



**From the Ohio Association of Civil Trial Attorneys  
Business & Commercial Litigation Committee:**

**Retroactive Insurance Coverage for Construction Defects?  
Ohio's highest court declines to answer**

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“When you have to make a choice and don't make it, that is in itself a choice.” -William James.

In *Lightning Rod v Southworth*, the Ohio Supreme Court declined to answer an important question impacting both the construction and insurance industries. Specifically, can a construction defect “occurring” before a CGL policy goes into effect, trigger coverage when some of the damages manifest during the policy period? For the time being, the Supreme Court’s answer to this question will have to wait. And while several appellate courts have weighed in, the appellate court decisions provide no clear insight to litigants involved in a construction defect case.

Before discussing the Supreme Court’s recent non-decision, it is important to understand the contextual background of insurance “trigger theory” as analyzed by Ohio courts. When considering construction defect claims, there are three important events to keep in mind:

- When the defective work is performed;
- When the defective work begins to cause damage; and
- When the damage caused by the defective work becomes “physically ascertainable” or results in identifiable property damage.

On certain occasions, two or more of these events may occur at the same time. For example, if an improperly executed excavation causes a building to collapse and be totally destroyed, all three of these “different” events occur at more or less the same time. Often, however, a significant amount of time may lapse between these events. For example, if a window is improperly flashed, it may be several days or weeks before the window begins to leak. Once leaking begins to occur, there may be additional weeks or months before the leak is physically manifested in the form of mold, rot, etc.

Generally speaking, a CGL insurance policy does not apply retroactively to construction defects occurring before the policy period. A CGL policy will cover construction defects only if the loss or damage qualifies as an “occurrence” under the policy, and only if the occurrence took place after the policy came into effect. Any one of the three “events” listed above may (or may not) qualify as an “occurrence,” depending on the facts of the loss, the policy at issue and the law of the jurisdiction where the loss occurs.

Ohio courts have articulated three principle “trigger theories” in analyzing whether a loss “occurs” during a policy period. These theories more or less correspond with the three events stated above. They are:

- Exposure Trigger:                      Loss occurs when defective work is performed

- Continuous Trigger: Loss begins to occur at the time that the defective work begins to cause damage and then continues to occur as long as the defective work continues to cause damage
- Manifestation Trigger: Loss occurs when defective work physically manifests itself as identifiable property damage

Much of the case law surrounding Ohio's analysis of the Continuous Trigger theory developed from toxic tort cases (e.g. asbestos cases). In such cases, the "continuing" occurrence is often a chronic illness caused by long term exposure to toxins, like asbestos. The circumstances and resulting damage of toxic chemical exposure, however, are very different from construction defect claims. Consequently, the Continuous Trigger standard is often inappropriate for construction defect claims.

Four (Districts 1, 9, 4, and 12) out of Ohio's twelve appellate district courts previously applied the "trigger theory" in construction defect cases when the damages did not manifest until after a policy went into effect. For example, in *Westfield Ins. Co. v. Milwaukee Ins. Co.*, 2005-Ohio-4746, the home builder switched insurers after completing the construction of a home. When the homeowner filed suit alleging construction defects, the builder's second insurer provided a defense and then sought additional coverage from the builder's previous insurer—the company who covered the builder at the time of construction. The court applied the continuous trigger to require both insurers to cover the loss, even though the damages did not manifest at all during the first insurer's policy.

Four different Ohio appellate districts (Districts 5, 8, 9, and 10) refused to apply the trigger theory in construction cases where the damages manifested before a policy went into effect. Instead, these courts applied some form of the Manifestation Theory and held that only the policy in effect on the date the damages first manifest covers the loss.

Technically speaking, due to the timing of when the damages manifested in these particular cases, the various appellate districts are not in conflict. Nevertheless, the different appellate districts' application of different theories leaves significant uncertainty on whether the trigger theory is viable.

In *Lightning Rod Mut. Ins. Co. v. Southworth*, 2016-Ohio-3473, 55 N.E.3d 1174 (4th Dist.), the Fourth District was faced with deciding which theory to adopt.

*Lightning Rod* involved the installation of a double-wide mobile home. The owners of the mobile home purchased the home from CMH Homes, Inc. ("CMH") in November of 2007. CMH contracted with Bob's Home Service, LLC ("Bob's") for the installation of the home. Robert Southland ("Southland") was the principal member of Bob's.

Shortly after taking occupancy, the homeowners began to notice problems with the home's construction. These included cracks in the drywall ceiling, separation at the marriage line, bunched carpeting, out-of-square doors, etc. CMH, as well as the home's original manufacture, began efforts to repair the home as early as January of 2008. The problems, however, persisted. It was ultimately discovered that Bob's installed fewer than 25% of the "marriage bolts" required to keep the two halves of the "double-wide" mobile home joined to each other.

In November of 2008, about a year after the home's sale and installation, Bob's purchased a CGL insurance policy from Lightning Rod Mutual Insurance Company ("Lightning Rod"). The policy automatically renewed annually through 2012. In June of 2012, the homeowners filed suit.

Bob's tendered its defense in the lawsuit to Lightning Rod, which provided a defense subject to a reservation of rights. Lightning Rod then sought a declaration from the court finding that Lightning Rod was *not* obligated to defend or provide coverage on behalf of Bob's because the "occurrence" did not take place during the policy period.

"When interpreting insurance policies, the terms of the policy are examined to determine the intention of the parties regarding coverage." *Snyder v. Westfield Ins. Co.*, 9th Dist. Wayne No. 02CA0064, 2003-Ohio-5904, ¶ 1. The specific language of the Lightning Rod policy was more or less identical to "form" language used in most of the CGL policies issued by most insurers. The policy required that an occurrence take place during the policy period, and it excluded coverage for pre-existing damages the insured knew of before contracting for insurance. In pertinent part, it read as follows:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of... "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages...
- b. This insurance applies to... "property damage" only if:
  - (1) The... "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
  - (2) The... "property damage" occurs during the policy period; and
  - (3) Prior to the policy period, no insured... and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the... "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the... "property damage" occurred, then any continuation, change or resumption of such... "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

CMH argued that even though Bob's was on notice of some of the damages before contracting for insurance, the pre-existing knowledge shouldn't defeat coverage. According to CMH, because *some* property damaged occurred during the policy period, coverage should apply.

Lightning Rod argued that the parties knew about some of the property damage resulting from the construction defect more than eight months before Bob's purchased the policy. Consequently, the policy did not cover the property damage. Stated differently, CHM argued that the court should apply the Continuous Trigger theory and rule that the claim was covered because some of the continuing injuries occurred during Lightning Rod's policy period. Meanwhile, Lightning Rod argued that the court should apply the Manifestation Theory and rule that the claim was not covered because property damage first manifested itself (and the injury, therefore, occurred) prior to the commencement of coverage.

The trial court agreed with Lightning Rod and held the Continuing Trigger Theory *did not* apply to create coverage. The court declared that Lightning Rod had no duty to defend or indemnify

Bob's or pay for any of the damages resulting from Bob's defective work. The Fourth Appellate District affirmed the trial court's decision, thereby rejecting the Continuous Trigger theory on behalf of the entire Fourth District.

With the Fourth District's ruling in *Lightning Rod*, the count of Ohio appellate districts rejecting the Continuous Trigger theory, in the context of construction defect claims, increased to five. The appellant asked the Fourth District Court of Appeals to certify a conflict, but the appellate court declined to do so.

After the appellate court declined to certify a conflict, CMH filed a discretionary appeal with the Ohio Supreme Court, which initially accepted jurisdiction – ostensibly to resolve a matter of great public interest in Ohio. Ultimately, in a 5 to 2 decision, the Ohio Supreme Court determined it “improvidently allowed” jurisdiction over the appeal and dismissed the case.

So as a practical matter, what does this mean? “Improvident Acceptance” is a relatively uncommon, but perfectly proper, discretionary tactic. The Ohio Supreme Court uses this tactic to “decide” a case after accepting jurisdiction without actually issuing a substantive decision. Generally speaking, the Court reserves its use of this discretionary authority for situations where the Court is either not ready to make a ruling on a particular issue or does not want to make a ruling based on the facts that are before it in the immediate, particular, case. It may also signify that the Court believes the underlying policy determination is best left to another branch of government.

At least two Justices felt that the Court should have rendered a decision reversing the court of appeals. In a dissenting opinion in which Justice French concurred, Justice O'Donnell concluded that “the policy provide[d] coverage for property damage that exist[ed] during the policy period, including the continuation, change, or resumption during the policy period so long as the insured or an authorized employee had no knowledge of the damage before the policy period.” Based on the remaining Justices' choice not to choose, however, the question remains as to whether or not the Continuous Trigger theory does or does not apply to construction defect claims in Ohio.

Other than the practical effect that the Supreme Court's decision had in the particular case of *Lightning v Southworth*, it would be presumptuous for any lawyer or litigant to read too much into the Supreme Court's decision. Ultimately, the question of whether continuing damages stemming from construction defects trigger CGL coverage under multiple policies is a question for some future case to resolve.

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