



## Current Articles 2005 – December

### The new CGL and “The Triple Trigger Theory”

In last month's article I commented on the Concurrent Causation decision by the Court and how the wording of the revised IBC CGL hopes to prevent a similar liberal interpretation. Another important Court decision has prompted further amendments. This is because of the use of the Triple Trigger Theory in settling bodily injury losses.

Black's Law Dictionary defines the Triple Trigger Theory as *“a theory of coverage providing that all insurers on a risk from the day a claimant is first exposed to an injury producing product beyond the last exposure to the date of diagnosis or death, whichever occurs first, must cover the loss.”* This is also called the Continuous Trigger or Multiple Trigger Theory.

The Courts, both Canadian and USA, have developed four approaches as to when the claim occurred. One of these, of course is the Triple Trigger Theory as above. In addition there is the “Exposure Theory” where liability is based to the time of **the exposure** to the cause of an illness. For continuous exposure, all insurers with a policy in effect during the exposure period are liable. The Manifestation Theory deems that the loss occurred only when damages become known. The Injury in Fact Theory deems that coverage is triggered only at the point where a loss actually occurs, regardless of the time of exposure. Only policies in force when the injury occurs will apply.

If the court adopts the Triple Trigger Theory, it means that all policies in force from the date of the first exposure to an adverse condition (asbestos, silica, etc.) will be required to contribute to the loss.

This was the case in the *Alie v. Bertrand* decision. In this case, Bertrand & Frere Construction Co. supplied concrete for the construction of about 140 homes from 1986 to 1988. The concrete contained a product known as “type C fly ash” which was supplied by Lafarge. In the 7 years between 1986 and 1992, almost 140 homeowners experienced deterioration in the concrete resulting in the need for complete replacement of the footings and foundation walls. The homeowners sued Bertrand and Lafarge.

All insurers (approximately 23) originally denied coverage under the CGL and refused to supply a defense. A 150-day trial awarded 80% against Lafarge and 20% against Bertrand.

The judge concluded that **all policies between 1986 and 1992 were triggered**. This followed the “Triple Trigger Theory which deems damages occurred from the initial exposure in 1986 to the time the damages became manifest. This allowed a “stacking” of the limits from the various insurers who affected each year's coverage. It also allowed coverage under prior policies in force before the damages were discovered, to apply. Although the losses had not manifested, the exposure to the defected product contributed to these losses.

In other situations, applying the triple trigger theory can make a claim settlement difficult. What if there was no coverage during part of the exposure period? Or if limits for some policies were

inadequate? In the USA the courts have applied the "joint and severable" clause, which can make all insurers liable for the full amount of the award. If this applies it could mean that one of the insurers could be held responsible for the whole loss.

The new CGL has added a condition to preclude coverage for known losses that occurred prior to the policy period e.g. to exclude coverage for losses being paid under multiple policies by the adoption of the "Triple Trigger Theory". The new CGL has added under the Insuring Agreement (1 *(d) Bodily Injury or Property Damage will be deemed to have been known to have occurred at the earliest time when any Insured (defined)... gives notice or receives notice of an occurrence or claim:*

- (1) Reports all, or any part of the BI or PD to us or any other insurer*
- (2) Receives a written or verbal demand or claim .....*
- (3) Becomes aware by any other means that BI or PD has occurred or has begun to occur.*

Once again, only time will tell if this amendment will stand up in Court!

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