

Comments

Insurance Triggers Then and Now: Reforming Pennsylvania Insurance Law Involving Cases of Continuous, Progressive Property Damage

Nicholas A. Taylor*

ABSTRACT

“Trigger of coverage theories are described as ‘judicial gatekeepers,’ matching specified claims to particular policies. They identify which insurance policies may have to respond to particular claims and, consequently, have a strong influence on the ultimate resolution of cases.”
—Gregory A. Goodman

Triggers of coverage in liability insurance coverage disputes often play a large role in determining which insurance policies, and thereby which insurers, will be forced to respond to a particular claim. The triggers of coverage to be applied are not written into the insurance policies, however. Rather, they are tests to be adopted by judges and applied by factfinders in determining which insurers had policies in effect that are triggered for the purpose of providing coverage to the insured. Therefore,

* J.D. Candidate, The Pennsylvania State University School of Law, 2018. The author is extremely grateful to everyone who gave comments and suggestions that improved this Comment, and to his family and friends for all of their love and support throughout the writing process.



judges hold a vast amount of power in making the final judgment as to how an insurance claim may play out. The four theories judges generally have to choose from are the “manifestation trigger,” the “exposure trigger,” the “injury-in-fact trigger,” and the “continuous trigger.”

Insurance law varies from state to state, and therefore, the theories judges will apply under certain circumstances may also vary from state to state. Currently, Pennsylvania courts apply continuous trigger in cases alleging delayed manifestation bodily injuries. However, Pennsylvania courts have applied manifestation trigger in some cases alleging continuous, progressive property damage. This Comment focuses on this split in authority in Pennsylvania. Based on the relevant language of the insurance policies, general principles of insurance policy interpretation, and the similarities between delayed manifestation bodily injuries and continuous, progressive property damage, this Comment concludes that the Supreme Court of Pennsylvania should apply continuous trigger in cases involving continuous, progressive property damage.

Table of Contents

I.	INTRODUCTION	219
II.	BACKGROUND.....	221
	A. The Trigger Theories of Liability Insurance Coverage	221
	B. The Application of Continuous Trigger and the First Manifestation Rule in Pennsylvania.....	224
	1. “Continuous Trigger” and How It Is Applied in Cases Involving Delayed Manifestation Bodily Injuries.....	224
	2. The “First Manifestation” Rule and How It Is Applied in Cases Involving Continuous, Progressive Property Damage	226
	3. The Vehicle Likely to Bring the Trigger Issue Before the Supreme Court of Pennsylvania: <i>Pennsylvania</i> <i>Manufacturers’ Ass’n Insurance Co. v. Johnson Matthey,</i> <i>Inc.</i>	231
III.	ANALYSIS	235
	A. Principles of Insurance Policy Interpretation: How the Supreme Court of Pennsylvania Should Interpret Policies Covering Continuous, Progressive Property Damage.....	236
	1. The Plain Language of CGL Policies Supports the Application of Continuous Trigger	236
	2. The Doctrine of <i>Contra Proferentem</i> Supports the Application of Continuous Trigger	239
	3. The Reasonable Expectations of the Insured are Best Represented When Continuous Trigger is Applied.....	240



4.	Interpreting Policy Provisions to Provide Maximum Coverage to the Insured Supports the Application of Continuous Trigger	242
B.	The Similarities Between Latent Bodily Injuries and Continuous, Progressive Property Damage Call for the Application of the Same Trigger Theory	243
C.	Recommendation	245
IV.	CONCLUSION	246

I. INTRODUCTION

In the liability insurance coverage context, the parties to a dispute can typically point to one event in particular that will help to determine whether a claim will be covered by the insurance carrier.¹ Determining the event that triggers the insurance coverage, however, is not always this straightforward because it is not always clear whether an insurance claim falls within a specific policy period.² An injury could span a longer period of time, and thus, there may be multiple insurers under whose policies a claim could potentially be made.³ Courts deciding these types of claims are forced to determine when a particular insurance policy is triggered.⁴

One example of an area where it is particularly difficult to determine when an insurance policy is triggered concerns asbestos-related diseases.⁵ Asbestos has been described as a “miracle substance” because of its versatility—it can be used in a wide number of products such as insulation, various building materials, and other heat-resistant products.⁶ Asbestos also exists in much of the Earth’s drinking water, as well as in various

1. James M. Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate Over the Appropriate Trigger Rule*, 45 *DRAKE L. REV.* 625, 626 (1997).

2. *Id.* at 627–28 (giving mass exposure tort claims involving progressive losses with long manifestation periods, such as asbestos and environmental contamination, as examples of situations where it is unclear whether a claim falls within a policy period); see also *CheckRite Ltd. v. Ill. Nat’l Ins. Co.*, 95 F. Supp. 2d 180, 193 (S.D.N.Y. 2000) (interpreting “policy period” to mean “the period commencing on the inception date and ending on the expiration date stated in [the insurance policy] unless sooner terminated as . . . provided”).

3. See Fischer, *supra* note 1, at 627–28.

4. See generally *Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr*, 799 A.2d 499 (N.J. 2002); see also Gregory A. Goodman, Note, *Insurance Triggers as Judicial Gatekeepers in Toxic Mold Litigation*, 57 *VAND. L. REV.* 241, 259–60 (2004) (referring to trigger of coverage theories as “judicial gatekeepers” because they identify which insurance policies may have to respond to the claims being brought).

5. See Fischer, *supra* note 1, at 627–29.

6. Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 *WIDENER L. J.* 97, 101 (2013).

commercial products.⁷ Humans become at risk to asbestos inhalation when the asbestos fibers become “friable,” or damaged, and are subsequently released into the air.⁸

The presence of asbestos fibers in the lungs can cause a wide range of reactions.⁹ These reactions may eventually culminate in a variety of different diseases, the most prominent among them being mesothelioma and asbestosis.¹⁰ These asbestos-related diseases, however, have typical periods of delayed manifestation ranging anywhere from 10 to 40 years.¹¹ Therefore, the extent of the damage caused by these diseases does not become readily apparent for decades, which in some cases, may be far too late to receive effective treatment.¹²

Due to the delayed manifestation of asbestos-related diseases, the trigger of coverage that a court applies may have a large impact on which claims will be covered by the insurer.¹³ The language of insurance policies generally does not specify the trigger theory to be applied, which makes these trigger determinations infinitely more difficult.¹⁴ The courts, therefore, are left to determine which policy, or policies, have coverage obligations for a particular claim.¹⁵

Part II of this discussion focuses on the different trigger theories that courts generally apply in liability insurance coverage disputes.¹⁶ These trigger theories include the “manifestation trigger,” the “exposure trigger,” the “injury-in-fact trigger,” and the “continuous trigger.”¹⁷ Part II also includes a comparison of three Pennsylvania cases: two decided by the Supreme Court of Pennsylvania involving delayed manifestation bodily injury and continuous, progressive property damage, and one decided by

7. Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 585 (2007).

8. Robreno, *supra* note 6, at 101.

9. J.H. Fr. Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 505 (Pa. 1993). For a detailed discussion of what exactly occurs upon the inhalation of asbestos fibers, see *id.* at 505–06.

10. Robreno, *supra* note 6, at 103–04.

11. *Id.* at 103.

12. *See id.*

13. *See* Fischer, *supra* note 1, at 629 (noting that the “practical consequences of adopting a particular trigger test should not be underestimated”).

14. Goodman, *supra* note 4, at 260; *see also* Owens-Ill. Inc. v. United Ins. Co., 650 A.2d 974, 979 (N.J. 1994) (reasoning that “[t]he policies do not refer to a ‘trigger;’ the term ‘trigger’ is merely a label for the . . . events that under the terms of the insurance policy determine[] whether a policy must respond to a claim in a given set of circumstances”).

15. Goodman, *supra* note 4, at 260.

16. *See infra* Part II.A.

17. *See* Emalie Diaz Sundale, Note, *A Comparative Perspective: Recognition of the “Continuous Injury” Trigger in Insurance Law in the United States and the United Kingdom*, 39 HASTINGS INT’L & COMP. L. REV. 281, 282 (2016).

the Commonwealth Court of Pennsylvania involving continuous, progressive property damage.¹⁸

Part III first considers the policy language of commercial general liability (“CGL”) insurance policies, which typically cover claims for both delayed manifestation bodily injuries and continuous, progressive property damage.¹⁹ Second, Part III analyzes and applies general principles of insurance policy interpretation to the standard language of CGL insurance policies.²⁰ The three general principles analyzed in the following discussion include *contra proferentem*, the reasonable expectations doctrine, and construing insurance policies so as to provide maximum coverage for the insured.²¹ Part III also includes a comparison of delayed manifestation bodily injuries and continuous, progressive property damage, and concludes with the recommendation that the Supreme Court of Pennsylvania should apply continuous trigger to cases involving such property damage.²² Part IV concludes by summarizing the discussion and again recommending that the Supreme Court of Pennsylvania apply continuous trigger upon its next consideration of the issue.²³

II. BACKGROUND

Courts generally apply one of four different “trigger of coverage” theories to a claim for insurance coverage under a CGL policy.²⁴ The four different trigger theories employed by courts are the “manifestation trigger,” the “exposure trigger,” the “injury-in-fact trigger,” and the “continuous trigger.”²⁵ Each of these trigger theories are discussed in depth below, followed by a discussion of three Pennsylvania cases applying two of the triggers in varying, but similar, contexts.²⁶

A. *The Trigger Theories of Liability Insurance Coverage*

The first trigger theory courts apply is the manifestation trigger. The manifestation trigger, also known as the “first manifestation rule,” requires indemnity only for injuries that manifest during the policy period.²⁷ Under this trigger theory, the policy responsible for covering a claim will be the

18. *See infra* Part II.B.

19. *See infra* Part III.A.1.

20. *See infra* Part III.A.1–4.

21. *See infra* Part III.A.2–4.

22. *See infra* Part III.B–C.

23. *See infra* Part IV.

24. Sundale, *supra* note 17, at 282.

25. *Id.*

26. *See infra* Part II.A–B.

27. Sundale, *supra* note 17, at 282.

one in effect when the injury was “reasonably apparent” or “known” to the claimant.²⁸ For example, a person exposed over time to products containing asbestos would eventually develop a disease or illness.²⁹ A court applying the first manifestation rule would find that the insurance policy responsible for covering such injuries would be the one in effect when the harmful effects of the asbestos exposure became reasonably apparent to the policyholder.³⁰

The second trigger theory courts apply in determining which insurance policies are triggered is the exposure trigger. The exposure trigger, as its name suggests, places the obligation to cover the insured on the insurance policy in effect when the party who suffered the injury was exposed to the harm.³¹ For example, a person exposed to asbestos-containing products could successfully bring a claim against an insurance carrier whose policy was in effect on the dates the policyholder was exposed to the asbestos-containing products. The exposure trigger is infrequently used, however, because the line between exposure and injury can be extremely difficult to define.³² Although the exposure trigger is broader than the first manifestation rule, it does not always provide more coverage because if, for example, an injury results from exposure to a product that occurred prior to the policy period’s commencement, the insured would be barred from recovering under the policy.³³

The third trigger theory applied by courts is the injury-in-fact trigger. Under this theory, coverage begins when the policyholder can prove that an actual injury occurred.³⁴ Similar to the first-manifestation rule, assuming only one injury occurs, the only policy triggered will be the one in effect when the injury takes place and when there is proof that the injury occurred.³⁵ For example, in the illustration above where the insured is exposed to asbestos-containing products,³⁶ the injury-in-fact trigger would hold responsible the insurance carrier whose policy was in effect when the policyholder could prove that she had been suffering an injury from her exposure to asbestos. On the other hand, if multiple injuries occur based

28. Fischer, *supra* note 1, at 644.

29. See *supra* Part I; see also Goodman, *supra* note 4, at 260. The hypothetical is based on an example given in Goodman, *supra* note 4, at 260, but is tailored specifically to the circumstances at issue in this discussion. The same hypothetical will be applied in discussing each of the four trigger theories in this section.

30. See, e.g., Pa. Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 21 (Pa. 2014).

31. Sundale, *supra* note 17, at 282.

32. Fischer, *supra* note 1, at 644. For example, where the injury occurred a number of years prior to the claim being brought, it can be difficult to determine when exactly the injured party was exposed to the cause of the injury. *Id.*

33. Sundale, *supra* note 17, at 282.

34. *Id.*

35. Goodman, *supra* note 4, at 265.

36. See *supra* note 29 and accompanying text.

on the same underlying occurrence, then multiple policies could potentially be triggered.³⁷

Under the injury-in-fact trigger, coverage is not necessarily defeated when an injury is not discovered until years after the policy period has expired.³⁸ A court applying the injury-in-fact trigger will hold an insurance carrier responsible for providing coverage to an insured for an injury that occurred during a policy period, regardless of how many years have passed since the insurance policy was in effect.³⁹ This trigger theory can be difficult to apply, however, because complications may arise in determining precisely when an injury occurred under the policy.⁴⁰

The fourth and final trigger theory applied by courts is the continuous trigger theory, also known as the “triple trigger” or “multiple trigger” theory.⁴¹ According to the continuous trigger theory, each and every policy in effect “(1) at the time of initial exposure, (2) during any subsequent period of continuing exposure, or (3) at the time of the physical manifestation of the harm or damage would be forced to respond” to the claim for coverage.⁴² For example, any insurance policy in effect from the time of exposure to asbestos through the time that the injuries manifested as a recognizable disease would be forced to provide coverage to the policyholder.⁴³ The continuous trigger is attractive to courts applying the reasonable expectations doctrine,⁴⁴ which involves construing insurance contracts so as to provide the policyholder with maximum coverage, because it allows courts to hold the largest number of insurance policies accountable for the loss.⁴⁵

37. See, e.g., *Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co.*, 162 F.3d 805, 810–11 (4th Cir. 1998) (applying South Carolina law).

38. Fischer, *supra* note 1, at 641.

39. *Id.*

40. Sundale, *supra* note 17, at 282. In the asbestos exposure example, *supra* note 29 and accompanying text, the injury-in-fact trigger would be difficult to apply because the date of the injury might be different from the date the exposure was actually discoverable. Goodman, *supra* note 4, at 265.

41. Sundale, *supra* note 17, at 282.

42. Goodman, *supra* note 4, at 267 (describing the continuous trigger as a “comprehensive rule” containing parts of all of the other trigger theories).

43. See, e.g., *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993) (finding that “every insurer which was on the risk at any time during the development of a claimant’s asbestos-related disease ha[d] an obligation to indemnify” the policyholder).

44. See *infra* Part III.A.3 for a discussion and analysis of the reasonable expectations doctrine.

45. Goodman, *supra* note 4, at 267; see also James M. Fischer, *The Doctrine of Reasonable Expectations is Indispensable, If We Only Knew What For?*, 5 CONN. INS. L. J. 151, 157–58 (1998) (noting that under the doctrine of reasonable expectations, insurance policies are “rigorously construed by courts with the intent of protecting the policyholder by providing the maximum coverage possible”).

Thus, which trigger theory a court adopts in an insurance coverage dispute can have an enormous impact on determining which, if any, insurance policy will be responsible for covering a claim. The differences in the way that each trigger theory holds insurers responsible give courts a large amount of discretion in determining how best to protect insureds. Particularly in Pennsylvania, the first manifestation rule and continuous trigger theory have been applied in cases involving two different types of damage: delayed manifestation bodily injury and continuous, progressive property damage.⁴⁶ The following discussion recommends applying the same trigger theory in both contexts.

B. The Application of Continuous Trigger and the First Manifestation Rule in Pennsylvania

In Pennsylvania, courts generally apply either the first manifestation rule or continuous trigger theory, depending on the type of claim at issue.⁴⁷ Specifically, the Supreme Court of Pennsylvania has applied continuous trigger to delayed manifestation bodily injury claims involving asbestos-related diseases,⁴⁸ but has yet to apply continuous trigger to cases involving continuous, progressive property damage, instead electing to apply the first manifestation rule.⁴⁹ As will be discussed below, the Supreme Court of Pennsylvania should reconsider this issue the next time it is before the court, and find that continuous trigger is the proper trigger theory to apply in cases involving continuous, progressive property damage.

1. “Continuous Trigger” and How It Is Applied in Cases Involving Delayed Manifestation Bodily Injuries

The first case in Pennsylvania in which the continuous trigger theory was applied to delayed manifestation bodily injury claims was *J.H. France Refractories Co. v. Allstate Insurance Co.*⁵⁰ In *J.H. France*, the appellant, J.H. France Refractories Company (“J.H. France”), manufactured and marketed products containing asbestos.⁵¹ On April 19, 1979, Gladys

46. See Pa. Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 21 (Pa. 2014); *J.H. Fr.*, 626 A.2d at 507.

47. See *infra* Part II.B.1–2.

48. See *J.H. Fr.*, 626 A.2d at 507.

49. See *St. John*, 106 A.3d at 21 (Pa. 2014); *but see* Pa. Mfrs.’ Ass’n Ins. Co. v. Johnson Matthey, Inc., 160 A.3d 285, 294 (Pa. Commw. Ct. 2017) (finding that continuous trigger was the correct trigger to be applied in cases involving continuous, progressive property damage, indicating a possible move away from the Supreme Court of Pennsylvania’s reasoning in *St. John*).

50. *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993).

51. *Id.* at 504.

Temple filed suit against J.H. France on behalf of her decedent, Charles Temple, claiming that Mr. Temple had suffered from asbestos-related diseases contracted through his exposure to J.H. France's products from 1948–1978.⁵² After each insurer covering J.H. France during the time period relevant to the action denied their duties of defense and indemnification,⁵³ J.H. France filed a declaratory judgment action to determine whether the insurers had a duty to defend or indemnify them against Ms. Temple's claim.⁵⁴

The Superior Court of Pennsylvania, affirming the trial court's decision that the insurers were required to both defend and indemnify against asbestos-related claims made against J.H. France, found that "the entire process from exposure to manifestation triggers coverage."⁵⁵ The Supreme Court of Pennsylvania on appeal noted that the six insurers that were parties to the action provided CGL insurance coverage to J.H. France at all times relevant to the action.⁵⁶ The main issue on appeal was whether the Superior Court was correct in applying continuous trigger to determine which, if any, insurers had a duty to both defend and indemnify J.H. France against Ms. Temple's claim.⁵⁷

The Supreme Court of Pennsylvania affirmed the Superior Court's adoption and application of continuous trigger and found that if any phases of injury related to exposure to asbestos occurred during the policy periods at issue, the insurer would be obligated to indemnify J.H. France.⁵⁸ The court reasoned that the insurance policies in effect obligated the insurers

52. *Id.*

53. *See Indemnification*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining indemnification as "[t]he action of compensating for loss or damage sustained").

54. *J.H. Fr.*, 626 A.2d at 504.

55. *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 578 A.2d 468, 477 (Pa. Super. Ct. 1990). The Supreme Court of Pennsylvania referred to the trigger as the multiple-trigger theory of liability coverage, but for purposes of continuity throughout this discussion, the trigger theory will be referred to as continuous trigger.

56. *J.H. Fr.*, 626 A.2d at 505. The court also noted that the policies contained the following language:

[The Insurer] will pay on behalf of the insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury . . . to which this insurance applies, caused by an occurrence, and [the Insurer] shall have the right and duty to defend any suit against the Insured seeking damages on account of such bodily injury

"Bodily injury" means bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom

"Occurrence" means an accident, including continuous or repeated exposure to conditions, which result in bodily injury . . . neither expected nor intended from the standpoint of the Insured.

Id. (alterations in original).

57. *Id.* at 506.

58. *See id.* at 507.

to “pay . . . *all sums* which the Insured shall become legally obligated to pay as damages because of bodily injury.”⁵⁹

The insurance policies defined “bodily injury” as “injury, sickness[,] or disease which *occurs* during the policy period.”⁶⁰ Additionally, the policies defined “occurrence” as an “accident, *including continuous or repeated exposure to conditions*, which results in bodily injury . . . neither expected nor intended.”⁶¹ Thus, whether the injuries claimed by Ms. Temple would be covered or not depended on whether they satisfied the definitions of “bodily injury” and “occurrence” as provided in the policies.⁶²

The court reasoned that the medical evidence in the case had “unequivocally establishe[d]” that injuries occur (1) during the development of asbestosis immediately upon exposure and (2) after exposure ends until the time that “increasing incapacitation” results in manifestation as a recognizable disease.⁶³ In addition, the court reasoned that it would be more accurate to regard all stages of the disease process as bodily injury triggering the insurer’s obligation to indemnify, rather than selecting one exclusive trigger of coverage.⁶⁴ This led the Supreme Court of Pennsylvania to conclude that if any phases of injury related to exposure to asbestos occurred during the policy periods, the insurer would be obligated to indemnify J.H. France.⁶⁵

2. The “First Manifestation” Rule and How It Is Applied in Cases Involving Continuous, Progressive Property Damage

The Supreme Court of Pennsylvania was given the opportunity to revisit its decision in *J.H. France* and decide whether the continuous trigger theory would also apply in cases involving continuous, progressive

59. *Id.* (emphasis added).

60. *Id.* at 507 (emphasis added).

61. *Id.* (alteration in original).

62. *Id.* at 506–07.

63. *See id.* Pursuant to the stipulations of the parties, the medical evidence at trial included the testimony of an anatomical and clinical pathologist, Dr. Craighead, who testified that the presence of asbestos in the lungs “stimulates a wide range of reactions” commencing immediately upon inhalation, and continuing even after exposure to the asbestos ends. *Id.* at 505.

64. *See id.* at 507.

65. *See id.* The court listed other jurisdictions that have adopted similar reasoning and conclusions. *Id.* Specifically, other jurisdictions have found that exposure to asbestos causes injury within the meaning of the same policy language controlling here. *See, e.g.,* Porter v. Am. Optical Corp., 641 F.2d 1128, 1145 (5th Cir. 1981); Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1218–19 (6th Cir. 1980). In addition, other jurisdictions have found that the manifestation of similar bodily injuries constitutes an injury that triggers the obligation to indemnify. *See, e.g.,* Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 19 (1st Cir. 1982).

property damage.⁶⁶ The events leading up to *Pennsylvania National Mutual Casualty Insurance Co. v. St. John*⁶⁷ began in 2002, when the St. Johns, a married couple who co-owned a dairy farm, sought to expand the size of their dairy herd and milking facility.⁶⁸ As part of the expansion, the St. Johns hired LPH Plumbing to install a new plumbing system, which included a new wastewater drainage system as well as a new separate freshwater drinking system for their dairy herd.⁶⁹

By July 2003, the St. Johns were able to begin full dairy operations in their new expanded facility.⁷⁰ The plumbing system, however, was defective; the piping used for the drainage system had been cracked when it was installed.⁷¹ The crack in the piping allowed “gray water,” which contained toxic materials, to escape the drainage system and infiltrate the freshwater holding tank.⁷² As a result, the St. Johns’ dairy herd became exposed to contaminated drinking water shortly after commencing operations in July 2003.⁷³

The contamination caused numerous health and reproductive problems for the dairy herd beginning in April 2004, which continued with an increasing frequency over the following two years.⁷⁴ The St. Johns did not discover the defects in the system or the contamination until March 2006, when they witnessed the cows “thrashing their heads in their drinking troughs and refusing to drink their water.”⁷⁵ Upon further investigation, the St. Johns discovered the cracked pipes, as well as the ongoing seepage of gray water into the dairy herd’s drinking supply.⁷⁶ The St. Johns subsequently brought suit against LPH Plumbing, claiming that the plumbing system had been negligently installed.⁷⁷ *Pennsylvania National Mutual Casualty Insurance Co. (“Penn National”)*, which insured

66. See Pa. Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 3 (Pa. 2014).

67. Pa. Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1 (Pa. 2014).

68. *Id.* at 3.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 4.

76. *Id.*

77. *St. John*, 106 A.3d at 4.

LPH Plumbing under four CGL policies⁷⁸ in effect from July 1, 2003 to July 1, 2006, defended LPH Plumbing in the suit.⁷⁹

The jury in *St. John* returned a verdict in favor of the St. Johns, finding LPH Plumbing and Stoltzfus⁸⁰ jointly and severally liable for \$3.5 million in damages.⁸¹ After Penn National agreed to pay \$1.2 million to the St. Johns in exchange for their waiver of all further claims, Penn National filed a declaratory judgment action seeking a determination of which of the four policies were triggered by LPH Plumbing's negligent installation of the plumbing system.⁸² Three of the policies were year-long primary CGL policies, while the fourth CGL policy provided year-long umbrella coverage.⁸³ Under the terms of the CGL policies, Penn National agreed to indemnify LPH Plumbing for its liabilities arising from property damage that occurred during the policy period in effect.⁸⁴

78. See KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 463 (Robert C. Clark et al. eds., 5th ed. 2010) (describing CGL insurance as a form of coverage that "provides 'general' insurance against the kinds of liability that any business may face, principally for bodily injury and property damage"); see also Joseph P. Monteleone, *Coverage Issues Under Commercial General Liability and Directors' and Officers' Liability Policies*, 18 W. NEW ENG. L. REV. 47, 48 (1996) (noting that CGL insurance is the type most often purchased by businesses as protection from liabilities arising while in operation).

79. *St. John*, 106 A.3d at 4.

80. Stoltzfus is the company to which LPH Plumbing had subcontracted part of the welding for the plumbing system. *Id.* at 3.

81. *Id.* at 4. In addition, the jury found the defendants jointly and severally liable for \$277,505.36 in delay damages. *Id.*

82. *Id.* The parties stipulated to the following facts: (1) the damage sustained constituted property damage under the language of each policy in place; (2) the property damage took place during each policy in place; and (3) no exclusions applied. *Id.* at 5–6.

83. *Id.* at 4. The first CGL policy covered the period from July 1, 2003 to July 1, 2004; the second policy covered the period from July 1, 2004 to July 1, 2005; the third policy covered the period from July 1, 2005 to July 1, 2006; and the umbrella policy also covered the period from July 1, 2005 to July 1, 2006. *Id.*; see also Douglas R. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 DENVER U. L. REV. 29, 31 (2000) (defining an umbrella insurance policy as "an excess policy . . . that . . . is written in addition to a primary policy to protect the insured against liability for catastrophic losses that would exceed the limits of affordable primary coverage").

84. *St. John*, 106 A.3d at 5. The policies in effect provided the following:

(a) [Penn National] will pay those sums that the insured [LPH Plumbing] becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which the insurance applies

. . . .

(b) This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured[s] . . . and no "employee" authorized by [LPH Plumbing] to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part.



The trial court in *St. John* entered an order finding Penn National liable only under the first CGL policy in effect from July 1, 2003 to July 1, 2004.⁸⁵ The trial court concluded that the underlying events, i.e., the negligent installation of the plumbing system, had constituted a single occurrence.⁸⁶ The single occurrence had manifested in April 2004, after the St. Johns first noticed a drop in the milk production of the dairy herd.⁸⁷ Therefore, the trial court found that Penn National could only be held liable under the first policy it issued, because it was the only policy in effect when the occurrence first manifested.⁸⁸ On appeal, the Superior Court affirmed the trial court's decision finding Penn National liable only under the first CGL policy.⁸⁹ The Superior Court found that the proper test for determining when an occurrence takes place pursuant to a CGL policy is the first manifestation rule.⁹⁰

The St. Johns appealed to the Supreme Court of Pennsylvania, arguing that the continuous trigger theory adopted by the Supreme Court in *J.H. France* should also apply to cases involving continuous, progressive property damage.⁹¹ The St. Johns argued that the similarities between the language of the Penn National policies and the policies in *J.H. France* should lead to the application of the same trigger theory in both cases.⁹² The court responded that after reading the language of the Penn National policies, it was clear that only the policy in effect when an occurrence first arises is triggered and “answerable for the ensuing bodily injury or property damage” pursuant to the first manifestation rule.⁹³ Thus, the Supreme Court of Pennsylvania affirmed the decision of the Superior Court.⁹⁴

Upon examining the policy language, the Supreme Court reasoned that coverage was provided for when an “occurrence,” defined as “an

Id. (alterations in original).

85. *Id.* at 7.

86. *See id.* The determination that the injury was a “single occurrence” was important because, in applying the first manifestation rule, coverage is triggered under the policy in effect when the injuries first manifest. *Id.* at 17. If the injuries had constituted multiple occurrences, then multiple policies may have been triggered. *Id.*

87. *Id.* at 7.

88. *See id.*

89. *Id.* at 8.

90. *Id.* at 8 (citing *Consulting Eng'rs, Inc. v. Ins. Co. of N. Am.*, 710 A.2d 82, 87–88 (Pa. Super. Ct. 1998), *aff'd on the basis of the opinion of the Superior Court*, 743 A.2d 911 (Pa. 2000), as an express refusal to extend the continuous trigger theory adopted in *J.H. France* beyond asbestos or other toxic tort scenarios).

91. *Id.* at 10.

92. *Id.* at 18–19.

93. *See id.* at 20–21. The court additionally noted that the first manifestation rule had served as the proper test for determining coverage under CGL policies, with an exception as provided in *J.H. France*, since 1986. *See id.* at 21.

94. *St. John*, 106 A.3d at 24.

accident, including continuous or repeated exposure to substantially the same general harmful conditions,” caused property damage during a policy period.⁹⁵ The court found that the intent and reasonable expectations of the parties to the policy were better represented when the language was interpreted to mean that continuous, progressive property damage caused by a single occurrence only triggered coverage under the policy in effect when the occurrence first arose.⁹⁶

The Supreme Court also expressed that the type of injury sustained by the St. Johns was not the same type of injury sustained in cases applying continuous trigger.⁹⁷ The court noted that one of the reasons for applying continuous trigger in cases involving asbestos-related diseases was because the injuries were predictable.⁹⁸ Due to such predictability, insurance carriers would often attempt to terminate coverage prior to the injuries becoming apparent in order to avoid paying out any insurance benefits.⁹⁹ However, the damage sustained by the St. Johns’ dairy herd did not lie undiscovered for an extended period of time, as is the case with asbestos-related diseases.¹⁰⁰ Rather, the damage to the dairy herd first became apparent less than a year after the negligent installation of the plumbing system.¹⁰¹ Thus, the Supreme Court did not view the type of property damage involved as requiring the same level of protection as asbestos-related bodily injuries.¹⁰²

Therefore, the Supreme Court of Pennsylvania concluded that while continuous trigger may have been appropriate in *J.H. France*, the damage sustained by the St. Johns’ dairy herd, together with the language in the Penn National policies, did not warrant the application of the same theory to the St. Johns’ claim.¹⁰³ The court in *St. John* found the decision in *J.H. France* to be distinguishable and declined to apply continuous trigger to the relevant Penn National policies.¹⁰⁴

95. *Id.* at 21.

96. *See id.* (explaining that it was unlikely that the parties would have intended or expected a single occurrence to trigger coverage under multiple, consecutive policies).

97. *See id.* at 23.

98. *See id.*

99. *See id.*

100. *Id.*

101. *Id.*

102. *See id.*

103. *Id.*

104. *See St. John*, 106 A.3d at 23.

3. The Vehicle Likely to Bring the Trigger Issue Before the Supreme Court of Pennsylvania: *Pennsylvania Manufacturers' Ass'n Insurance Co. v. Johnson Matthey, Inc.*

The Supreme Court of Pennsylvania's decision in *St. John*, in which the Supreme Court applied the first manifestation rule, led to much confusion throughout the state because Pennsylvania law regarding the appropriate trigger theory in cases involving continuous, progressive property damage was now convoluted by two conflicting decisions. On one hand, the Supreme Court of Pennsylvania in *J.H. France* applied the continuous trigger theory to an instance of delayed manifestation bodily injury.¹⁰⁵ On the other hand, the court later applied the first manifestation rule in *St. John* to damage occurring over a similar, progressive period, though this time in the context of property damage rather than bodily injury.¹⁰⁶

Although both of these cases involved CGL policies that insurance companies had issued to their insureds, the Supreme Court of Pennsylvania arrived at two different conclusions.¹⁰⁷ Thus, the following question became important: did *St. John* truly set the standard for which trigger theory was appropriate in cases involving continuous, progressive property damage, or could *St. John* be easily distinguished? The Commonwealth Court of Pennsylvania eventually answered that question in *Pennsylvania Manufacturers' Ass'n Insurance Co. v. Johnson Matthey, Inc.*¹⁰⁸

In *Johnson Matthey*, the Pennsylvania Department of Environmental Protection (DEP) named Johnson Matthey, Inc. ("JMI") as a defendant in a civil action in which the DEP alleged that one of JMI's predecessor companies had used hazardous substances in their manufacturing operations, which contributed to the occurrence of environmental contamination that eventually spread to off-site properties.¹⁰⁹ Upon being named as a defendant in the civil action, JMI sought coverage under the CGL policies under which its predecessor company had been insured.¹¹⁰ These policies were provided by Pennsylvania Manufacturers' Association Insurance Company ("PMA"), and were at least in effect for

105. *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993).

106. *St. John*, 106 A.3d at 23.

107. *See id.* at 4; *J.H. France*, 626 A.2d at 502.

108. *Pa. Mfrs.' Ass'n Ins. Co. v. Johnson Matthey, Inc.*, 160 A.3d 285, 294 (Pa. Commw. Ct. 2017).

109. *Id.* at 288. The DEP also asserted that JMI was responsible for the costs incurred in remediating the environmental damage caused by the release of hazardous substances. *Id.*

110. *Id.*

a ten-year period, from April 1, 1969 to April 1, 1979.¹¹¹ On June 2, 2010, PMA agreed to defend JMI under its policies, and continued such defense until 2015, when PMA notified JMI that it would no longer be providing JMI with a defense in the civil action brought by the DEP.¹¹²

Subsequently, PMA filed a petition for review seeking a declaratory judgment that it had no duty to defend or indemnify JMI because the underlying action was not within the coverage provided by the pertinent CGL policies.¹¹³ PMA explained that the environmental damage at issue had not manifested until after the expiration of the policies, and therefore did not fall with the policies' coverage.¹¹⁴ PMA then filed a motion for summary relief, arguing that the *St. John* decision called for the application of the first manifestation rule in the DEP's civil action, which would have placed the damage outside the purview of the CGL policies at issue.¹¹⁵

In answering the question of which trigger theory was appropriate for environmental property damage claims under Pennsylvania law, the Commonwealth Court of Pennsylvania ultimately rejected the first manifestation rule and confirmed the application of continuous trigger under such circumstances.¹¹⁶ The court began by addressing the principle that the proper trigger theory under CGL policies is typically the first manifestation rule.¹¹⁷ Additionally, the court noted that policies covering time periods beyond the first manifestation of the damage will not be triggered, even if the cause of the injury is not discovered until those later policy periods.¹¹⁸

However, the court found that when considering the continuous, progressive environmental damage at issue in the DEP's civil action, "all 'occurrence' policies from the date of exposure to the date of first manifestation [were] triggered."¹¹⁹ The Commonwealth Court cited the Supreme Court's reasoning in *J.H. France* in observing that "because asbestos causes undetected injury at the time of exposure and continues to cause undetected injury up to the time of manifestation of recognizable disease, all periods from exposure to manifestation satisfy the requirement that bodily injury occur during the policy period."¹²⁰ The Commonwealth

111. *Id.*

112. *Id.* at 288–89.

113. *Id.* at 289.

114. *Id.* JMI then filed an answer to the petition, claiming that PMA was required to defend and indemnify JMI with respect to both the civil action brought by the DEP, as well as for breach of contract. *Id.*

115. *Id.*

116. *See id.* at 294.

117. *See id.* at 291.

118. *Johnson Matthey*, 160 A.3d at 291.

119. *Id.* (citing *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506–07 (Pa. 1993)).

120. *Id.*

Court applied this same reasoning to the environmental damage caused by JMI's predecessor company.¹²¹

PMA argued that the Supreme Court's decision in *St. John* limited the application of continuous trigger to cases involving either asbestos-related injuries or other similar bodily injuries.¹²² In addition, PMA argued that the first manifestation rule was the proper trigger of coverage for environmental contamination claims.¹²³ However, the Commonwealth Court rejected both arguments and instead reasoned that "neither the Supreme Court's rejection of a [continuous] trigger of coverage in *St. John* nor the Court's reasoning in that opinion suggests that *J.H. France* . . . is inapplicable to property damage coverage for undetected environmental contamination."¹²⁴

In fact, the Commonwealth Court explained that the court in *St. John* was deciding an entirely different question.¹²⁵ There, the question decided by the Supreme Court of Pennsylvania was whether coverage continued to be triggered *after* the property damage had first manifested,¹²⁶ whereas in *Johnson Matthey*, the question was whether coverage for environmental contamination claims was triggered in the period between exposure and first manifestation.¹²⁷ This distinction is ultimately what led to the Commonwealth Court's rejection of the first manifestation rule because, according to the Commonwealth Court, claims of environmental contamination present the "long latency of continuing, undetected injury or damage that supports a trigger of insurance coverage prior to manifestation."¹²⁸

The Commonwealth Court further supported its holding by looking to the relevant language in the PMA policies and finding that the application of the first manifestation rule to claims of environmental contamination would be contrary to the relevant policy language.¹²⁹ The court reasoned that the "central issue . . . is what event must take place within the policy period to trigger coverage under [PMA's] CGL policies."¹³⁰ According to the court, "[i]dentifying the appropriate trigger

121. *Id.*

122. *Id.* at 292.

123. *See id.*

124. *Id.*

125. *See id.*

126. Pa. Nat'l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 3 (Pa. 2014) (noting that the St. Johns were seeking coverage under a CGL policy in effect *after* the harm had initially manifested).

127. *Johnson Matthey*, 160 A.3d at 292.

128. *Id.* at 293.

129. *See id.*

130. *Id.* at 289.

of coverage under an insurance policy turns upon the language of the policy.”¹³¹

The Commonwealth Court found that the policy language covered “property damage which *occurs* during the policy period,” not just the property damage discovered or manifesting during the policy period.¹³² Thus, the court concluded that when environmental contamination occurs when a policy is in effect, the language requiring that property damage simply *occur* during the policy period would be satisfied whether or not the contamination had been discovered at the time.¹³³ The first manifestation rule would be inconsistent with this language because the “date of manifestation of the harm from environmental contamination may merely be a result of when testing happens to be done to determine whether any contamination exists.”¹³⁴

Finally, the Commonwealth Court reasoned that if coverage for environmental contamination were limited to the policies in effect when the damage first manifested, PMA might have been able to limit or terminate their potential liability for coverage.¹³⁵ In 1970, pollution exclusions, which are typically used by insurers in an attempt to deny coverage for claims arising out of any “actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time,” became common in standard CGL policies.¹³⁶ The environmental contamination at issue in the DEP’s civil action occurred prior to 1970; it just did not manifest until at least 1980, which was the first date alleging the awareness of any environmental contamination.¹³⁷ If the first manifestation rule was applied, the pollution exclusion in the language of the PMA policy might have permitted PMA to deny coverage even though property damage had occurred, but had gone undetected, during their earlier policies that contained no pollution exclusions.¹³⁸

Therefore, the Commonwealth Court of Pennsylvania concluded that coverage would be triggered under the relevant PMA policies if any environmental contamination occurred during the policy periods, regardless of whether the contamination had been detected or not.¹³⁹ Given the language of the CGL policies at issue, Pennsylvania case law, and the continuous and progressive nature of environmental contamination, the

131. *Id.* (citing *St. John*, 106 A.3d at 14).

132. *Id.* at 293 (emphasis added).

133. *See id.*

134. *Id.*

135. *Id.*

136. *Id.* at 293–94.

137. *Johnson Matthey*, 160 A.3d at 293.

138. *Id.*

139. *See id.* at 294.

court found that the proper trigger theory to be applied to long-term environmental contamination claims was the continuous trigger theory.¹⁴⁰

This holding resolved the issue of which trigger theory applies in cases of continuous, progressive property damage. When presented with an appropriate opportunity, the Supreme Court of Pennsylvania should revisit the issue and affirm the Commonwealth Court's decision applying continuous trigger in cases involving property damage of this nature. Affirming this decision would not only clear up a gray area of Pennsylvania insurance law, but would also prevent insurance companies from limiting coverage when the property damage claimed by the insured goes undetected or undiscovered for a number of years.

III. ANALYSIS

Should the Commonwealth Court's decision in *Johnson Matthey* ultimately come before the Supreme Court of Pennsylvania, then the Supreme Court should follow its reasoning in *J.H. France*,¹⁴¹ along with the growing body of law from other jurisdictions,¹⁴² and find that the continuous trigger theory applies in cases involving continuous, progressive property damage. This holding by the Supreme Court would allow for coverage to be provided to an insured for continuous, progressive property damage beginning from the time the damage commences, up to the time that the damage manifests. The following discussion centers on the issue of which trigger theory is appropriate in cases involving continuous, progressive property damage, as well as the various principles to which courts will adhere in construing insurance policies during

140. See *id.*

141. See generally *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993).

142. See Brief in Opposition to Pennsylvania Manufacturers' Ass'n Insurance Co.'s Motion for Summary Judgment filed on Behalf of Amici Curiae, Allegheny Technologies, Inc. et al. at 16–17, *Johnson Matthey*, 160 A.3d 285 (No. 330 M.D. 2015) (listing the following decisions from other jurisdictions that have considered the issue of triggering coverage for environmental liabilities and applied a continuous trigger under "historical CCL policies": *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1417 (W.D. Wash. 1990); *Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 913 P.2d 878, 880–81 (Cal. 1995); *Pub. Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 939 (Colo. 1999); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 492 n.33 (Del. 2001); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 670 N.E.2d 740, 748 (Ill. App. Ct. 1996); *Chi. Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 797 N.E.2d 434, 443 (Mass. App. Ct. 2003); *Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr*, 799 A.2d 499, 511–14 (N.J. 2002); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 840 (Ohio 2002); *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1210 (Or. 1996); *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 254 (Wash. 1998); *Soc'y Ins. v. Town of Franklin*, 607 N.W.2d 342, 346 (Wis. Ct. App. 2000)).

coverage disputes.¹⁴³ As will be discussed, each principle of insurance policy interpretation described below supports the application of the continuous trigger theory.

A. *Principles of Insurance Policy Interpretation: How the Supreme Court of Pennsylvania Should Interpret Policies Covering Continuous, Progressive Property Damage Claims*

Although insurance policies generally fail to directly address progressive injury, insurance policies must be interpreted in “a manner that is equitable and administratively feasible and that is consistent with insurance principles, insurance law, and the terms of the contracts themselves.”¹⁴⁴ In addition to giving effect to the plain language of insurance policies,¹⁴⁵ three principles that courts use to aid in their interpretation of insurance policies are (1) *contra proferentem*,¹⁴⁶ (2) the reasonable expectations doctrine,¹⁴⁷ and (3) interpreting insurance policies so as to provide maximum coverage to the insured.¹⁴⁸ Each of these principles, when used to interpret the language of standard CGL policies, supports the application of the continuous trigger theory in cases involving continuous, progressive property damage.¹⁴⁹

1. The Plain Language of CGL Policies Supports the Application of Continuous Trigger

Pennsylvania law requires courts construing an insurance policy to first give effect to the plain language of the policy.¹⁵⁰ As the Supreme Court of Pennsylvania has stated, “[t]he goal in construing and applying the language of an insurance contract is to effectuate the intent of the parties as manifested by the language of the specific policy.”¹⁵¹ When the policy language is plain and unambiguous, Pennsylvania courts will be bound by that language.¹⁵² Specifically, the plain language of standard CGL policies supports the application of continuous trigger to claims for continuous, progressive property damage.

143. See, e.g., Fischer, *supra* note 45, at 157–58 (noting that under the doctrine of reasonable expectations, insurance contracts are “rigorously construed by courts with the intent of protecting the policyholder by providing the maximum coverage possible”).

144. Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1041 (D.C. Cir. 1981).

145. See *infra* Part III.A.1.

146. See *infra* Part III.A.2.

147. See *infra* Part III.A.3.

148. See *infra* Part III.A.4.

149. See *infra* Part III.A.1-4.

150. See Pa. Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 14 (Pa. 2014).

151. *Id.*

152. See *id.*

As previously mentioned, the phrase “trigger of coverage” refers to what must take place during a policy period in order for the policy’s coverage obligations to be triggered.¹⁵³ In standard CGL policies, such as those at issue in both *J.H. France* and *Johnson Matthey*, the plain language provides that the policies will be triggered simply by bodily injury or property damage taking place during the policy period.¹⁵⁴ In *Johnson Matthey*, the insurer, PMA, even admitted that “the insurance applies only where there is bodily injury or property damage that occurs during the policy period.”¹⁵⁵ The plain language of standard CGL policies therefore supports the application of the continuous trigger theory because the coverage requirements provided in the policy would be satisfied whenever injury or damage takes place.¹⁵⁶

Conversely, the application of the first manifestation rule in cases involving continuous, progressive property damage is at odds with the plain language of standard CGL policies.¹⁵⁷ In addition to the fact that the word “manifestation” is nowhere to be found in the language of such policies,¹⁵⁸ the date of manifestation in cases presenting continuous, progressive property damage is not typically the same as the date(s) on which the damage occurred.¹⁵⁹ The first manifestation rule adds an extra obstacle in the way of an insured seeking coverage under a standard CGL policy by requiring the damage to have manifested. This obstacle is not required by the language of the policy, and therefore, would clearly contravene the policy’s plain language by requiring a court interpreting the policy to supplement it with additional language.

Thus, because the policy language in both cases clearly states that coverage obligations will be triggered simply by bodily injury or property damage taking place while a policy is in effect, and because the policies

153. See *Pa. Mfrs.’ Ass’n Ins. Co. v. Johnson Matthey, Inc.*, 160 A.3d 285, 289 (Pa. Commw. Ct. 2017).

154. See *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 505 (Pa. 1993) (“[The Insurer] will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury . . . to which this insurance applies, caused by an occurrence.”); *Johnson Matthey*, 160 A.3d at 290 (“[The Insurer] will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage . . . to which this insurance applies, caused by an occurrence.”). The policies at issue in *Johnson Matthey* went one step further and explicitly defined “occurrence” as “an accident, including injurious exposure to conditions, which results, *during the policy period*, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” *Id.* at 291 (emphasis added).

155. See Supplemental Brief of *Johnson Matthey, Inc.* in Opposition to Pennsylvania Manufacturers’ Ass’n Insurance Co.’s Motion for Summary Judgment at 14, *Johnson Matthey*, 160 A.3d 285 (No. 330 M.D. 2015) (emphasis omitted).

156. *Johnson Matthey*, 160 A.3d at 293.

157. *Id.*

158. See, e.g., *id.* at 290–91.

159. *Id.* at 293.

make no mention of the word manifestation in any way, the language in these policies is plain and unambiguous.¹⁶⁰ A court interpreting the language of standard CGL policies should apply its plain meaning and find that continuous trigger applies in cases involving continuous, progressive property damage.

Although the Supreme Court of Pennsylvania's decision in *St. John* would appear to refute this conclusion, that decision can be easily distinguished. As previously mentioned, the court in *St. John* was not deciding which trigger theory applies in cases involving continuous, progressive property damage.¹⁶¹ Rather, it was deciding whether coverage continued to be triggered *after* the property damage had first manifested.¹⁶² In *Johnson Matthey*, on the other hand, the Commonwealth Court decided which trigger of coverage was generally applicable in cases involving claims for continuous, progressive environmental contamination.¹⁶³

Additionally, the policy language at issue in *St. John* was not the same as the historical CGL policy language at issue in both *J.H. France* and *Johnson Matthey*.¹⁶⁴ After determining that there was an ambiguity in the policy language in *St. John*, the Supreme Court of Pennsylvania looked to a unique provision in the Penn National policy, which stated the following:

“Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured . . . includes any continuation, change, or resumption of that “bodily injury” or “property damage” after the end of the policy period.¹⁶⁵

When the court read this provision together with the language it deemed ambiguous, the court found that the first manifestation rule was the better approach for determining coverage compared to that of the continuous trigger theory.¹⁶⁶ The Supreme Court reasoned that allowing a single occurrence to trigger coverage under multiple policy periods would render the unique provision irrelevant because the provision already allows for coverage when the property damage “continu[es], change[s], or

160. *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506–07 (Pa. 1993); *Johnson Matthey*, 160 A.3d at 293.

161. *See* Pa. Nat'l Mut. Cas. Ins. Co. v. *St. John*, 106 A.3d 1, 3 (Pa. 2014); *Johnson Matthey*, 160 A.3d at 292.

162. *See St. John*, 106 A.3d at 3; *Johnson Matthey*, 160 A.3d at 292.

163. *See Johnson Matthey*, 160 A.3d at 292.

164. *Compare J.H. Fr.*, 626 A.2d at 505, and *Johnson Matthey*, 160 A.3d at 290–91, with *St. John*, 106 A.3d at 5 n.5.

165. *St. John*, 106 A.3d at 5 n.5 (alterations in original) (emphasis added).

166. *See id.* at 21.

resum[es]” after the end of the policy period.¹⁶⁷ If this unique provision had not been in the Penn National policy in *St. John*, the Supreme Court may have come to a different conclusion.

Therefore, *St. John* should not be treated as controlling authority with respect to policies containing standard CGL policy language because the policy at issue in *St. John* contained a unique provision not contained in the language of standard CGL policies.¹⁶⁸ The court’s adoption of the first manifestation rule as the appropriate trigger, which was based on an analysis of irregular policy language, is fundamentally flawed when considered in the context of standard CGL policy language. The plain language of standard CGL policies supports the application of continuous trigger because the plain language simply requires bodily injury or property damage to take place during the policy period, which occurs whether or not the damage has already manifested.¹⁶⁹

2. The Doctrine of *Contra Proferentem* Supports the Application of Continuous Trigger

The doctrine of *contra proferentem* also supports the application of continuous trigger in cases involving continuous, progressive property damage. Under the doctrine of *contra proferentem*, courts are required to construe any ambiguous terms in an insurance policy against the insurer and in favor of coverage.¹⁷⁰ The general rule for determining whether policy language is ambiguous is that language will be deemed ambiguous if it is “reasonably or fairly susceptible to different interpretations or meanings.”¹⁷¹ Thus, if both parties to an insurance policy are able to offer different reasonable interpretations of the policy language at issue, the policy language will be deemed ambiguous and should be construed in favor of coverage.¹⁷²

In a typical insurance coverage dispute,¹⁷³ there will be no debate over when an injury occurred.¹⁷⁴ In a case involving continuous, progressive property damage, however, the parties will likely always argue over the meaning of the term “occurrence” in attempting to

167. *Id.*

168. *Id.*

169. *See J.H. Fr.*, 626 A.2d at 505; *Johnson Matthey*, 160 A.3d at 290–91.

170. Christopher C. French, *Revisiting Construction Defects as “Occurrences” Under CGL Insurance Policies*, 19 U. PA. J. BUS. L. 101, 109 (2016).

171. *Id.*

172. *Id.*

173. For example, a case involving an automobile accident where the date of the accident is clearly defined.

174. *Wis. Elec. Power v. Cal. Union Ins. Co.*, 419 N.W.2d 255, 258 (Wis. Ct. App. 1987).

determine which policies are triggered by the underlying injury.¹⁷⁵ The policyholder will likely argue that the damage occurred during multiple successive time periods during which coverage was in effect, while the insurer will likely argue that the damage manifested during a policy period that it did not cover, or alternatively, under only one of its policies when the damage first manifested.¹⁷⁶ Thus, in cases alleging continuous, progressive property damage, when the damage “occurred” is often determinative of which trigger theory will be applied to the claim.¹⁷⁷

However, the term “occurrence” has been found to be ambiguous in the context of continuous, progressive property damage because it was susceptible to more than meaning.¹⁷⁸ This ambiguity required the term “occurrence” to be construed strictly against the insurer and in favor of coverage, which ultimately led the court to apply the continuous trigger theory.¹⁷⁹ The Supreme Court of Pennsylvania should adopt the same reasoning when the appropriate opportunity arises and find that the term “occurrence” is ambiguous under standard CGL policy language. This finding would subsequently require the Supreme Court to construe the term “occurrence” in favor of coverage, which in turn would support the application of continuous trigger because any CGL policy in effect would then be triggered if any portion of the damage took place during the policy period.¹⁸⁰ In view of the fact that continuous, progressive property damage typically occurs over a number of years and during multiple policy periods, the doctrine of *contra proferentem* would support the application of continuous trigger in cases involving such damage by requiring a court to construe the term “occurrence” in favor of coverage.

3. The Reasonable Expectations of the Insured are Best Represented When Continuous Trigger is Applied

The reasonable expectations doctrine also supports the application of continuous trigger to claims involving continuous, progressive property

175. *See id.*

176. *See id.*

177. *See id.*

178. *Id.*

179. *Id.*

180. *See id.* Moreover, the Supreme Court of Pennsylvania’s decision in *St. John* is flawed because it does not correctly apply *contra proferentem*. In his dissent, now Chief Justice Saylor described how, although the majority had “discern[ed] a critical ambiguity in the policy language,” they then refused to apply the doctrine of *contra proferentem* and construe the language in favor of the insured. Pa. Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 25–26 (Pa. 2014) (Saylor, J., dissenting). Thus, the majority opinion in *St. John* defied a major principle of insurance policy interpretation when it refused to construe ambiguous language in favor of the insured, making the decision flawed when considered in this context.

damage. Under the reasonable expectations doctrine, in an insurance coverage dispute, the words of the policy should be construed in accordance with what the reasonable insured would have understood and expected the words to mean, rather than what the insurer unilaterally claims it intended the words to mean.¹⁸¹ This construction of the language of the policy is given effect “in spite of the fact that had [the insured] made a painstaking study of the contract, he would have understood the limitation that defeats the expectations at issue.”¹⁸² In the case of continuous, progressive property damage, a “perfectly reasonable expectation” of an insured based on the plain language of a CGL policy defining what constitutes an “occurrence” is that whenever harmful exposure to any dangerous conditions is taking place, then the occurrence is continuous and will trigger multiple policy periods.¹⁸³

This interpretation of what constitutes an occurrence is reasonable because standard CGL policy language defines “occurrence” as “an accident, *including continuous or repeated exposure to conditions . . . neither expected nor intended*” by the insured.¹⁸⁴ An insured would be likely to understand this language to mean that as long as exposure to harmful conditions is continuing, coverage will be provided until the damage has become either expected or intended from their standpoint.¹⁸⁵ The reasonable expectations doctrine would thus require a court to construe the term “occurrence” in accordance with the interpretation provided by the insured,¹⁸⁶ thereby requiring the application of continuous trigger.¹⁸⁷

Interpreting the language in CGL policies in this way aids courts in applying the reasonable expectations doctrine to ensure that the understanding and expectations of the insured are represented.¹⁸⁸ When policyholders purchase CGL insurance, they expect to be covered for any potential liabilities that might occur during the policy period.¹⁸⁹

181. *Wis. Elec.*, 419 N.W.2d at 256–57; *see also* James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text Versus Context*, 24 ARIZ. ST. L. J. 995, 996 (1992) (reasoning that insurance contracts are generally contracts of adhesion because “there is little, if any, freedom to negotiate the standardized language of the insurance contract that determines the scope of coverage”).

182. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

183. *Wis. Elec.*, 419 N.W.2d at 258.

184. *See, e.g.*, *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993) (alterations in original).

185. *Wis. Elec.*, 419 N.W.2d at 258.

186. *Id.* at 256–57.

187. *Id.* at 258.

188. *Id.*

189. *Vale Chem. Co. v. Hartford Accident & Indem. Co.*, 490 A.2d 896, 902 (Pa. Super. Ct. 1985), *rev'd on other grounds*, 516 A.2d 684 (Pa. 1986).

Additionally, an insurer agrees to assume the risk of the insured's liability when the policy is issued in exchange for the payment of an insurance premium.¹⁹⁰ Thus, when purchasing CGL insurance, an insured is really purchasing certainty-certainty that they will be covered in the event of any potential liability.¹⁹¹ The adoption of the continuous trigger theory gives effect to this valuable commodity by giving the insured what it reasonably expects: coverage for injuries occurring during the policy period.¹⁹²

The Supreme Court of Pennsylvania should adopt and apply continuous trigger in cases involving continuous, progressive property damage because continuous trigger best represents the reasonable expectations of the insured. When insureds purchase CGL insurance, it is reasonable that they would expect to be covered for any potential liabilities that might occur during the policy period.¹⁹³ Continuous trigger not only represents, but also honors, the objectively reasonable expectations of the insured regarding the insurer's coverage obligations under the language of the CGL policy.¹⁹⁴

4. Interpreting Policy Provisions to Provide Maximum Coverage to the Insured Supports the Application of Continuous Trigger

Finally, interpreting insurance policy provisions so as to provide maximum coverage to the insured also supports the application of continuous trigger in cases involving continuous, progressive property damage. When determining how much coverage an insured might be afforded under the provisions of an insurance policy, a court is required to interpret the provisions in order to give effect to the policy's central purpose of coverage.¹⁹⁵ In furtherance of this purpose, courts are tasked with construing the language of the policy in order to provide the insured with the maximum amount of coverage allowable.¹⁹⁶ Continuous trigger best helps courts to maximize coverage for the insured under the policy in effect.¹⁹⁷

190. *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981).

191. *Id.*

192. *See id.*

193. *Vale Chem. Co.*, 490 A.2d at 902.

194. *See, e.g., Wis. Elec. Power v. Cal. Union Ins. Co.*, 419 N.W.2d 255, 256–57 (Wis. Ct. App. 1987).

195. *Hancock Labs. v. Admiral Ins. Co.*, 777 F.2d 520, 523 n.5 (9th Cir. 1985).

196. *See, e.g., U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1163 (W.D. Mich. 1988); *Hancock Labs.*, 777 F.2d at 523 n.5; *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 576 F. Supp. 936, 941 (E.D. Pa. 1983); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 17 (1st Cir. 1982); *Keene Corp.*, 667 F.2d at 1041.

197. *Sundale, supra note 17*, at 288 (citing *Keene Corp.*, 667 F. 2d at 1041).

Continuous trigger provides maximum coverage for the insured because it allows for coverage to be provided in circumstances where the damage or injury occurred over a number of years, thereby forcing the insurer to indemnify the insured for damages related to the continuous occurrence.¹⁹⁸ Additionally, continuous trigger guarantees coverage for property damage that is “continuous or progressively deteriorating throughout successive policy periods.”¹⁹⁹ However, the principle of maximizing the coverage provided is subject to one limitation: the court cannot allow for a recovery greater than the amount lost.²⁰⁰

Notwithstanding this limitation, the Supreme Court of Pennsylvania should adopt continuous trigger in cases involving continuous, progressive property damage in an effort to maximize coverage for the insured. By providing coverage from the point of initial exposure until the damage’s manifestation, continuous trigger permits the insured to fully obtain the benefit of his or her purchase.²⁰¹ Without continuous trigger, an insured may find himself or herself liable for injuries occurring during the policy period.²⁰² If an insured remains liable for such injuries, the purpose of purchasing CGL insurance would be entirely defeated.²⁰³

B. The Similarities Between Latent Bodily Injuries and Continuous, Progressive Property Damage Call for the Application of the Same Trigger Theory

In addition to the principles of insurance policy interpretation discussed above, the similar process by which asbestos-related bodily injuries and continuous, progressive property damage occur calls for the same trigger theory to be applied in cases involving both types of damage.²⁰⁴ The Supreme Court of Pennsylvania should follow its line of

198. See *Dayton Indep. Sch. Dist. v. Nat’l Gypsum Co.*, 682 F. Supp. 1403, 1409 (E.D. Tex. 1988), *rev’d sub nom. on other grounds*, *W.R. Grace & Co. v. Cont’l Cas. Co.*, 896 F.2d 865 (5th Cir. 1990) (concluding that the time between asbestos installation and removal triggered coverage).

199. See 43 AM. JUR. 2D *Insurance* § 680 (2017) (noting further that the “timing of the accident, event, or conditions causing [damage] is largely immaterial” under the continuous trigger theory).

200. *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1452 (3d Cir. 1996).

201. See *Sundale*, *supra* note 17, at 289.

202. See *Pa. Nat’l Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 23 (Pa. 2014) (declining to apply continuous trigger to the relevant Penn National policies, effectively limiting the amount of coverage to which the St. Johns were entitled).

203. See *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508 (Pa. 1993) (noting that “once the liability of a given insurer is triggered, it is irrelevant that additional exposure or injury occurred at times other than when the insurer was on the risk[;] [t]he insurer in question must bear potential liability for the entire claim”).

204. See *J.H. Fr.*, 626 A.2d at 507 (describing the process by which asbestos-related bodily injuries occur upon exposure to asbestos); *Pa. Mfrs.’ Ass’n Ins. Co. v. Johnson*

reasoning in *J.H. France*²⁰⁵ and adopt continuous trigger as the proper trigger of coverage in cases involving continuous, progressive property damage as well. This decision would allow claims for continuous, progressive property damage to be treated similarly to claims for delayed manifestation bodily injuries, which would provide for maximum uniformity in a less-than-uniform area of the law.²⁰⁶

The similar process by which asbestos-related bodily injuries and continuous, progressive property damage manifest supports the application of continuous trigger when both types of damage occur. First, with asbestos-related diseases, the gap between exposure to the asbestos and its manifestation as a recognizable disease makes the exact time of bodily injury extremely difficult to determine.²⁰⁷ The inhalation of asbestos, which is the beginning of the disease process leading up to the manifestation of a disease, may progress throughout numerous policy periods, with the disease continuing to develop in subsequent policy periods and ultimately manifesting even later.²⁰⁸ Different policy periods are likely to be in effect at various times throughout the entirety of the disease process.²⁰⁹ As such, asbestos-related diseases present a “difficult problem of contractual interpretation,”²¹⁰ which is what has ultimately led to the adoption of continuous trigger.²¹¹

A similar problem of contractual interpretation to that described above is presented in cases involving continuous, progressive property damage.²¹² Similar to injuries sustained through exposure to asbestos, injuries sustained due to continuous, progressive property damage involve an “ongoing exposure to a harmful substance with harm occurring over several policy periods.”²¹³ As noted by the Commonwealth Court in *Johnson Matthey*, claims of environmental contamination present the

Matthey, Inc., 160 A.3d 285, 293 (Pa. Commw. Ct. 2017) (describing the issues presented by the delayed onset of environmental contamination).

205. *J.H. Fr.*, 626 A.2d at 507.

206. *See supra* Part II.B.1–3.

207. *See Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1040 (D.C. Cir. 1981).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 1041.

212. *See Pa. Mfrs.’ Ass’n Ins. Co. v. Johnson Matthey, Inc.*, 160 A.3d 285, 293 (Pa. Commw. Ct. 2017) (describing the issues presented by the delayed onset of the environmental contamination).

213. *Plastics Eng’g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 626 (Wis. 2009); *see also Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1450 (3d Cir. 1996) (reasoning that “[a]s with asbestos-related bodily injury, environmental property damage is a progressive harm that, as a practical matter, is indivisible”); *GenCorp, Inc. v. AIU Ins. Co.*, 104 F. Supp. 2d 740, 747 (N.D. Ohio 2000) (noting “where damage or injury is the result of a continuing process rather than a single or episodic exposure, continuous trigger should apply”).

“long latency of continuing, undetected injury or damage that supports a trigger of insurance coverage prior to manifestation.”²¹⁴ This delayed manifestation makes it likely that different policies will be in effect at different times throughout the length of the manifestation process,²¹⁵ as evidenced by the fact that the environmental contamination at issue in the DEP’s civil action in *Johnson Matthey* occurred prior to 1970, but did not manifest until at least 1980.²¹⁶ The similar process by which the two different types of damage manifest demonstrates that the same trigger theory should be applied in cases involving both types of damage.

The Supreme Court of Pennsylvania reasoned in *J.H. France* that it was “more accurate to regard all stages of the disease process as bodily injury sufficient to trigger the insurers’ obligation to indemnify.”²¹⁷ If the words “property damage” are simply substituted for “bodily injury” when the case involves continuous, progressive property damage, the same reasoning could just as easily be applied.²¹⁸ The similarities in the way the injuries evolve and ultimately manifest should lead the Supreme Court of Pennsylvania, when given a chance to revisit the issue, to adopt continuous trigger in cases involving continuous, progressive property damage.

C. Recommendation

Although the Supreme Court of Pennsylvania has not yet applied continuous trigger in cases involving continuous, progressive property damage, the court has heard arguments regarding the issue in the past.²¹⁹ The time has come, especially in light of the Commonwealth Court’s decision in *Johnson Matthey*, for the Supreme Court to follow the lead of other jurisdictions in holding that continuous trigger applies in cases involving such damage.²²⁰ Through the interpretation of CGL policies in accordance with the various principles of insurance policy interpretation noted above, the Supreme Court of Pennsylvania can ensure that the insureds of its state will no longer be left uncovered under CGL policies when continuous, progressive property damage occurs but goes undetected for a number of years.²²¹

214. *Johnson Matthey*, 160 A.3d at 293.

215. *See Keene*, 667 F.2d at 1040 (describing this problem in the context of asbestos-related injuries).

216. *Johnson Matthey*, 160 A.3d at 293.

217. *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993).

218. *See id.*

219. *See generally* Pa. Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 9–11 (Pa. 2014).

220. *See supra* note 144 and accompanying text.

221. *See supra* Part III.A.1–4.



IV. CONCLUSION

The current standard set by the Supreme Court of Pennsylvania as to which trigger theory applies in cases involving continuous, progressive property damage has fluctuated due to the court's seemingly conflicting decisions in *J.H. France* and *St. John*.²²² However, as evidenced by the Commonwealth Court's decision in *Johnson Matthey*, the trend appears to be moving in favor of applying continuous trigger in cases involving property damage with a delayed onset.²²³ Should *Johnson Matthey* be appealed and heard by the Supreme Court of Pennsylvania, the court should affirm the Commonwealth Court's decision and hold that continuous trigger is the proper trigger to apply to these types of claims.

CGL insurance is purchased as a form of coverage that "provides 'general' insurance against the kinds of liability that any business may face, principally for bodily injury and property damage."²²⁴ Through an analysis of the relevant policy language and general principles of insurance policy interpretation, one can see that the purpose of purchasing CGL insurance is to protect the insured from liabilities that might arise during the policy periods.²²⁵ The first manifestation rule does not adequately protect the insureds when continuous, progressive property damage occurs.²²⁶ The Supreme Court of Pennsylvania should adopt and apply the continuous trigger theory in order to protect insureds when continuous, progressive property damage occurs.

222. See *supra* Part II.B.1–2.

223. See *supra* Part II.B.3.

224. ABRAHAM, *supra* note 78, at 463.

225. See *supra* Part III.A.1–4.

226. See Fischer, *supra* note 45, at 157–58 (noting that insurance contracts are "rigorously construed by courts with the intent of protecting the policyholder by providing the maximum coverage possible").