurance contracts involved. As a result, courts should not abandon traditional tools of insurance contract interpretation such as the reasonable expectations doctrine. In addition, the term "occurrence" and "property damage" must not be construed in ways which hamper the established indemnity goals of third-party insurance. Application of the manifestation trigger to liability policies circumvents the insured's understanding of coverage and forces artificial interpretations of the relevant policy terms. In light of these considerations, well-reasoned judicial opinions have adopted the continuous trigger.

*The Loss-in-Progress Rule and Notions of Fortuity*¹⁹⁸

The concept of fortuity is a significant stumbling block for many courts confronted with continuous loss claims. Because insurance is designed to protect against risks of loss and not certainties of loss, the fortuity doctrine was developed as a fun-

196. See, e.g., *Fireman's Fund*, 273 Cal. Rptr. at 434. "The general principle that ambiguities in insurance contracts must be interpreted in favor of coverage is inapplicable where, as here, the case concerns only the respective liabilities of two insurers." *Id.* (citation omitted).

197. See *infra* notes 235-72 and accompanying text (discussing public policy considerations).

198. A complete discussion of the many facets of fortuity and the loss-in-progress doctrine, even as it relates to progressive property damage, is beyond the scope of this Note. For a general discussion of fortuity in progressive property loss situations, see Antognini, *supra* note 40, at 419; Robert E. Reeder, *Fortuity: The Unnamed Exclusion and Environmental Claims Under First-Party Policy of Insurance*, in ENVIRONMENTAL CLAIMS AND PROPERTY INSURANCE COVERAGE 106 (A.B.A. Tort & Ins. Proc. Sec. 1989).

damental tenet of insurance law to determine whether an insurable contingency exists.¹⁹⁹ This limitation encourages the purchase of insurance and promotes efficient risk allocation by preventing the purchase of insurance only when known losses arise.²⁰⁰ In keeping with this policy, courts confronting continuous loss cases must avoid forcing an insurer to indemnify a risk which was no longer fortuitous when the policy was issued.

In first-party property insurance, the initial inquiry involves whether the covered peril was a fortuitous event. In this context, the "known loss" or "loss-in-progress" doctrine prohibits coverage of losses that were known to the insured at the time the insurance policy was purchased.²⁰¹ Once a loss becomes known or manifest to the insured, only the extent of damage, not the loss, is uncertain.²⁰² As a consequence, the peril is no longer fortuitous.

In third-party situations, the analogous concepts of "accident" and "fortuitous event" are employed.²⁰³ Liability policies insure

199. ROBERT E. KEETON, INSURANCE LAW § 1.3(a) (1988) (discussing risk).

A fortuitous and therefore insurable event . . . is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.

RESTATEMENT OF CONTRACTS § 291 cmt. a (1932) (emphasis added). This was adopted with approval in *Compagnie des Bauxites de Guinee v. Insurance Co. of North America*, 724 F.2d 369, 371 (3d Cir.), cert. denied, 457 U.S. 1105 (1982), and *Great Southwest Fire Insurance Co. v. Watt Industries, Inc.*, 280 Cal. Rptr. 249, 252 (Ct. App. 1991).

200. There are several reasons the concept of fortuity has been adopted as a fundamental doctrine in insurance law. First, public policy concerns counsel against insuring certainties. Second, the insurance industry believes that allowing certainties to be insured would encourage fraud and distort industry underwriting practices. Lastly, insurance does not provide a warranty, but rather a contract for indemnity if a risk occurs. See Reeder, *supra* note 198, at 108.

201. See, e.g., *Bartholomew v. Appalachian Ins. Co.*, 655 F.2d 27, 28-29 (1st Cir. 1981); *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230, 1244 n.7 (Cal. 1990); *Chu v. Canadian Indem. Co.*, 274 Cal. Rptr. 20, 25 (Ct. App. 1990). Fortuity issues also arise in determining whether a loss arises from reckless business practices or purposeful conduct. See, e.g., Marcus, *supra* note 6, at 199-217; John J. O'Leary, Jr., *Current Trends in Comprehensive General Liability Insurance Coverage for Environmental Claims: An Introduction to Some Key Coverage Issues*, in ENVIRONMENTAL COVERAGE: FROM INTERPRETATION TO LITIGATION 104-08 (1990).

202. *Chu*, 274 Cal. Rptr. at 25.

203. *Compagnie*, 724 F.2d at 372.

only those risks which are accidents or injurious exposures neither expected nor intended from the standpoint of the insured.²⁰⁴ Damage which is an unexpected or unintended consequence of the insured's conduct is a covered loss. When the damage is either expected or intended by the insured,²⁰⁵ however, there is no "occurrence" or "accident" and, correspondingly, no coverage. As a result, third-party policies move the focus of fortuity from the risk nature of the insured peril to a subjective investigation of the insured's actions and awareness of liability.

Clearly, application of the manifestation trigger to first-party property loss cases harmonizes well with the loss-in-progress rule. As in *Prudential*,²⁰⁶ once the damage manifests itself to the insured, the covered peril is no longer uncertain. Coverage of related loss by later insurers would not be appropriate because the peril is no longer contingent but certain.²⁰⁷ Only the extent of damage and the amount of loss remain undetermined, if anything. Terminating fortuity, and thus coverage, at a date earlier than discovery would effectively eliminate indemnification for progressive, delayed manifestation damage because of the twelve month suit limitation provision.²⁰⁸

Courts which adopt the manifestation trigger in third-party situations apply this construction of the loss-in-progress doctrine as well.²⁰⁹ In *Fireman's Fund*, for example, the court defined the doctrine as prohibiting coverage "where the forces which eventually lead to a loss were an immediate threat of loss when the policy was issued."²¹⁰ Thus, where the peril is manifest, there is no longer an insurable contingency. More generally,

204. See *supra* notes 50-51 and accompanying text (quoting the relevant CGL policy language).

205. See *supra* notes 48 and 50 and accompanying text (quoting applicable policy language).

206. 798 P.2d 1230 (Cal. 1990).

207. *Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963); *Snapp v. State Farm Fire & Casualty Co.*, 24 Cal. Rptr. 44 (Ct. App. 1962).

208. See *supra* notes 41-45 and accompanying text (discussing the preclusive effect of the suit limitations provision).

209. *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1551 (C.D. Cal. 1992); *Pines of La Jolla Homeowners Ass'n v. Industrial Indem.*, 7 Cal. Rptr. 2d 53, 57 (Ct. App. 1992); *Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co.*, 273 Cal. Rptr. 431, 434 (Ct. App. 1990).

210. *Fireman's Fund*, 273 Cal. Rptr. at 432 n.2.

these courts define fortuity in terms of actual damage, not the insured's awareness of liability. If the damage has been discovered, even by someone other than the insured, the loss is no longer uncertain or fortuitous and any subsequent insurers are relieved of responsibility.²¹¹

In contrast, courts applying the continuous trigger to third-party claims generally define fortuity in terms of the insured's liability rather than actual damage.²¹² In *Stonewall*, the court refuted *Fireman's Fund's* expression of contingency, stating "we cannot conceive how a loss covered by third-party liability insurance can be uninsurable when liability is unknown."²¹³ Because such policies agree to pay those sums for which the insured becomes legally obligated to pay, continuous trigger courts reason, coverage is limited to unknown liabilities.²¹⁴ In this way, actual damage may no longer be fortuitous, but coverage is still available when the insured's liability is still unknown and therefore contingent.

Similarly, in *Montrose* the court read California's statutory codification of fortuity to merely require some degree of contingent liability.²¹⁵ As a result, the court found that notification from the Environmental Protection Agency that the plaintiff was

211. The court in *Chemstar* explained the relationship between the loss in progress rule and the manifestation trigger as follows:

The loss in progress rule and the manifestation trigger complement one another and protect the insured's access to insurance: To use the current case as an example, even after plaster-pitting manifested in the first home, subsequent insurers would be willing to issue policies to Chemstar By contrast, the continuous injury trigger risks exposing the insured to gaps in coverage: Once plaster pitting manifests in the first home, a potential insurer that is aware of the heightened risk . . . would be unwilling to issue policies to Chemstar

Chemstar, 797 F. Supp. at 1551. For a more detailed analysis of how courts emphasize public policy considerations, see *infra* notes 226-61 and accompanying text.

212. See, e.g., *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358 (Ct. App.), review granted, 862 P.2d 661 (Cal. 1992).

213. *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663, 677 (Ct. App.), review granted, 834 P.2d 1147 (Cal. 1992).

214. *Stonewall*, 9 Cal. Rptr. 2d at 677; *Montrose*, 5 Cal. Rptr. 2d at 371; *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249, 252 (Ct. App. 1991); see also *Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963) (showing focus should be on insured's knowledge).

215. *Montrose*, 5 Cal. Rptr. 2d at 370.

a potentially responsible party for environmental contamination was insufficient to remove contingency.²¹⁶ However inevitable an event might be, the court reasoned, an inevitable event is still contingent if liability has not been firmly affixed to the insured.²¹⁷ In *Montrose*, the court stated that "[o]ur holding is simply that where, as here, the insured is under no legal obligation to pay and no lawsuits were filed at the time the policies were purchased, there is an insurable risk within the meaning of [California Insurance Code] sections 22 and 250."²¹⁸ Thus, these courts look to the larger goal of third-party policies as protection for the insured against liability claims. If no known liability exists at the time policy coverage begins, the risk is still fortuitous and insurable regardless of any damage that may have occurred previously.

The court in *Chemstar*, which favored the manifestation trigger, suggested that such a broad interpretation of fortuity combined with the continuous trigger creates the risk of post-manifestation insurer liability.²¹⁹ Its application, the court argued, would force an insurer to be responsible for damage which previously manifested in another insurer's policy period simply because the insured's liability was uncertain when the policy was purchased.²²⁰ Consequently, insureds would be exposed to coverage gaps when insurers aware of the manifested loss and the potential for future deterioration and liability claims would refuse to issue policies.²²¹ Such a concern, however, incorrectly presupposes a complete abandonment of the concept of fortuity.

216. *Id.*

217. *Id.*

218. *Id.* at 371. California Insurance Code § 22 reads: "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." CAL. INS. CODE § 22 (West 1992). Section 250 reads: "Except as provided in this article, any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code." *Id.* § 250.

219. *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1551 (C.D. Cal. 1992).

220. *Id.*

221. *Id.*

This perceived threat of post-manifestation insurer liability resulting from application of a continuous trigger was confronted successfully in the case of *Great Southwest Fire Insurance Co. v. Watt Industries*.²²² In *Great Southwest Fire*, the issue involved whether an insurer was liable for damages that resulted from a continuous loss that had manifested itself to a third-party homeowner during a previous insurer's period but which had only manifested itself, through the inception of legal action, to the insured some months later.²²³ In this case, the court confronted the highly probable scenario of manifestation to the injured party long before the loss is known to the insured.²²⁴ Similar to *Stonewall* and *Montrose*, the majority in *Great Southwest Fire* avoided the threat of coverage gaps by applying fortuity in relation to the insured's, not the injured third party's, knowledge.²²⁵ Because property damage occurred during both policy periods but was unknown to the insured during this time, the loss was still fortuitous and insurable by both insurers.²²⁶ Consequently, the continuous trigger was appropriate because coverage was not precluded by a certainty of liability.²²⁷ In this way, the court avoided holding a "post-manifestation" insurer

222. 280 Cal. Rptr. 249 (Ct. App. 1991). In this case, the insurance policy contained a "completed operations" provision. This provision stipulated that "[t]he company will pay . . . all sums which the insured shall become legally obligated [which are] included in the completed operations hazard" *Id.* at 251 n.1. Completed operations include "property damage arising out of operations or reliance upon a representation or warranty" *Id.* The court did not distinguish the policy from a standard CGL as a result of this provision, however. *Id.* at 251-56. Instead, it relied on the definition of "occurrence" as provided in the standard CGL definitions section. *Id.* at 258.

223. *Id.* at 252.

224. The court commented on the issues implicated in the case before it:

The issues in this case concern the availability and extent of liability insurance coverage for progressive damage which is first manifest *before* the policy period but which continues *during* the policy period. The issues arise because of the unique context of third-party liability insurance creates the likelihood that damage will be manifest (i.e. observable to the injured party) long before it is known to the insured or the insurer.

Id. (emphasis added).

225. *Id.* at 252-53.

226. *Id.*

227. *Id.* at 255.

liable for a known loss, as advocates of the manifestation trigger fear.

The dissent in *Great Southwest Fire*, however, supported application of the manifestation rule and argued that the majority did not interpret "occurs" properly with respect to "occurrence."²²⁸ Properly interpreted, the dissent argued, the insured loss was the damage that had previously manifested itself to a third party.²²⁹ Therefore, the risk was no longer contingent when the subsequent policy was purchased regardless of the insured's ignorance of liability.²³⁰ Thus, the dissent avoided the threat of post-discovery insurer liability by interpreting loss as the manifestation of damage to the injured party, rather than with respect to the insured's knowledge.²³¹

The problems that proponents of the manifestation trigger foresee are misplaced. As the outcome in *Great Southwest Fire* demonstrated, the continuous trigger does not promote coverage gaps or violate the fortuity doctrine. It is well established in insurance law that once the responsible insurers are determined for a particular loss, future insurers are relieved of responsibility for that loss.²³²

Once the contingent event insured against has occurred during the period covered, the liability of the carrier becomes *contractual* rather than *potential* only, and the sole issue remaining is the extent of its obligation, and it is immaterial that this may not be fully ascertained at the end of the policy period.²³³

228. *Id.* at 258 (Huffman, J., dissenting).

229. *Id.*

230. The dissent argued:

[O]ne cannot usefully discuss when a loss "occurs" for coverage purposes without acknowledging some beginning and potential ending point of the loss Here, the loss started and was discoverable by the homeowners' association . . . under the *Remmer* test some three months before [insured's] policy period began. It was then a manifested loss.

Id. at 258 (citation omitted).

231. *Id.*

232. *Harman v. American Casualty Co.*, 155 F. Supp. 612, 614 (S.D. Cal. 1957); *Sabella v. Wisler*, 377 P.2d 889 (Cal. 1963); *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277, 280-81 (Ct. App. 1988); *Snapp v. State Farm Fire & Casualty Co.*, 24 Cal. Rptr. 44 (Ct. App. 1962).

233. *Snapp*, 24 Cal. Rptr. at 46 (citations omitted).

Consequently, policies triggered by an insured's liability are responsible for all related damage, even progressive deterioration which occurs in the future under other carriers. The fortuity doctrine is in full force as it terminates responsibility of future insurers for the liability once it becomes known to the insured.

As demonstrated, the concept of fortuity should be defined in relation to the policy which insures the risk. The continuous trigger can only be conceptualized as violating the fortuity doctrine when the trigger mechanism is misidentified as the manifestation of damage rather than the insured's knowledge of liability. Comprehensive General Liability policies do not insure damage as such; rather they insure a party's potential liability for damage or loss. Thus, defining a known loss in relation to a third party's knowledge of loss rather than the insured's knowledge of liability divorces the implementation of the policy from its goals and express policy language. Liability insurance may involve three parties, but only the insured and the insurer are parties to the contract. When property damage occurs over successive policy periods, triggering all policies on the risk through the insured's actual notice of liability is appropriate and does not violate the fortuity doctrine.

Consequently, the manifestation trigger should be limited to first-party progressive loss situations such as in *Prudential*.²³⁴ First-party policies undertake to protect the insured from the risk of property damage within the policy period. Unlike liability insurance, the limitation of suit provision in first-party policies has forced courts to define fortuity in a manner that maximizes coverage. In addition, it is appropriate to define the known loss in terms of manifested damage because there is no intermediary party involved. A first-party insured would be expected to know of damage, whereas a third-party insured may not.

Public Policy Considerations

Ultimately, the trigger a particular court adopts reflects that court's considered or implied view toward the role of law in shaping insurance policy. Because the insurance industry is at

234. *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (Cal. 1990).

once a political, regulatory, and cultural phenomenon,²³⁵ public policy concerns are difficult to avoid. The cases illustrate that courts applying the manifestation trigger champion public policy as necessitating the creation of consistent, bright line rules to promote insurance industry interests and indirectly benefit insureds.²³⁶ In contrast, continuous trigger proponents tend to interpret a policy's contractual language in light of public policy considerations such as the reasonable expectations of the insured, advancing the plain language of the policies and the consideration of injured third parties.²³⁷ Public policy, however, should not overshadow the implementation of the express contractual provisions that outline the established indemnity relationship of the insurance policy.

The parties to the litigation are a primary influence on the direction a court will take in analyzing public policy. Indemnity and subrogation actions between insurers tend to produce opinions concerned with potential insurance industry ramifications.²³⁸ In contrast, actions by an insured or injured third party against an insurer generally encourage greater emphasis on adequately compensating the claimant.²³⁹ Judicial efforts to preserve a right of action by the insured or to compensate innocent third-party beneficiaries have frequently played a dominant role in the adoption of a particular trigger in individual cases.²⁴⁰

235. See, e.g., Richard D. Barger & Eugene E. Miller, "Speaking with One Voice": Constitutional Failure of State Insurance Government Ownership Statutes, 26 U.S.F. L. REV. 657 (1992); Benjamin Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 HARV. L. REV. 1782 (1987); Anne C. Cicero, Note, *Strategies for the Elimination of Sex Discrimination in Private Insurance*, 20 HARV. C.R.-C.L. L. REV. 211 (1985); Christopher Keele, Note, *State Insurance Takeover Acts: A Constitutional Analysis After Edgar v. Mite*, 59 IND. L.J. 255 (1983/1984).

236. *Chemstar*, 797 F. Supp. at 1551; *Prudential*, 798 P.2d at 1246-47; *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277, 282 (Ct. App. 1988); *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267, 272 (Ind. Ct. App. 1976). 237. *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663, 672, 677 (Ct. App.), review granted, 834 P.2d 1147 (Cal. 1992); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 365-66 (Ct. App.), review granted, 862 P.2d 661 (Cal. 1992); *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 2d 249, 256 (Ct. App. 1991); *Harford*, 610 A.2d at 295.

238. *Pines*, 7 Cal. Rptr. 2d at 60; *Fireman's Fund*, 273 Cal. Rptr. at 435.

239. *Great Southwest Fire*, 280 Cal. Rptr. at 249.

240. See, e.g., *Dayton Indep. Sch. Dist. v. National Gypsum Co.*, 682 F. Supp. 1403

In *Fireman's Fund Insurance Co. v. Aetna Casualty & Surety Co.*,²⁴¹ a third-party liability dispute, the court determined that the nature of the action was particularly important and used it to justify its heavy reliance on a first-party continuous loss case.²⁴² Confronted with a coverage dispute between insurers, the court in *Fireman's Fund* found that "cases which interpret similar policy language in a dispute between the insured and the insurer are distinguishable."²⁴³ The court explained that this distinction was critical because actions between insurers allow the courts to adopt rules based more on public policy considerations than the policy language itself.²⁴⁴ In addition, courts did not need to be concerned with the compensation of innocent third parties when remedying insurer-only disputes.²⁴⁵

Without these compensation concerns, these courts look primarily to the impact of their holding on the future conduct of the insurance industry. In *Fireman's Fund*²⁴⁶ and *Pines of La Jolla Homeowners Association v. Industrial Indemnity*,²⁴⁷ the courts noted that the industry understanding of an "occurrence" policy was "to anchor all losses in the one policy in effect at the onset of the condition rather than apportion [the loss] over several policies."²⁴⁸ Unlike cases involving insureds, the reason-

(E.D. Tex. 1988) (observing that judicial desires to maximize coverage influence trigger decisions), *rev'd and dismissed for lack of jurisdiction sub nom. W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865 (5th Cir. 1990); *Lac d'Amiante du Que., Ltee., v. American Home Assurance Co.*, 613 F. Supp. 1549, 1551 (D.N.J. 1985) (noting the desire of some courts to maximize an insured's coverage); *Mara v. Fire Ins. Exch.*, 271 Cal. Rptr. 620, 622 (Ct. App. 1990) (stating that some courts decide triggers almost without reference to the policy language).

241. 273 Cal. Rptr. 431 (Ct. App. 1990).

242. *Id.* at 434.

243. *Id.* at 435.

244. "That fact is the critical one because it permitted the court to adopt a rule based more upon public policy considerations; there was no need to focus on the insurance policy language interpreted in light of the insured's reasonable expectation of coverage." *Id.* at 434 (citation omitted).

245. *Id.*

246. 273 Cal. Rptr. 431 (Ct. App. 1990).

247. 7 Cal. Rptr. 2d 53 (Ct. App. 1992).

248. *Pines*, 7 Cal. Rptr. 2d at 57.

able expectations doctrine²⁴⁹ of interpreting ambiguities in favor of the insured was deemed inapplicable.²⁵⁰

Some courts adopting the manifestation rule in both first- and third-party situations, however, do not overlook the insured's interests completely but instead approach them indirectly.²⁵¹ These courts suggest that the rule provides greater certainty to insurers in an industry that demands stability.²⁵² Application of the manifestation trigger, they argue, grants insurers the ability to estimate risks more accurately, thus allowing the technical subsystem of insurance to function most effectively.²⁵³ For example, in *Prudential*²⁵⁴ the court hoped to promote the interests of both the insurer and the insured by adopting the manifestation trigger, stating that such a rule

promotes certainty in the insurance industry and allows insurers to gauge premiums with greater accuracy. Presumably this should reduce costs for consumers because insurers will be able to set aside proper reserves for well-defined coverages and avoid increasing such reserves to cover potential financial losses caused by uncertainty in the definition of coverage.²⁵⁵

Because of this certainty and the knowledge that insurers no longer on the risk will be free from liability for losses long after their policies have expired, advocates of the manifestation trigger assert that the insureds' interests will be furthered by strengthening public access to liability insurance.²⁵⁶

249. See *supra* notes 177-97 and accompanying text (discussing the reasonable expectations doctrine and policy interpretation).

250. "The general principle that ambiguities in insurance contracts must be interpreted in favor of coverage is inapplicable where, as here, the case concerns only the respective liabilities of two insurers." *Fireman's Fund*, 273 Cal. Rptr. at 435 (citation omitted; see also *Pines*, 7 Cal. Rptr. 2d at 57 (applying the industry understanding of the policy language and adopting the reasoning of *Fireman's Fund*)).

251. *Carty v. American States Ins. Co.*, 9 Cal. Rptr. 2d 1, 4-5 (Ct. App. 1992); *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (Cal. 1990).

252. *Carty*, 9 Cal. Rptr. 2d at 4-5.

253. *Id.*

254. *Prudential*, 798 P.2d 1230.

255. *Id.* at 1246 (quoting *Home Ins. Co. v. Landmark Ins. Co.*, 253 Cal. Rptr. 277, 282 (Ct. App. 1988)).

256. See, e.g., *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 797 F. Supp. 1541, 1551 (C.D. Cal. 1992).

In contrast, the use of the continuous trigger of coverage is more prevalent in actions between the insured and the insurer in which an innocent third party or the insured merit compensation.²⁵⁷ Unlike first-party insurance where policies are purchased solely for the benefit of the insured, inadequate liability coverage exposes third parties to loss as well. Because of the nature of continuous property damage claims, these losses could be quite large.²⁵⁸ As a result, coverage under multiple policies avoids the constraints of individual policy limits and generally facilitates adequate compensation.

Opponents of the continuous trigger argue that its use exposes insurers to unpredictable risks, endless liability and depleted reserves.²⁵⁹ Such concerns do have merit. Continuous trigger advocates find support for their holdings in insurance industry commentary on the 1966 and 1973 revisions of the standard Comprehensive General Liability policy, which recognizes potential multi-policy liability for continuous losses.²⁶⁰ In *Stonewall*, the court even recognized the unpredictability for insurers that accompanies such liability.²⁶¹ The court reasoned, however, that the issue regarded a choice between whether the insured or the insurers should bear the cost of the unexpected liability.²⁶² Without hesitation, the court found that the question should be resolved in favor of the insureds and their reasonable expectations of coverage after paying premiums to transfer their risk.²⁶³

257. *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663 (Ct. App.), *review granted*, 834 P.2d 1147 (Cal. 1992); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358 (Ct. App.), *review granted*, 862 P.2d 661 (Cal. 1992); *Great Southwest Fire Ins. Co. v. Watt Indus., Inc.*, 280 Cal. Rptr. 249 (Ct. App. 1991); *American Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954 (Colo. Ct. App. 1990); *Harford County v. Harford Mut. Ins. Co.*, 610 A.2d 286 (Md. 1992).

258. *See supra* notes 120-36 (detailing recent verdicts and claims in continuous loss cases).

259. *Chemstar*, 797 F. Supp. at 1551; *see also Prudential*, 798 P.2d at 1246-47 (advocating the use of the manifestation rule in first party progressive property loss cases).

260. *See, e.g., Stonewall*, 9 Cal. Rptr. 2d at 672-73. Of course, manifestation advocates also are able to find supporting commentary from the period of the revisions.

261. *Id.* at 672.

262. *Stonewall*, 9 Cal. Rptr. 2d at 673.

263. *Id.*

Clearly, the impact of continuous loss holdings on the insurance industry and their subsequent ramifications on the future availability of insurance are of great significance and cannot be ignored. Because of the upsurge in legal liability for continuous losses, their unpredictable nature and lengthy gestation, and the ever-present effects of inflation, an insurer's ability to accurately gauge liability premiums is made difficult. In response, courts have been motivated to use the manifestation trigger to assist insurers in minimizing their losses from inadequately priced premiums and dwindling reserves.²⁶⁴ However, this response releases insurers from their contractual duties as a result of their own negligence. In addition, adoption of a manifestation trigger does not necessarily increase access to insurance or guarantee industry stability.

Premiums paid under current liability policies are determined in accordance with the expected losses of the insured.²⁶⁵ These premiums are not only designed to reflect the level of perceived risk but also to achieve an efficient allocation between loss prevention and risk distribution through the purchase of insurance.²⁶⁶ As a consequence, excessive concentration on the equi-

264. Of course, across-the-board adoption of the manifestation trigger would not necessarily reduce an insurer's overall liability for continuous loss claims. Were the continuous or injury-in-fact triggers to be universally adopted, more insurers would bear the burden of indemnifying insureds. Depending on how an insured's claim was apportioned among insurers, a particular insurer might only be liable for a percentage of the total cost representing only a portion of its maximum policy liability. Issues of apportionment among successive insurers, however, is beyond the scope of this Note. Cases which have discussed apportionment include: *Chemical Leaman Tank Lines v. Aetna Casualty & Sur. Ins. Co.*, 817 F. Supp. 1136, 1153 (D.N.J. 1993) (adopting joint and several liability); *Northern States Power Co. v. Fidelity & Cas. Co.*, 504 N.W.2d 240 (Minn. Ct. App. 1993); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508 (Pa. 1993) (holding that each triggered policy bears potential liability for entire claim); *Gruol Constr. Inc. v. Insurance Co. of N. Am.*, 524 P.2d 427, 431 (Wash. Ct. App. 1974) (placing burden of apportionment on insurers).

265. KENNETH S. ABRAHAM, *DISTRIBUTING RISK 2* (1986). In its simplest form, risk is determined by multiplying the probability of a loss by the magnitude of the loss if it occurs. *Id.* The risk is then distributed from the individual to the insurance company. The insurance company then manages the risk by distributing it among large numbers of individuals or businesses through the insurance of different classes of insureds. *Id.* at 1-2.

266. *Id.* at 12. Accurate premium gauging not only insures efficient distribution of risk but provides incentives for insureds to take risk prevention measures other than

table distribution of losses in the present ignores future implications and ultimately hinders efficient risk allocation.²⁶⁷ As reflected in the policies and insurance industry commentary, the 1966 and 1973 Comprehensive General Liability policy revisions contemplated potential coverage of continuous loss under multiple policy periods.²⁶⁸ In response, premiums were fixed to reflect the perceived risk.²⁶⁹ The availability of "claims-made" policies especially underscores this endeavor and the broader spectrum of risk incorporated into occurrence policy premiums.

Applying the manifestation trigger to comprehensive general liability policies conveys misinformation to both the insureds and insurers. It effectively transforms the "occurrence" policy contracted for into a "claims-made" policy by limiting coverage to the insurer on the risk when damage is discovered. Occurrence policies attempt to predict the future costs of present activities, regardless of when liability attaches. In contrast, a claims-made policy only predicts an insured's liability in the policy period from activities in the past.²⁷⁰ Consequently, an individual purchasing claims-made coverage will feel only the effects, through premium rates, of past activities. Therefore, the incentive to minimize the potential costs of risky activities through loss prevention measures is reduced.²⁷¹ In contrast, occurrence policy premiums reflect the future risks and costs of present activities. In response, an insured will be inspired to reduce total costs by

insurance. *Id.* High premiums dissuade individuals from investing in insurance, while low premiums encourage excessive purchase of insurance and neglect of other possible risk reducing measures. *Id.* For example, low fire insurance premiums might encourage an individual to spend money on extra insurance rather than fire extinguishers, alarm systems and fire prevention measures. *Id.*

267. *Id.* "This is because any decision to distribute a loss when such distribution is not the result of an already determined risk allocation both disturbs a previous allocation and creates new incentives on the part of similarly situated insureds." *Id.*

268. See *supra* notes 48-53 and accompanying text (discussing the evolution of relevant CGL policy provisions).

269. See, e.g., *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663, 673 (Ct. App.), review granted, 834 P.2d 1147 (Cal. 1992); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 367-68 (Ct. App.), review granted, 862 P.2d 661 (Cal. 1992).

270. ABRAHAM, *supra* note 265, at 50.

271. *Id.*

pursuing an optimum balance of insurance and loss prevention measures.²⁷²

The effects of applying the manifestation trigger to liability policies mirror those of claims-made policies. Prevention of future risks is discouraged as only the effects of past activities are felt by the insured as a result of policy application. The fact that disincentives for loss prevention are created through judicial intervention with occurrence policies, rather than the affirmative purchase of claims-made policies, makes the effects even more insidious. When combined with the inconsistent application of trigger theories, neither the insured nor the insurers can predict their insurance needs. Insurers cannot accurately gauge premiums because of the uncertainty as to whether they are insuring risks through true occurrence coverage or judicially imposed claims-made policies. In response, individuals will find themselves paying exorbitant premiums, unable to obtain insurance, or underinsured if courts apply the manifestation trigger to relieve insurer indemnity burdens arising from poor underwriting practices. Consistent application of the continuous trigger, in accordance with established underwriting practices and policy language, however, can avoid these harmful consequences in the future.

CONCLUSION

The California Supreme Court's decision in *Prudential*²⁷³ resolved many questions involving the trigger of coverage in first-party progressive loss cases. In these situations, the court appropriately concluded that only the insurer on the risk at the time of "manifestation" is responsible for indemnifying the insured.²⁷⁴ Unfortunately, coverage in third-party loss situations still suffers from inconsistent and poorly reasoned holdings.

In an attempt to clarify and bring a measure of predictability to third-party progressive loss litigation, some courts have recently elected to apply the manifestation trigger to liability

272. *Id.* at 51.

273. *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (Cal. 1990).

274. *Id.* at 1246-47.

claims as well.²⁷⁵ Such action, however, negates the express contractual differences between first- and third-party policies and overlooks the important and distinct policy goals of each. The manifestation trigger is not a touchstone for all progressive loss scenarios.

Courts confronted with third-party continuous loss claims should first examine the contractual provisions which govern the indemnity relationship at issue. Public policy concerns, insurance industry ramifications, and the future availability of coverage should be secondary to the terms of the insuring contract. Objective interpretation of comprehensive general liability policies reveals that "an occurrence" resulting in property damage within the policy period is the designated trigger of coverage. No other restrictions are contemplated and therefore should not be read into the relationship. Consequently, in third-party continuous loss situations, the continuous trigger most effectively mirrors the coverage intended by these policies.

Application of the continuous trigger does not necessarily thwart the certainty that is such a cherished component of the manifestation trigger. Insurers carrying the burden of indemnity can still be easily ascertained when litigation arises. Litigants will be assured that the contractual provisions of the indemnity relationship, and not the public policy whims of the court, will govern the outcome of their cases. Consistent application may also prevent needless litigation by generating certainty of results. In addition, the insurance industry will have a reliable and predictable trigger with which to calculate their premiums and estimate their necessary reserves.

The follies of excessive underwriting in earlier decades and heavy insurer burdens should not tempt courts to drift from their role as the ultimate interpreters of the insurance contract. Manipulating the future of insurance coverage through policy rewriting is a job for the insurance industry and its experts, not the courts.

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275. *See supra* note 109.