
MINNESOTA'S TRIGGER-OF-COVERAGE LAW: DISCRETE AND IDENTIFIABLE CONFUSION

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It is not always obvious whether the allegations in a complaint trigger an insurer's duty to defend its insured under a commercial general liability policy. The challenge is heightened when the underlying liability took place over more than one policy period. The insuring agreement for bodily injury and property damage liability requires allegations of damages because of bodily injury or property damage,

but "only if . . . [t]he 'bodily injury' or 'property damage' occurs during the policy period." See ISO Form CG 00 01 (12-07). It is obvious a policy is triggered if, for example, a customer slips, falls, and breaks a leg in the insured's store during the policy period. But what if the plumbing in an office building slowly leaks water, causing damage to the cement floor, and the damage occurs over several policy periods and is not discovered for a significant time? Which policy or policies are triggered? Does it matter when the plumbing was installed?

Courts have applied several different methods for addressing how many single-year-policy periods are triggered, and therefore must provide coverage for a lawsuit against the insured, under such circumstances as continuing property damage, long-term environmental contamination, and bodily injury caused by long-term exposure to asbestos. Some courts have applied a so-called "exposure" theory, holding that only those policies in effect when the property or person is exposed to the harmful conditions are triggered. See, e.g., *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980). Other courts have applied a so-called "manifestation" theory, concluding that those policies in effect when the injury or damage is first discovered or becomes apparent are triggered. See, e.g., *Mraz v. Canadien Universal Ins. Co.*, 804 F.2d 1325 (4th

Cir. 1986). Still other courts have applied an "actual injury" or "injury-in-fact" approach, holding that those policies in effect when the injury or damage actually occurs are triggered. See, e.g., *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760 (2d Cir. 1984). Finally, some courts have taken a hybrid approach, concluding that all policies from the time of first exposure through the time of manifestation are triggered. See, e.g., *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981). Courts have referred to this approach as a "continuous" trigger of coverage.

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Minnesota courts apply the "actual injury" rule regarding which insurance policies are triggered when there is continuous injury or damage over consecutive policy periods. Arguably, this rule is most consistent with the policy language, because all policies are triggered when injury or damage occurs during the policy period. But Minnesota courts have taken a nuanced approach to this rule that is unclear and, at times, downright confusing. In the first instance, a court will determine whether it can identify a "discrete and identifiable event" that caused the injury or damage, and if so, only the policy in effect at the time of that event is triggered. Yet if the court cannot identify such an event, then all of the policies in effect when the injury or damage occurs are triggered. But as recent Minnesota courts have found, this standard becomes difficult to apply when the discrete and identifiable event, such as the installation of faulty construction materials into a building, may not result in property damage until years later. Under such circumstances, a policy might be triggered simply because the event that caused the damage took place during that policy period, even though there was no property damage that occurred during the policy period. This creates a relatively unpredictable – as well as inaccurate – result for insurers.

Minnesota courts should abandon the discrete-and-identifiable-event approach, in favor of the simpler and more

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accurate theory that all those policies in effect when injury or damage occurs are triggered, regardless of the event or events that caused it. As discussed below, Minnesota began with this easy-to-apply approach, and it is where the courts should return.

ADOPTION OF THE ACTUAL-INJURY APPROACH

The precursor to Minnesota's trigger-of-coverage jurisprudence was a 1976 case, *Singsaas v. Diederich*, 238 N.W.2d 878 (Minn. 1976), in which a construction company sought coverage from its insurer for an injury that occurred after the applicable policy was cancelled, but where the insured's work giving rise to the liability took place during the policy period. The Minnesota Supreme Court rejected the insured's argument for coverage, instead adhering to the "generally accepted rule that the time of the occurrence is not the time the wrongful act was committed but the time the complaining party was actually damaged." *Id.* at 880. The court, therefore, deemed irrelevant the timing of the accident that gave rise to the injury or damage, instead relying on the timing of the injury or damage, itself, in determining whether an "occurrence" took place during the policy period.

In *Northern States Power Co. v. Fidelity & Casualty Co. of New York*, 523 N.W.2d 657 (Minn. 1994) (hereafter *NSP*), a 1994 environmental contamination case, the Minnesota Supreme Court formally adopted its approach to trigger of coverage, following the precedent established in *Singsaas*. The court noted that while courts from other jurisdictions had taken various approaches to trigger of coverage for continuing injury or damage claims, the approach most consistent with the standard language in a commercial general liability policy was "actual injury," also known as "injury in fact." *Id.* at 662. Under this approach, "only those policies in effect when damage occurred are triggered." *Id.* As articulated in *Singsaas*, this rule provides that the time of the occurrence is not the time that the wrongful act was committed but instead the time the complaining party was actually damaged. In *re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 415 (Minn. 2003). To trigger a policy, then, the insured must show that "some damage" occurred during the applicable policy period, regardless of whether the damage actually manifested during the policy period. *Id.* Accordingly, the court in *NSP* held that each insurer on the risk when property damage occurred afforded coverage to the insured. 523 N.W.2d at 664 (stating that "[w]here . . . the

damages occurred over multiple policy periods, the trial court should presume that the damages were continuous from the point of the first damage to the point of discovery or cleanup," unless an insurer within that timeframe proves otherwise).

LOOKING FOR A DISCRETE AND IDENTIFIABLE EVENT

A year after *NSP*, the supreme court tinkered with this relatively simple and straight-forward approach. In *SCSC Corp. v. Allied Mutual Insurance Co.*, 536 N.W.2d 305, 318 (Minn. 1995), another environmental contamination case, the court applied the actual-injury trigger, but noted that unlike in *NSP*, the present case had "sufficient evidence indicating that the damage arose from a single event in 1977." That event was a chemical spill, from which chemicals continued to leach from the soil into the ground water for years afterwards. Consequently, rather than concluding that all policies on the risk from the time of the spill until the time in which the spill was discovered were triggered, the court held that the insured's liability only triggered the primary policy and excess policy in effect at the time the spill happened. *Id.*

The supreme court followed the *SCSC* approach in *In re Silicone Implant Insurance Coverage Litigation*. The court stated that "[i]f we can identify a discrete originating event that allows us to avoid allocation [among all of the policies during the entire span of continuing injury or damage], we should do so." 667 N.W.2d at 421-22. The court stated that it is only in difficult cases that allocation among several policy periods is appropriate – that is – those cases where a discrete originating event cannot be identified. *Id.* at 421. Relying on testimony that bodily injury for defective breast implants began at implantation, even though the injury continued for years, the court held that implantation was a "readily identifiable discrete event from which all of the plaintiffs' alleged injuries arose." *Id.* at 422. The court therefore concluded that only those insurers on the risk at the time of implantation, and not all insurers during the entire span of the ongoing injury, provided coverage for the claim. *Id.* ("[T]his case is not one of the 'difficult cases' in which allocation is appropriate[.]")

In *Wooddale Builders, Inc. v. Maryland Casualty Co.*, 722 N.W.2d 283, 295 (Minn. 2006), the supreme court recognized that its "application of the 'actual injury' rule has not hewn strictly to [the court's] description in *NSP*." The court noted that in *SCSC*, it had held that when a discrete event gives rise

to property damage, “the time the discrete event occurred is liable for all damage that results from that event, even when the damage persists for many years.” *Id.*; see also *id.* at 289 n.1 (“We have held that the pro-rata-by-time-on-the-risk method applies when damage is continuous and does not arise from a discrete and identifiable event.” (citing *Silicone Implant*, 667 N.W.2d at 421.)). Nevertheless, the *Wooddale Builders* court did not offer further clarification to assist in determining what might constitute a “discrete and identifiable event,” noting that although in the construction defect case before it, the damage was arguably traceable to such an event, the allocation-by-time-on-the-risk method was the law of the case, regardless of whether a discrete event could be identified. *Id.* at 291 n.6 (“[T]he issue whether the pro-rata-by-time-on-the-risk method is generally applicable to water intrusion damage cases is not before us.”). Therefore, the problems borne out of distinguishing between cases where a discrete and identifiable event could be established, and those cases where all policies on the risk during the entire time of the injury or damage were triggered, persisted.

DIFFICULTY IN APPLYING THE DISCRETE-AND-IDENTIFIABLE-EVENT RULE

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attempts at making such determinations in construction-defect cases. In *Westfield Insurance Co. v. Kroiss*, 694 N.W.2d 102, 104-05 (Minn. Ct. App. 2005), the claimant-homeowners alleged damage on account of water intrusions arising out of faulty construction, but there is no indication from the case exactly what kind of construction defect or defects caused the intrusions. One of the homebuilder’s insurers commenced a declaratory judgment action seeking a declaration of no coverage. In determining whether the insurer had a duty to defend, the court of appeals noted that “Minnesota courts have either spread the liability among the different insurers if the damages were the result of con-

tinuing events or assigned the liability to the insurers based on the period of time when the main event and primary damages occurred.” *Id.* at 106. Nevertheless, the court did not attempt to identify a “main event” during the declaratory judgment action, but instead concluded that because the insurer’s policy was potentially on the risk during the time property damage may have occurred, the insurer had a duty to defend. *Id.* at 106-07.

In another case, *Donnelly Brothers Construction Co. v. State Auto Property & Casualty Insurance Co.*, 759 N.W.2d 651 (Minn. Ct. App. 2005), a construction company in the stucco business commenced a declaratory judgment action against its insurer seeking to establish a duty to defend in six separate lawsuits, each of which involved a claim by a homeowner for water intrusion and each of which involved multiple allegations of construction defects, including the misapplication of stucco. While the insurer did not dispute that damage was ongoing when its policy period incepted, the insurer argued that the insured’s liability could be traced to a discrete, identifiable event, that being the improper application of stucco at each house, which took place before the insurer’s policy period. Yet the court of appeals observed that “property damage does not necessarily occur when defective stucco work is performed; rather, the insurer’s duties depend on when the defective work causes damage to the property. *Id.* at 657. The court recognized the pitfalls in attempting to identify a discrete and identifiable event:

Our caselaw . . . does not support the straightforward expedient of simply using the date stucco work was completed as the operative event date. Furthermore, the record on appeal does not indicate when the initial water intrusion resulted from [the insured’s] defective stucco work or when such water intrusion actually caused damage. There is a difference between the misapplication of stucco and the actual failure of the misapplied stucco which allows damaging water intrusion. For our purposes, the date of the defective work cannot be substituted for the commencement of water intrusion or resulting damage.

Id. at 657-58. The court further noted that there were allegations of several construction defects, not the misapplication of stucco alone. Consequently, the “multi-cause dynamic” of defects that led to the water intrusion could be different in each of the houses. *Id.* at 658. The court therefore concluded that the respondent-insurer had a duty to defend because there were questions of fact regarding when the stucco-related defect contributed to the property damage and the effect

of the other alleged construction defects on the ensuing damage. *Id.*

In *Kootenia Homes, Inc. v. Federated Mutual Insurance Co.*, No. A05-278, 2006 WL 224162 (Minn. Ct. App. Jan. 31, 2006), another construction defect case involving water intrusion on account of misapplied stucco, the court of appeals found a discrete and identifiable event, and therefore concluded that coverage was not triggered during other, subsequent policy periods. In that case, the record reflected that the insurer had admitted that the water damage began shortly after completion of construction, so the district court concluded that although the time of the stucco's application was not the time of the occurrence, property damage began occurring shortly after completion of the homes. *Id.*, at *5. On appeal, the court of appeals declined to allocate damages among all insurers on the risk during the course of the continuing damage from water intrusion. The court stated that "the indivisibility and indeterminacy of the injury's origin is the critical issue to allocation, and not the incremental progression of the ongoing damage." *Id.*, at *6. The court concluded that "installation of the stucco was a discrete and identifiable event," and therefore the insurer on the risk at the time of installation was responsible for all damages. *Id.*

In yet another stucco case, *Tony Eiden Co. v. State Auto Property & Casualty Insurance Co.*, No. A07-2222, 2009 WL 233883, at *4-*5 (Minn. Ct. App. Jan. 26, 2009), the Minnesota Court of Appeals could not determine a single discrete and identifiable event, but adding to the quagmire of confusion, found "a series of discrete and identifiable events." The case arose out of a house for which construction was completed in 1994, but property damage due to water intrusion was not identified until 2002. Nevertheless, the district court determined that property damage had begun within the first year or two after construction had been completed, and then continued until October 2002. *Id.*, at *3. The court of appeals noted that the damage was continuous throughout several policy periods, but, relying on the record, stated that it was "impossible to ascertain a specific date when property damage began to occur." *Id.*, at *4. The court of appeals concluded that there was "no single discrete and identifiable event." *Id.* (emphasis added). Nevertheless, the court of appeals stated that allocating among all of the insurance policies during the time that damage occurred was the exception to the rule, and if the court could identify a discrete, originating event, it should do so. *Id.*, at *4 (citing

Silicone Implant, 722 N.W.2d at 421-22). Therefore, because the court of appeals could not determine a single discrete and identifiable event, the court concluded that the continuous injury to the house arose from a series of discrete and identifiable events: "the series of incidents of water intrusion at the . . . house is the functional equivalent of a single discrete and identifiable event." *Id.*, at *5. Because the insurer from whom indemnity was sought was not on the risk during the "series of incidents of water intrusion," the court of appeals concluded that the insurer had no duty to indemnify the insured. *Id.*

RECONCILING DIFFERENT OUTCOMES

In the past four appellate decisions regarding construction defect claims, therefore, the Minnesota Court of Appeals twice identified discrete and identifiable events – *Tony Eiden* and *Kootenia Homes* – and twice relied on the "exception" to the rule, concluding instead that no such event could be established – *Donnelly Brothers* and *Kroiss*. Even though the underlying facts of these cases do not easily lend themselves to reconciling why courts have been able to find a discrete and identifiable event in some instances, while failing to do so in others, the legal posture of the four cases provides some explanation. *Donnelly Brothers* and *Kroiss* involved declaratory judgment actions regarding an insurer's duty to defend, before the underlying liability actions had concluded. Consequently, the court of appeals did not have a factual record from which to determine a discrete and identifiable event, instead relying only on the allegations in the complaints. In contrast, the liability actions underlying *Tony Eiden* and *Kootenia Homes* had progressed to the point where the court of appeals could examine evidence offered and findings of fact made in order to better determine what caused the property damage, as well as when the damage actually occurred.

But that distinction among the cases fails to address the heart of the problem that has developed in Minnesota's trigger-of-coverage jurisprudence: just what exactly is a "discrete and identifiable event," and how does the concept align with the underlying premise of what constitutes an occurrence? Recall, the starting point in Minnesota was that an occurrence is not the time when an accident or wrongful act happens, but it is instead the time when the injury or damage arising from that accident or act occurs. See *Singsaas*, 238 N.W.2d at 880. That articulation of the law has not changed. See *Tony Eiden*, 2009 WL 233883, at *2.

Accordingly, coverage cannot be triggered during a policy period during which no injury or damage occurs. *NSP*, 523 N.W.2d at 663 (“[I]n order to trigger a policy the insured must show that *some damage* occurred during the policy period.”) But how exactly does this relatively simple rule of law align with the determination of a discrete and identifiable event? Is the discrete and identifiable event the acci-

Is the discrete and identifiable event the accident or wrongful act that gives rise to the injury or damage, or is it the injury or damage itself?

dent or wrongful act that gives rise to the injury or damage, or is it the injury or damage itself?

This is the question with which Minnesota courts have struggled, if not explicitly, at least implicitly. The Minnesota Supreme Court did not initially have to grapple with this issue because in those early cases, the accidents and wrongful acts resulted in immediate injury or damage. In *SCSC*, the supreme court determined that the chemical spill was the discrete and identifiable event, the spill resulted in immediate property damage, and therefore only the policies on the risk during the time of the actual spill were triggered. 536 N.W.2d at 318. Similarly, in *Silicone Implant*, the supreme court determined that the implantation of silicone was the discrete and identifiable event, the silicone resulted in immediate bodily injury, and therefore only those policies on the risk at the time of implantation were triggered. 667 N.W.2d at 422. In other words, the Minnesota Supreme Court did not have to grapple with the question of which policies are triggered when the accident or wrongful act giving rise to the injury or damage does not happen during the same policy period as the inception of the bodily injury or property damage.

The Minnesota Court of Appeals was able to avoid the issue in *Kootenia Homes*. There, the court held that the installation of stucco was a discrete and identifiable event, and that property damage began shortly after the house was completed; therefore, the insurer on the risk at the time of the stucco’s installation was responsible for all of the damage. But *Donnelly Brothers* and *Tony Eiden* – the two most recent cases – presented facts in which the court had to deal with the conundrum directly: what happens when the discrete

and identifiable event does not happen during the same policy period as the resulting injury or damage? The issue led to the complex solution in *Tony Eiden*, where the court found a “series of discrete and identifiable events.” Those events were not, however, the construction defects themselves (the accidents or wrongful acts that led to the property damage), but instead “the series of incidents of water intrusion,” which the court confusingly described as “the functional equivalent of a single discrete and identifiable event.” 2009 WL 233883, at *5. In so holding, the court of appeals divorced the accident or wrongful act – the construction defect, which pursuant to the *Singsaas* rule cannot be the occurrence or triggering event – from the resulting injury or damage – the water intrusion.¹ Therefore, in an effort to abide by the preferred option of finding a discrete and identifiable event, Minnesota courts will now have to determine: (1) whether a series of incidents is the functional equivalent of a discrete and identifiable event; and (2) whether the series of incidents must encompass the same policy period as the bodily injury or property damage, or whether somehow the series of incidents can take place during a different policy period.

The court in *Donnelly Brothers*, however, addressed in a more straight-forward manner the tension between finding a discrete and identifiable event on the one hand, and on the other hand, ensuring that the only policy periods that were triggered were periods in which “some damage” occurred. In that case involving misapplication of stucco, the court of appeals recognized that the date the stucco work was completed could not be the operative event and therefore could not be substituted for the water intrusion or resulting damage. 759 N.W.2d at 657-58. Unlike in *Tony Eiden*, the court in *Donnelly Brothers* understood that when past courts have identified discrete and identifiable events – as in *SCSC Corp.*, *Silicone Implant*, and *Kootenia Homes* – the courts considered the accidents or acts giving rise to the bodily injury or prop-

¹ Of course, the *Tony Eiden* court’s analysis appears to assume that the water intrusion was the property damage, which is not necessarily the case; property damage did not necessarily occur at the time the water seeped into the home. Instead, as the district court noted, wood rot and deterioration constituted the property damage. *Tony Eiden*, 2009 WL 233883, at *4. But this distinction further exemplifies the tension between the *Singsaas* rule and the discrete-and-identifiable-event concept, the latter of which makes little sense when considering injury or damage that does not immediately follow the act that caused it.

erty damage as the events, not the resulting injury or damage. The *Donnelly Brothers* court further understood that it could not trigger coverage under those policy periods during which the misapplication of stucco took place, because that would effectively violate the *Singsaas* rule that coverage is only triggered during the periods in which bodily injury or property damage occur. But fact issues precluded the court from attempting to resolve this tension.

RETURNING TO SQUARE ONE

The problem raised, but not answered, in *Donnelly Brothers* will undoubtedly recur in future cases. To illustrate, imagine that contractors install defective plumbing products into many buildings, but property damage from the defective plumbing – for example, water damage to a concrete floor – does not take place at the buildings until years later. The damages then give rise to a class-action lawsuit against the manufacturer of the defective plumbing products. If property damage had begun immediately after installation, it would be simple for a court to determine that the installation of the plumbing constituted a discrete and identifiable event, and therefore conclude that only the policies on the risk at the time of installation are triggered.

But that is not the case described. Instead, time has elapsed between installation and when property damage first occurred. A Minnesota court would therefore have three options. First, a court might find that installation was the discrete and identifiable event and conclude that all subsequent policies on the risk are not triggered; but that approach would violate the *Singsaas* rule because there would be no property damage during the policy period of the triggered policy. Second, a court could take the *Tony Eiden* approach, and in an attempt to find a discrete and identifiable event, conclude that several instances of water leakage from the plumbing constituted the functional equivalent of a discrete and identifiable event; but that approach is seemingly unworkable, where the insured's liability arises from a class action involving many claimants because a court could not begin to engage in the necessary fact-finding to enable this approach.

Third, the court could abandon its attempt to identify a discrete and identifiable event, or, for that matter, any attempt to find a functional equivalent of a discrete and identifiable event, and instead apply the original *Singsaas* rule to its plain letter. Under this approach, all policies are triggered while the injury or damage was ongoing. This rule is not only simple and easily applied by future courts, but it offers predictability for insurers, who would no longer have any need to attempt to prove the all-or-nothing proposition that the discrete and identifiable event took place outside their policy period. While insurers might need to afford coverage for more claims, there would no longer be a risk that a court would conclude that a single insurer is responsible for an insured's entire liability based on injury or damage that occurred over many years. Instead, the insured's liability would be allocated over many policies.

This approach would solve the issue of how to address trigger of coverage when the bodily injury or property damage begins in a later policy period than when the discrete and identifiable event takes place. But broad application of the black-letter, actual-injury rule is encouraged for all trigger-of-coverage determinations. The benefits of abolishing the empirical confusion created by the discrete-and-identifiable-event rule are three-fold: (1) the courts' job of determining trigger of coverage would be much easier; (2) insurers' coverage obligations would be more predictable; and (3) Minnesota's trigger-of-coverage rule would return to its reliance on the policy language: policies are triggered "only if . . . [t]he 'bodily injury' or 'property damage' occurs during the policy period[.]" ISO Form CG 00 01 (12-07). ▲