

## The Progression of Trigger Litigation in Maryland - Determining the Appropriate Trigger of Coverage, Its Limitations, and Ramifications

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### Recommended Citation

Lee H. Ogburn, *The Progression of Trigger Litigation in Maryland - Determining the Appropriate Trigger of Coverage, Its Limitations, and Ramifications*, 53 Md. L. Rev. 220 (1994)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol53/iss1/7>

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# THE PROGRESSION OF TRIGGER LITIGATION IN MARYLAND—DETERMINING THE APPROPRIATE TRIGGER OF COVERAGE, ITS LIMITATIONS, AND RAMIFICATIONS

LEE H. OGBURN\*

## I. INTRODUCTION

In the myriad insurance coverage disputes pending across the country, courts and litigants face the question of whether the insurance policies at issue were “triggered.” Courts have not established uniform principles to resolve this question.<sup>1</sup> The Maryland Court of Appeals recently added its voice to this debate and in the process fundamentally changed insurance law in Maryland. In *Lloyd E. Mitchell, Inc. v. Maryland Casualty Co.*<sup>2</sup> and *Harford County v. Harford Mutual Insurance Co.*,<sup>3</sup> the court abandoned the “manifestation” theory for determining when a policy is triggered and replaced it with the “injury-in-fact” theory.<sup>4</sup>

This Article discusses the ramifications of the court’s decision to adopt injury in fact as the trigger of coverage for the standard commercial general liability insurance policy. The Article compares the strengths and weaknesses of the injury-in-fact trigger with those of other trigger theories. The Article first examines cases from jurisdictions outside of Maryland and describes and analyzes their different trigger theories. It then examines the development of trigger theory under Maryland law. Finally, the Article suggests how Maryland courts

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1. Trigger litigation emerged in the late 1970s with the advent of asbestos-related claims. See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230 (E.D. Mich. 1978) (involving a dispute over which insurance carrier had a duty to defend Forty-Eight Insulations in over 250 asbestos-related lawsuits), *aff’d*, 633 F.2d 1212 (6th Cir. 1980), *reh’g granted and clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981). Trigger litigation has continued unabated not only in asbestos-related cases but also in cases involving other toxic torts and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (1988) (CERCLA). See, e.g., *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760 (2d Cir. 1984) (involving a dispute over whether an insurance policy covered injuries arising from the sale of pharmaceuticals); *Fireman’s Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987) (involving a dispute over whether an insurance policy covered the cost of a CERCLA clean up). See generally KENNETH A. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 91-128, 225-28 (1991).

2. 324 Md. 44, 595 A.2d 469 (1991).

3. 327 Md. 418, 610 A.2d 286 (1992).

4. See *infra* notes 74-77, 89-93 and accompanying text.

should implement the new injury-in-fact trigger. Specifically, the Article suggests that, when expert testimony cannot provide evidence establishing the actual time of injury, the court should apportion liability among the various insurers on a pro rata, rather than a joint and several, basis.

## II. TRIGGER LITIGATION OUTSIDE MARYLAND

It is important for context to understand the "trigger" provisions of the standard form Commercial General Liability (CGL) insurance policy<sup>5</sup>—the policy that most businesses purchase to protect against claims that third parties assert for bodily injury or property damage<sup>6</sup>—before delving into the trigger cases. Since 1966, the standard CGL policy has provided that the insurer will pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which [the] insurance applies."<sup>7</sup> The standard CGL policy limits the scope of the insuring agreement by stating that "[t]his insurance applies only to 'bodily injury' and 'property damage' which occurs during the policy period. The 'bodily injury' or 'property damage' must be caused by an 'occurrence.'"<sup>8</sup>

These provisions are easy to apply when the event giving rise to a claim against the insured is a sudden accident causing an immediately apparent injury.<sup>9</sup> In other circumstances, however, the question of when policy coverage is triggered becomes more complex. For exam-

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5. The standard CGL policy, formerly known as the "Comprehensive General Liability" insurance policy, underwent significant revisions in 1947, 1955, 1966, 1973, and 1986. See ABRAHAM, *supra* note 1, at 24. This Article addresses the issues raised by the language in the 1966, 1973, and 1986 forms.

6. *Id.* at 25.

7. *Id.* at 274 (quoting from the 1986 standard CGL policy).

8. *Id.* at 274 (quoting from the 1986 standard CGL policy). Between 1966 and 1973, the requirement that the "bodily injury" or "property damage" occur during the policy period was contained in the definition of "occurrence," which was: "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury and property damage neither expected nor intended from the standpoint of the insured." *Id.* at 299 (quoting from the 1966 standard CGL policy).

Although the requirement that the injury or damage occur "during the policy period" was deleted from the definition of "occurrence" in 1973, *id.* at 288 (quoting from the 1973 standard CGL policy), the definitions of "bodily injury" and "property damage" were modified to include that requirement. *Id.* at 287-88. "Bodily injury" was defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period." *Id.* at 287. "Property damage" was defined as "physical injury to or destruction of tangible property which occurs during the policy period." *Id.* at 288.

9. For example, when a person asserts a claim alleging traumatic injury resulting from being hit on the head by a box that fell off a shelf in the ABC Shoe Store, one can determine easily that coverage of the insurance policy in effect on the date of the accident is "triggered."

ple, when a claim arises out of a third party's extended exposure to a toxic substance manufactured by the insured that results in a disease which remains latent for several decades, it is unclear whether the initial exposure to the substance, the manifestation of the disease, or some event during the latency period triggers coverage. Resolving the issue of when coverage is triggered is important because only a triggered policy potentially covers the injury.

Courts have concluded that exposure, latency, occurrence of the injury, or manifestation—and even combinations of these—will “trigger” coverage. Corresponding trigger theories followed: the exposure theory, the manifestation theory, the triple-trigger theory, and the injury-in-fact theory.<sup>10</sup> The inconsistent conclusions that courts have reached in interpreting the same policy language seem to result from these courts' desire to expand the scope of coverage.

For example, in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,<sup>11</sup> the United States Court of Appeals for the Sixth Circuit concluded that it was exposure to the harmful substance (asbestos fibers) that triggered coverage for personal injury claims by asbestos workers, stating that “we are bound to broadly construe the insurance policies to promote coverage.”<sup>12</sup> The court reasoned that under any trigger theory other than exposure “the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself.”<sup>13</sup> Based in part on this reasoning, the court concluded that the exposure trigger represented the correct interpretation of the standard CGL policy.<sup>14</sup>

In *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*,<sup>15</sup> the United States Court of Appeals for the First Circuit reached essentially

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10. See *infra* text accompanying notes 11-23.

11. 633 F.2d 1212 (6th Cir. 1980), *reh'g granted and clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

12. *Id.* at 1219. In *Forty-Eight Insulations*, the Insurance Company of North America sought a declaration as to which insurers had a duty to defend or indemnify Forty-Eight Insulations, Inc. against lawsuits arising out of its manufacture of asbestos products. *Id.* at 1214. The lower court, the United States District Court for the Eastern District of Michigan, had ruled that the policies of each insurer that insured Forty-Eight Insulations, Inc. during the exposure period were triggered. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230, 1245 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *reh'g granted and clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

13. *Forty-Eight Insulations*, 633 F.2d at 1219.

14. See *id.* at 1223.

15. 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983). In this case, Eagle-Picher Industries, Inc., a manufacturer of products containing asbestos, sought a declaration that its insurers between 1968 and 1980 had to provide coverage for asbestos-related claims based on the “manifestation” trigger theory. *Id.* at 15-16. Some of Eagle-Picher's

the opposite conclusion, stating that "in this case, the public policy underpinnings of insurance law support the manifestation result."<sup>16</sup> This court also demonstrated an interest in expanding the available insurance coverage.<sup>17</sup> It explained that "[c]overage based on manifestation was certainly more desirable than coverage based on exposure, given that Eagle-Picher was uninsured during the longest period of exposure and that the number of claims was accelerating during the period of coverage."<sup>18</sup>

Yet a third interpretation of the standard CGL policy, the "triple trigger" theory, was announced in *Keene Corp. v. Insurance Co. of North America*.<sup>19</sup> The *Keene* court concluded that using a "triple trigger"—under which coverage is triggered during exposure,<sup>20</sup> upon manifestation,<sup>21</sup> and during the latency period<sup>22</sup>—was the only way to ensure that Keene Corporation received full and complete indemnity for all of its asbestos-related losses.<sup>23</sup>

The common thread in these opinions is the courts' desire to resolve policy interpretation issues in a way that maximizes coverage.<sup>24</sup>

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insurers countered by arguing that exposure was the appropriate trigger of coverage. *Id.* at 16.

16. *Id.* at 23.

17. *See id.*

18. *Id.*

19. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). *Keene Corp.* sought a declaratory judgment that its insurers from 1961 to 1980 were obligated to provide coverage for bodily injury claims against it arising out of exposure to asbestos-laden products. *Id.* at 1039.

20. *Id.* at 1045.

21. *Id.* at 1044.

22. *Id.* at 1046-47.

23. *See id.* at 1050.

24. *See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230, 1232 (E.D. Mich. 1978) (holding that court should "resolve doubts in favor of maximizing coverage"), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *reh'g granted and clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 17 (1st Cir. 1982) (holding that policies should be construed to "promote the policy objective of providing coverage"), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp.*, 667 F.2d at 1050 (holding that a triple trigger theory "is the only way that Keene can be assured the security that it purchased with each policy"). These courts are not alone in their view that a victory for the insured fulfills some public policy and advances a common good. Judge Sarokin of the United States District Court for the District of New Jersey invoked the sanctity of contract when he expressed his view that "insurance companies can be seen scurrying about the courts of this country in search of ways to avoid honoring their policies." *Sandoz, Inc. v. Employer's Liab. Assurance Corp.*, 554 F. Supp. 257, 258 (D.N.J. 1983). Judge Sarokin concluded that "[t]he presumption should be in support of coverage, rather than its rejection." *Id.*

This result-oriented approach leads to jurisprudential problems, however, *see supra* note 25, and raises other important questions. For example, is it in the public interest for a polluter to enjoy relief from financial responsibility for the consequences of its conduct by

This result-oriented approach has made it difficult or impossible to reconcile the courts' decisions with any legal principle.<sup>25</sup> Indeed, several courts and commentators have noted that trigger litigation has become a repository of result-oriented jurisprudence.<sup>26</sup>

### III. TRIGGER LITIGATION IN MARYLAND

#### A. *The Manifestation Trigger*

1. *The Cases.*—The United States Court of Appeals for the Fourth Circuit was the first court to find and apply Maryland law in a

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shifting that responsibility to an insurer? Being able to shift accountability to an insurer may reduce or remove a polluter's incentive not to pollute. In turn, the insurer that is held responsible for the costs of the cleanup will attempt to pass on those costs to other insureds through increased premiums. Consequently, the cost of cleaning up after the culpable few is shouldered by the nonculpable many. In a sense, this constitutes a tax imposed by the judiciary.

Although it may be true that the public benefits when a solvent insurer is held responsible for cleaning up the toxic mess created by an insolvent insured, the public policy issues raised by insurance coverage litigation are not as simple to resolve as some courts appear to believe. The issues extend far beyond merely locating the deepest pocket.

25. Some courts have cited as the controlling legal principle the maxim that ambiguities in a contract must be resolved against the drafter, which, in the case of a standard CGL policy, is the insurer. *See, e.g., Keene Corp.*, 667 F.2d at 1041 ("We are aided in our analysis of these policies' coverage by the well-accepted rule that ambiguity in an insurance contract must be construed in favor of the insured."). *Cf. American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983) ("This [contra-insurer] rule of construction, in fact, appears to be the single factor that unified the discordant opinions applying the CGL [policy] and its derivatives to insidious diseases."), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984).

The idea that ambiguities not resolved through extrinsic evidence should be construed against the drafter is well entrenched in American jurisprudence. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). This idea does not, however, logically lead to the conclusion that a court faced with a dispute about the meaning of a clause in an insurance contract is obliged to resolve the case in the way that will maximize the sum of money that the insurer pays to the insured. Courts' efforts to do so have brought about the existing situation in which a standard-form contract is interpreted inconsistently on a case-by-case basis, based on post-contractual circumstances that had nothing to do with the drafting of the contract or the intent of the parties when the contract was made. *See supra* notes 11-23 and accompanying text.

26. *See, e.g., Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 126 n.35 (D.C. Cir. 1986) ("The central basis for the *Keene* holding, however, was the panel's conclusion that their central objective 'must be to give effect to the policies' dominant purpose of indemnity.") (quoting *Keene Corp.*, 667 F.2d at 1041); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1392 (E.D.N.Y. 1988) ("[T]he *Keene* court viewed its mission as ensuring that the manufacturer received complete indemnity for all its asbestos-related losses."); BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 9.03[a] (5th ed. 1992) ("One of the problems in insurance law is that it is result oriented. In an effort to compensate litigants, the courts have manipulated concepts of contract law and interpretations of insurance contracts and have vastly expanded theories of liability and contractual relationships." (citing *Standard Asbestos Mfg. & Insulating Co. v. Royal Indem. Ins. Co.*, No. CV80-14909, slip op. at 9 (Mo. Cir. Ct. Jackson County, Apr. 3, 1986)).

complex trigger dispute. In *Mraz v. Canadian Universal Insurance Co.*,<sup>27</sup> the court held that the "manifestation" of the injury was the appropriate trigger of coverage.<sup>28</sup> *Mraz* involved a claim by the United States and the State of Maryland against Galaxy Chemical, Inc. (Galaxy) under CERCLA.<sup>29</sup> The plaintiffs sought to recover the costs they had incurred in cleaning up a site where Galaxy had buried drums of hazardous waste, which had begun to leak and contaminate the soil and groundwater.<sup>30</sup> Canadian Universal Insurance Co. (Canadian Universal) had insured Galaxy from 1966 through January 1, 1970,<sup>31</sup> and Galaxy had buried the drums in August 1969, within the coverage period of the Canadian Universal policies.<sup>32</sup> In 1982, twelve years after the last Canadian Universal policy expired, the Environmental Protection Agency and the State of Maryland removed the buried drums and cleaned up the site.<sup>33</sup> Although soil testing in 1981 established that hazardous substances had been released from the drums and potentially could continue to be released, it was unclear when the leakage actually had begun.<sup>34</sup>

The Canadian Universal insurance policies defined an "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."<sup>35</sup> The Fourth Circuit recognized that, based on this language, the event that triggered coverage was bodily injury or property damage, not wrongful conduct: "The general rule is that '[t]he time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time when the complaining party was actually damaged."<sup>36</sup>

Having correctly stated this principle, however, the court then abandoned it. The court reasoned that "[d]etermining exactly when damage begins [in buried hazardous waste cases] can be difficult, if

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27. 804 F.2d 1325 (4th Cir. 1986).

28. *Id.* at 1328.

29. *Id.* at 1326.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1328.

35. *Id.* at 1327 (quoting the Galaxy insurance policy).

36. *Id.* at 1328 (quoting *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267, 270 (Ind. Ct. App. 1976) (quoting, in turn, C.T. Drechsler, Annotation, *Occurrence of Accident or Injury as During, or Before or After, Time Period of Coverage of Liability Policy*, 57 A.L.R.2d 1385, 1389 (1958))).

not impossible."<sup>37</sup> Therefore, the court deemed the occurrence to take place when the injuries first manifest themselves and held that, at least in buried waste cases, manifestation of the property damage is the event that triggers coverage.<sup>38</sup>

The court's adoption of the "manifestation" trigger clearly was prompted by its view that proving the actual time of the property damage would be a potentially insurmountable obstacle.<sup>39</sup> In the face of this obstacle, the court believed that selecting a trigger based on a clearly ascertainable event—manifestation of damage or injury—was the best available option.

Two years later, in *Harford Mutual Insurance Co. v. Jacobson*,<sup>40</sup> the Court of Special Appeals extended the *Mraz* rule to encompass coverage disputes in which proving the actual time of a claimed bodily injury was not difficult.<sup>41</sup> The *Jacobson* case required a determination of whether a landlord-lessor's liability insurance policy covered damages related to the lead-paint poisoning of a tenant. The landlord-lessor in *Jacobson*, Israel Louis Shapiro, owned sixty-nine one-family rental properties in Baltimore City.<sup>42</sup> Following Shapiro's death, Shapiro's estate obtained a liability insurance policy effective June 3, 1983, covering claims for bodily injury or property damage arising out of ownership of the properties.<sup>43</sup> Shapiro had leased one of the properties, 1429 Madison Avenue, to Brenda Carter, who lived there with her daughter Keisha.<sup>44</sup>

On August 25, 1983, during the coverage period of the Harford Mutual policy, the Baltimore City Health Department issued a "Violation Notice to Remove Lead Paint Nuisance" to Jacobson concerning the 1429 Madison Avenue property.<sup>45</sup> The violation notice indicated that Keisha Carter had an elevated blood-lead level and that the lead paint on the premises had to be removed.<sup>46</sup> Shortly thereafter, the Carters filed suit against Jacobson in the Circuit Court for Baltimore City, and Harford Mutual undertook Jacobson's defense.<sup>47</sup>

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37. *Id.*

38. *Id.*

39. *Id.*

40. 73 Md. App. 670, 536 A.2d 120, *cert. denied*, 312 Md. 601, 541 A.2d 964 (1988).

41. *Id.* at 682, 541 A.2d at 126.

42. *Id.* at 67, 536 A.2d at 121. Shapiro died in March 1983; consequently, Martin Jacobson became the personal representative of Shapiro's estate and was a party to this case while serving in that capacity. *Id.*

43. *Id.*

44. *Id.* at 673-74, 536 A.2d at 122.

45. *Id.* at 673, 536 A.2d at 121.

46. *Id.*, 536 A.2d at 121-22.

47. *Id.* at 674, 536 A.2d at 122.



In the course of the defense, Harford Mutual learned that Keisha Carter had been diagnosed with lead poisoning on September 8, 1982, nine months prior to the inception of the Harford Mutual policy.<sup>48</sup> Consequently, Harford Mutual withdrew from Jacobson's defense, contending that because Keisha Carter's injuries manifested themselves before the inception of the policy, the occurrence alleged in the suit did not arise during the policy period.<sup>49</sup> The Court of Special Appeals agreed,<sup>50</sup> characterizing *Mraz* as holding that "the occurrence is judged by the time at which the leakage and damage are first discovered."<sup>51</sup> Accordingly, the court held that "the date of an 'occurrence' for purposes of determining coverage under an insurance policy is the date when the harm is first discovered."<sup>52</sup> In essence, the Court of Special Appeals expanded the *Mraz* manifestation trigger for property damage claims to include bodily injury claims. Thus, the Harford Mutual policy was held to afford no coverage because Keisha Carter's injuries became manifest before the policy took effect.<sup>53</sup>

The *Jacobson* court failed to recognize that the *Mraz* court had invoked the manifestation trigger only because it found that it was "difficult, if not impossible," to determine the time of the actual injury.<sup>54</sup> In short, the *Jacobson* court employed the *Mraz* rule in the absence of circumstances justifying its application. The *Jacobson* court reasoned that once an injury is manifest, the occurrence causing that injury already has happened, and therefore no insurance policy purchased thereafter can cover damages for any injury arising out of that occurrence.<sup>55</sup> This conclusion is flawed because it assumes that the occurrence must happen during the policy period in order for the policy to cover the resulting harm,<sup>56</sup> when in fact it is *the happening of bodily injury or property damage* during the policy period that triggers

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48. *Id.*

49. *Id.*

50. *Id.* at 684, 536 A.2d at 127.

51. *Id.* at 682, 536 A.2d at 126.

52. *Id.* at 684, 536 A.2d at 127 (citing *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986)).

53. *Id.*

54. See *Mraz*, 804 F.2d at 1328 ("Determining exactly when damage begins can be difficult, if not impossible. In such cases we believe that the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves."). The *Mraz* court recognized that the question of whether the policy was triggered should be answered by determining when the complaining party actually suffered damage, if possible. See *id.* See also *supra* note 36 and accompanying text.

55. See *Harford Mut. Ins. Co. v. Jacobson*, 73 Md. App. 670, 684, 536 A.2d 120, 127, cert. denied, 312 Md. 601, 541 A.2d 964 (1988).

56. *Id.* at 684, 536 A.2d at 127 (holding that the date of discovery of the harm is the date of the "occurrence").

coverage.<sup>57</sup> The “occurrence”—which can include ongoing accidental conduct—may happen before or during the policy period and may, for that matter, continue after the expiration of the policy period.<sup>58</sup>

*Mraz* and *Jacobson* together established a clear rule in Maryland that a form CGL insurance policy was triggered solely by the manifestation of the bodily injury or property damage that gave rise to the claim for which coverage was sought. Consequently, only the policy in effect on the date of the first manifestation of the bodily injury or property damage could afford coverage.<sup>59</sup>

2. *Analysis.*—The “manifestation” trigger theory sometimes works to the advantage of the insured<sup>60</sup> and sometimes to the advan-

57. OSTRAGER & NEWMAN, *supra* note 26, § 9.01 (“The Standard CGL policy provides coverage for bodily injury and property damage which occurs during the policy period. Thus, subject to policy terms and conditions, a CGL insurer’s duty to indemnify is ‘triggered’ by a determination that fortuitous bodily injury or property damage occurred during the policy period.”).

58. *See id.* § 8.03[a], at 256 & n.2; *see also* ABRAHAM, *supra* note 1, at 288. In 1966, an “occurrence” was defined as “an accident, including injurious exposure to conditions.” *Id.* at 299 (quoting from the 1966 standard CGL policy). Under the 1973 definition, an “occurrence” was “an accident, including *continuous or repeated* exposure to conditions.” *Id.* at 288 (quoting from the 1973 standard CGL policy) (emphasis added). In 1966 and 1973, the occurrence definition included the requirement that the accident be one that results in bodily injury or property damage. *Id.* at 288, 299. In 1986, however, the definition was modified to provide that continuous or repeated exposure must be to “substantially the same harmful conditions” for a resulting injury to constitute an “occurrence.” *Id.* at 282 (quoting from the 1986 standard CGL policy).

The *Jacobson* court’s failure to distinguish between “occurrence” and “injury” may have resulted from its reliance on two cases, *Bartholomew v. Insurance Co. of North America*, 502 F. Supp. 246 (D.R.I. 1980), *aff’d*, 655 F.2d 27 (1st Cir. 1981), and *Appalachian Insurance Co. v. Liberty Mutual Insurance Co.*, 676 F.2d 56 (3d Cir. 1982). In both of these cases, the court answered the question of whether an insured can obtain coverage for property damage or bodily injury after discovering the damage or injury, *Bartholomew*, 502 F. Supp. at 254-56; *Appalachian*, 676 F.2d at 63. This is not a trigger question at all; rather, it is a question of the nature of losses against which insurance can be purchased. Both *Bartholomew* and *Appalachian* stand for the logical proposition that an insured may not obtain coverage for a loss of which the insured is aware because “the purpose of insurance is to protect insureds against *unknown* risks.” *Appalachian Ins. Co.*, 676 F.2d at 63 (emphasis added). *Accord* *Planters & Citizens Bank v. Home Ins. Co.*, 786 F. Supp. 977 (S.D. Ga. 1992), *aff’d*, 992 F.2d 328 (11th Cir. 1993) (discussing whether the plaintiff knew about the damage before he purchased the policy). Therefore, *Bartholomew* and *Appalachian* do not support the decision in *Jacobson*, where the manifestation of injury resulted in a denial of coverage even though the insured (*Jacobson*, as representative of *Shapiro’s* estate) was *unaware* of the injury (which *Keisha Carter*, a third party to the insurance contract, suffered). *See supra* note 55 and accompanying text.

59. *See supra* notes 53, 55 and accompanying text.

60. *See supra* text accompanying notes 24-26. Courts often apply the manifestation trigger to promote coverage and benefit the insured in a highly arbitrary manner. For example, the court in *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 682 F.2d 12

tage of the insurer.<sup>61</sup> In every case, however, the manifestation trigger is inconsistent with the standard CGL policy because it ignores language that specifically provides that the policy covers only bodily injury or property damage that "occurs during the policy period."<sup>62</sup> Thus, when the *Mraz* and *Jacobson* courts held that manifestation triggered policy coverage, they failed to follow the rule in Maryland that insurance contracts are to be interpreted in a manner that will give their words their "customary and normal meaning."<sup>63</sup>

*B. Abandoning the Manifestation Trigger in Favor of the Injury-in-Fact Trigger*

1. *The Cases.*—The Maryland Court of Appeals recognized the problems associated with the manifestation trigger in *Lloyd E. Mitchell, Inc. v. Maryland Casualty Co.*<sup>64</sup> In that case, the highest court of Maryland addressed for the first time the question that has spawned the tremendous run of insurance coverage litigation in the last decade: how to allocate among two or more insurers responsibility for claims asserted by individuals suffering from asbestos-related injuries.<sup>65</sup>

Lloyd E. Mitchell, Inc. (Mitchell) was a mechanical contractor engaged in the sale and distribution of products containing asbestos.<sup>66</sup> Between 1955 and 1977, Mitchell was insured by the Maryland Casualty Company under a series of standard CGL policies.<sup>67</sup> After the Maryland Casualty policies expired, individuals who were exposed to

(1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983), explicitly found that the manifestation trigger afforded the insured greater protection than the exposure trigger. *Id.* at 23. The court's conclusion was based on the specific circumstances of that case, where "Eagle-Picher was uninsured during the longest period of exposure." *Id.*

61. The manifestation trigger benefits insurers when the policies in effect at the time of manifestation—typically newer policies—have large deductibles, or when the coverage limits of the policy or policies in effect at the time of manifestation are less than the coverage limits of all of the policies in effect during a prolonged period of exposure. Indeed, in this regard, it is noteworthy that the manifestation trigger benefitted the insurers both in *Mraz* and in *Jacobson*. See *supra* text accompanying notes 38-39, 52-53.

62. See ABRAHAM, *supra* note 1, at 299 (quoting from the definition of "occurrence" in the 1966 standard CGL policy).

63. Harford Mut. Ins. Co. v. Jacobson, 73 Md. App. 670, 680, 536 A.2d 120, 125, *cert. denied*, 312 Md. 601, 541 A.2d 964 (1988).

64. 324 Md. 44, 595 A.2d 469 (1991).

65. *Id.* at 46, 595 A.2d at 470.

66. *Id.*

67. *Id.* The policies defined an occurrence as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Id.* at 47, 595 A.2d at 470. The policies defined "bodily injury" as "bodily injury, sickness, or disease sustained by any person which occurs during the policy period including death at any time resulting therefrom." *Id.*

asbestos products that Mitchell allegedly sold or distributed sued the company.<sup>68</sup> Because the asbestos-related claims arose out of bodily injury that first manifested itself after the Maryland Casualty policies had expired, Maryland Casualty refused to defend or indemnify Mitchell in connection with those claims.<sup>69</sup> In an ensuing declaratory judgment action to determine coverage, Maryland Casualty moved for summary judgment, arguing that the bodily injuries giving rise to the claims were not discovered until after the Maryland Casualty policies had expired.<sup>70</sup> Mitchell, in turn, cross-moved for summary judgment, claiming that its Maryland Casualty policies required the insurer to defend and indemnify against any claims for bodily injury that resulted from exposure to asbestos during the policy periods, whether or not the bodily injury first manifested itself after the expiration of the policies.<sup>71</sup>

Based on the undisputed fact that the asbestos-related diseases did not become manifest until after the Maryland Casualty policies had expired, the trial court granted Maryland Casualty's motion for summary judgment and declared that the policies afforded no coverage for the asbestos-related claims.<sup>72</sup> While Mitchell's appeal was pending before the Court of Special Appeals, the Court of Appeals granted certiorari to consider the trigger issue.<sup>73</sup>

The Court of Appeals focused its trigger analysis on when the bodily injury occurred.<sup>74</sup> By examining medical evidence concerning the point at which the inhalation of asbestos fiber causes injury, the Court of Appeals concluded that "'bodily injury' occurs when asbestos is inhaled into the lung, and that, *at a minimum*, coverage under the policy is triggered by exposure to the insured's asbestos products during the policy period."<sup>75</sup> The court based this conclusion on undisputed medical evidence that "the inhalation and retention of asbestos

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68. *Id.*

69. *Id.*

70. *Id.* at 48, 595 A.2d at 471.

71. *Id.*

72. *Id.* at 50, 595 A.2d at 472.

73. *Id.*

74. *Id.* at 57, 595 A.2d at 475. Although the decision in *Lloyd E. Mitchell* clearly was based on when bodily injury occurred, the opinion also created a potential confusion with respect to the trigger issue. The court stated that it is apparent from the policy "provisions that coverage turns on the happening of an 'occurrence' during the policy period which results in 'Bodily Injury.'" *Id.* By using the phrase "during the policy period" to modify "occurrence" instead of "bodily injury," the court confused the time of the "occurrence" with the time of the "bodily injury." In effect, the court invited lower courts to continue to follow the mistaken analysis of *Jacobson*. See *supra* notes 56-58 and accompanying text (criticizing the *Jacobson* analysis).

75. *Lloyd E. Mitchell*, 324 Md. at 58, 595 A.2d at 476 (emphasis in original).

fibers may cause immediate harm to the cells and tissues of the lung."<sup>76</sup> As a result of its conclusion that injury occurred at the time of exposure, rather than merely at the onset of the symptoms of injury, the court vacated the judgment below and directed the trial court to declare that the insurer was "required to provide a defense for Mitchell against all personal injury asbestos-related suits brought by plaintiffs allegedly exposed to Mitchell's asbestos products during the policy period, regardless of when the alleged asbestos-related injuries became manifest."<sup>77</sup> In so holding, the Court of Appeals abandoned the manifestation trigger of insurance coverage in favor of the injury-in-fact trigger.

Although the *Mraz* court also had recognized that the happening of injury triggers coverage,<sup>78</sup> it concluded that proving the actual time of the occurrence of the injury in question was too difficult, and so opted for a rule that deemed the injury to occur at manifestation.<sup>79</sup> The *Mitchell* court started with the same legal premise—that the occurrence of actual injury or damage during the policy period triggers coverage—and then proceeded into the factual fray to determine when the bodily injury actually occurred.<sup>80</sup>

In *Harford County v. Harford Mutual Insurance Co.*,<sup>81</sup> the Court of Appeals used the same injury-in-fact approach to analyze a coverage dispute arising out of property damage claims. Between 1954 and 1982, Harford County operated five landfills.<sup>82</sup> The county purchased CGL insurance policies from the Insurance Company of North America from 1958 to 1964, from Harford Mutual Insurance Company from 1965 to 1980, and from The Home Insurance Company from 1980 to 1982.<sup>83</sup> The Harford Mutual and Home policies provided coverage for property damage occurring during the policy period.<sup>84</sup>

After the policies at issue had expired, Harford County discovered that its landfills were leaking and that pollutants had seeped into the underlying groundwater.<sup>85</sup> In the declaratory judgment action

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76. *Id.* at 61, 595 A.2d at 477.

77. *Id.* at 63, 595 A.2d at 478.

78. See *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986). See also *supra* note 36.

79. *Mraz*, 804 F.2d at 1328. See also *supra* text accompanying notes 37-38.

80. *Lloyd E. Mitchell*, 324 Md. at 58, 61, 595 A.2d at 476, 477. See also *supra* notes 75-76 and accompanying text.

81. 327 Md. 418, 610 A.2d 286 (1992).

82. *Id.* at 420, 610 A.2d at 287.

83. *Id.*

84. See *id.* at 421-22, 610 A.2d at 287.

85. *Id.* at 422, 610 A.2d at 288.

that ensued, the insurers attempted to distinguish *Lloyd E. Mitchell* on the ground that it involved claims for bodily injury rather than for property damage and that there was medical evidence showing that bodily injury occurred immediately upon the victim's inhalation of asbestos fibers.<sup>86</sup> The insurers insisted that *Jacobson* and *Mraz* controlled because, like *Mraz*, *Harford County* involved the leakage of pollutants, which did not result in immediate property damage.<sup>87</sup> *Harford County*, on the other hand, contended that regardless of whether the underlying claim arose from bodily injury or property damage, the language of the policies required the court to employ the *Lloyd E. Mitchell* analysis.<sup>88</sup> The Court of Appeals agreed with *Harford County*, noting that

nothing in the language of the policies, affording words their ordinary and accepted meanings, requires that the claimed property damage actually be discovered or manifested during the policy period; rather, it is the occurrence of property damage, as defined in the policies, within the policy period that triggers coverage.<sup>89</sup>

The *Harford County* court recognized, as did the Fourth Circuit in *Mraz*, that it can be difficult to determine exactly when property damage resulted from the leakage of contaminants from a landfill.<sup>90</sup> Unlike the *Mraz* court, however, the Court of Appeals did not regard that difficulty as a justification for abandoning the language of the policies.<sup>91</sup> Instead, the court noted that the factual determination of when the property damage actually occurred was "quite likely a matter for expert testimony."<sup>92</sup> Accordingly, the court charged the parties with proving when the injury for which they sought coverage actually

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86. *Id.* at 433-34, 610 A.2d at 293-94.

87. *Id.* at 434, 610 A.2d at 294.

88. *Id.* at 429-30, 610 A.2d at 291-92.

89. *Id.* at 435, 610 A.2d at 294. Apparently following its language in *Lloyd E. Mitchell*, the Court of Appeals in *Harford County* again made the potentially confusing statement that "[f]rom [the policy] provisions, it is clear that coverage turns on the happening of an 'occurrence' during the policy period, which results in 'property damage.'" *Id.* at 434, 610 A.2d at 294. See also *supra* note 74 (discussing the *Lloyd E. Mitchell* court's use of similar language). Although the court undertook the correct analysis, it failed to apply the phrase "during the policy period" to modify "property damage" instead of "occurrence." In fact, as the analysis in the opinion indicates, coverage is triggered when the insured property suffers damage during the policy period. *Harford County*, 327 Md. at 435, 610 A.2d at 294.

90. See *Harford County*, 327 Md. at 435, 610 A.2d at 294.

91. See *id.*

92. *Id.* at 436, 610 A.2d at 295.

occurred, instead of deeming that the injury occurred at the time it first became manifest.<sup>93</sup>

2. *Analysis.*—But for the wrong turn taken in *Jacobson*, the evolution from *Mraz* to *Lloyd E. Mitchell* and *Harford County* would be essentially a change in the requirement of proof rather than a change in the interpretation of the standard insurance contract. The *Mraz*, *Lloyd E. Mitchell*, and *Harford County* courts all acknowledged that injury or damage during the policy period triggered coverage under the policy.<sup>94</sup> The *Mraz* court simply “deemed” the injury to have occurred upon manifestation,<sup>95</sup> while the *Lloyd E. Mitchell* and *Harford County* courts required the parties to produce proof on the issue.<sup>96</sup>

“Deeming,” in the trigger context, is dangerous. Each of the trigger theories, other than injury-in-fact, in effect deems injury or property damage to occur at a particular time—upon exposure, at manifestation, or during the entire period between exposure and manifestation. Each theory in which the injury is “deemed” to occur at a fixed point or period in time may be accurate or inaccurate in a given case, depending upon the nature of the underlying injury or damage. But none of the theories, except injury-in-fact, will be accurate in every case.

Some injuries, such as a noise-induced hearing loss, occur solely upon exposure to the injury-causing agent.<sup>97</sup> In such cases, the exposure trigger is consistent with the language of the standard CGL policy because the injury indeed occurs solely upon exposure. In other instances, as in the case of spalling bricks on a building, the damage can occur only upon manifestation.<sup>98</sup> In such cases, an exposure trigger would miss the mark. Finally, there are instances in which neither a

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93. *Id.* at 435-36, 610 A.2d at 294-95.

94. See *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986); *Lloyd E. Mitchell, Inc. v. Maryland Casualty Co.*, 324 Md. 44, 57, 62, 595 A.2d 469, 475, 478 (1991); *Harford County v. Harford Mut. Ins. Co.*, 327 Md. 418, 435-36, 610 A.2d 286, 294-95 (1992).

95. *Mraz*, 804 F.2d at 1328.

96. *Lloyd E. Mitchell*, 324 Md. at 61-62, 595 A.2d at 477-78; *Harford County*, 327 Md. at 436, 610 A.2d at 295.

97. See *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, 113 S. Ct. 692, 699 (1993) (“The injury, loss of hearing, occurs simultaneously with the exposure to excessive noise. Moreover, the injury is complete when the exposure ceases.”).

98. See *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267, 271 (Ind. Ct. App. 1976); *Trizec Properties v. Biltmore Constr. Co.*, 767 F.2d 810, 813 n.5 (11th Cir. 1985) (“Because this damage [spalling bricks] was aesthetic rather than structural, the [*American Ins. Co.*] court merely held the date of the damage was the time the spalling was first noticed. Prior to the date that this type of damage becomes apparent, the complaining party has simply suffered no injury.”).

pure exposure trigger nor a pure manifestation trigger would be appropriate. For example, in asbestos exposure cases, courts have found that initial injury occurs upon exposure and progresses following exposure.<sup>99</sup>

The possibilities concerning when bodily injury or property damage actually occur are innumerable. Because standard CGL policies are triggered by the occurrence of bodily injury or property damage during the policy period, and because injury or damage may occur upon exposure, at manifestation, or at some time in between, any attempt to impose in every case a single trigger theory—be it manifestation, exposure, or the triple trigger—inevitably will fail. The only trigger that accurately applies in every case is the injury-in-fact trigger, which recognizes that the time of actual injury or damage will vary with the circumstances of each case.

### C. *Implications of the Injury-in-Fact Trigger*

Although true to the language of the policies, the *Lloyd E. Mitchell* and *Harford County* injury-in-fact trigger implies important and potentially troubling difficulties for the resolution of insurance coverage disputes under Maryland law. The simple factual inquiry that *Mraz* and *Jacobson* required is replaced by a more demanding inquiry into when, over the course of a potentially long period of time, latent bodily injury or property damage actually occurred. Moreover, the burden of showing that bodily injury or property damage occurred within the relevant policy period rests with the insured.<sup>100</sup> For this reason, insureds and prudent insurers must be prepared to offer proof concerning when the injury or damage for which coverage is sought actually occurred.

As the *Mraz* court pointed out, proving when injury or damage actually occurred poses a difficult problem.<sup>101</sup> In *Harford County*, the Court of Appeals indicated that expert testimony can solve the problem.<sup>102</sup> In many cases, the expert will be able to provide the fact

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99. See *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506 (Pa. 1993) (“The asbestosis process continues to progress even after exposure to asbestos ceases.”).

100. *Harford County v. Harford Mut. Ins. Co.*, 327 Md. 418, 436, 610 A.2d 286, 295 (1992). See also *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 127 (D.C. Cir. 1986) (“[T]he language of these policies demands that *the insured* prove that an exposure caused an injury during the policy period.”) (emphasis added).

101. *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986) (“Determining exactly when damage begins can be difficult, if not impossible.”).

102. *Harford County*, 327 Md. at 436, 610 A.2d at 295 (“Whether at any time during the policy period the discharge of contaminants into the soil and underlying groundwater is of sufficient gravity to prove detectable ‘property damage’ within the policies’ definition of



finder an opinion concerning when the injury or damage actually occurred. Inevitably, however, cases will arise in which it is impossible to sort out which injury or damage occurred in which policy year. Maryland courts and litigants now must consider how to handle this eventuality.

#### IV. WHERE EXPERT TESTIMONY IS NOT ENOUGH—THE DIFFICULT CASES AND POSSIBLE SOLUTIONS

When expert testimony cannot provide proof as to the time of injury, some default approach to apportioning the damages among the potentially applicable policies becomes necessary. The *Mraz* manifestation trigger is one possible default approach. For reasons already discussed,<sup>103</sup> however, it is not the best approach. Another possibility is to relieve insurers of responsibility altogether if the insured cannot prove during which policy period the injury or damage occurred. It

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that term is quite likely a matter for expert testimony.”). When offering expert testimony to prove when the injury or damage actually occurred, the parties should keep a number of factors in mind. First, the expert witness should distinguish new property damage from existing property damage, which resulted “because of” deteriorating conditions. See *Auto-tronic Sys., Inc. v. Aetna Life & Casualty*, 456 N.Y.S.2d 504, 506 (N.Y. App. Div. 1982). This distinction must be drawn because the policies in effect at the time of the new property damage would be the proper source of coverage for the new damage, while the policies in effect at the time of the original damage would be the proper source of coverage for the damage that occurs “because of” those conditions.

For example, in the case of an automobile accident which occurs in year one, the insurer covering the insured in year one must afford coverage, subject to limits of liability, for the plaintiff’s medical costs incurred in year two “because of” the accident. Likewise, if a landfill leaks contaminants into the groundwater in year one, the harm that results “because of” that leakage is the responsibility of the year-one insurer, even if the harm occurs in year two, year three, or any time thereafter.

Progressive injuries or damages—that is, injuries or damages that continue to worsen even after the conduct causing them has stopped—present especially difficult problems of proof. Whether Maryland courts will factor the “because of” issue into the injury-in-fact inquiry remains to be seen.

One court has been presented with a formula that incorporated the “because of” language of the policy. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980). The court summarized:

Thus, if three insurance companies were on the risk for a 9 year period of exposure, under Forty-Eight’s formula the first insurer would be on the risk for the first 3 years *plus* the remaining 6 while the disease progressed. The second insurer would be on the risk for 3 years *plus* the following 3 years. The final insurer would be on the risk only for the final 3 years. Thus liability would be apportioned 9/18 for the first insurer, 6/18 for the second, and 3/18 for the third. Under the district court’s formula, of course, each insurer would be liable for 1/3 of the costs.

*Id.* at 1226. The Sixth Circuit described Forty-Eight’s approach as an “interesting formula,” but refused to adopt it, stating that it would lead to an “anomalous result.” *Id.* In fact, the suggested formula appears to be consistent with the “because of” language in the policy.

103. See *supra* notes 60-63 and accompanying text.

is, after all, the insured party's burden to prove the existence of coverage.<sup>104</sup> On the other hand, there is no reason to believe that the "occurring during the policy period" language was intended to create an insurmountable obstacle that bars coverage altogether. It would be harsh indeed to send the insured away with no coverage because it could not offer evidence on a point that all parties agreed was not susceptible of proof.

#### A. *Joint and Several Liability*

Some courts have adopted a "joint and several" approach to apportioning liability, whereby each insurer on the risk during any period when bodily injury or property damage occurred is responsible for the full amount of the loss, subject to its policy limit.<sup>105</sup> For example, an insurer providing \$20,000,000 of coverage during one year of a property damage loss occurring over thirty years and totalling \$30,000,000, would owe the full policy limit of \$20,000,000 rather than 1/30 of \$30,000,000 or \$1,000,000.

The *Keene Corp.* and *J.H. France Refractories Co.* courts used this approach to apportion damages for asbestos-related injuries.<sup>106</sup> A brief background on the issues presented by coverage disputes in the asbestos-related injury context is helpful in understanding the joint and several liability approach and its shortcomings.

In asbestos-related injury litigation, the finder of fact must resolve the difficult factual issue of when a person who was exposed to asbestos over an extended period of time actually suffered bodily injury. The *France* court concluded, based on medical evidence, that a person who inhales asbestos fibers suffers bodily injury within minutes of exposure.<sup>107</sup> Additionally, both the *Keene* and *France* courts found, as a factual matter, that injury continues to occur from the time of exposure, through a latency period during which the injury becomes worse, up to the point at which the asbestos-related disease is diag-

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104. See *supra* note 100 and accompanying text.

105. See, e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Acands, Inc. v. Aetna Casualty & Sur. Co.*, 764 F.2d 968 (3d Cir. 1985); *Sandoz, Inc. v. Employers Liab. Assurance Corp.*, 554 F. Supp. 257 (D.N.J. 1983); *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 9 Cal. Rptr. 2d 663 (Cal. Ct. App.), *review granted*, 834 P.2d 1147 (1992); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508 (Pa. 1993) (holding that "each insurer which was on the risk during the development of an asbestosis-related disease is a primary insurer").

106. See *supra* note 105. The joint and several approach also has been used in coverage litigation involving latent injuries resulting from ingesting prescription drugs, see *Sandoz, Inc.*, 554 F. Supp. at 257, and long-term damage to real property from erosion. See *City of Palos Verdes Estates*, 9 Cal. Rptr. 2d at 663.

107. *J.H. France Refractories Co.*, 626 A.2d at 505-06.

nosed.<sup>108</sup> Accordingly, both courts found that all policies on the risk from the time of exposure through the time of diagnosis had been triggered.<sup>109</sup>

Having reached this conclusion, the *Keene* and *France* courts faced the problem of allocating liability among the insurers whose policies had been triggered.<sup>110</sup> Both courts concluded that each insurer on the risk during any part of the period between exposure and manifestation was jointly and severally liable for the entire claim.<sup>111</sup>

The *France* court offered several justifications for this conclusion.<sup>112</sup> First, the court relied on language found in the standard CGL insuring agreements at issue providing that the insurer would "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."<sup>113</sup> The court reasoned that, once the occurrence of a bodily injury had triggered each policy, each policy became obligated by its terms to pay "all sums" the insured owed as a result of the injury.<sup>114</sup>

This reasoning is faulty, however, because each policy provides coverage only for "bodily injury . . . which occurs *during the policy period*."<sup>115</sup> Accordingly, although bodily injury may span the entire twenty-year period from exposure to manifestation, the bodily injury to which the year-one policy applies is only the bodily injury occurring in year one, not the bodily injury occurring in years two through twenty. Likewise, the bodily injury to which the year-two policy applies is only the bodily injury occurring in year two, not the injury occurring in year one or in years three through twenty. Moreover, the "all sums" language modifies "damages because of bodily injury . . . to which this insurance applies."<sup>116</sup> Because the insurance applies only to bodily injury that occurs during the policy period,<sup>117</sup> the court's statement that "[w]e have already ascertained that any stage of the development of the claimant's disease constitutes an injury 'to which this

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108. See *Keene Corp.*, 667 F.2d at 1046; *J.H. France Refractories Co.*, 626 A.2d at 506.

109. *Keene Corp.*, 667 F.2d at 1042-46; *J.H. France Refractories Co.*, 626 A.2d at 508.

110. See *Keene Corp.*, 667 F.2d at 1051; *J.H. France Refractories Co.*, 626 A.2d at 508-09.

111. *Keene Corp.*, 667 F.2d at 1051; *J.H. France Refractories Co.*, 626 A.2d at 508-09.

112. *J.H. France Refractories Co.*, 626 A.2d at 507-08.

113. *Id.* at 507.

114. *Id.* at 507-08.

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

116. *Id.*

117. See *supra* text accompanying note 115.

insurance applies' under each policy in effect during any part of the development of the disease"<sup>118</sup> plainly is incorrect.

Second, the *France* court correctly observed that, because the disease asbestosis does not progress linearly, a pro rata apportionment of liability does not accurately reflect how much bodily injury occurred during the course of each policy.<sup>119</sup> Consequently, the court rejected a pro rata apportionment of liability in favor of joint and several liability.<sup>120</sup>

The inability of the pro rata approach to track precisely the actual rate of injury or damage, however, is not a sound basis for adopting the joint and several approach. Although a pro rata approach will not precisely track the amount of bodily injury occurring during each policy period, it will approximate more closely the actual rate of bodily injury—which is impossible to determine precisely in any event—than will a joint and several approach. In short, pro rata liability is consistent with the fundamental premise that the policy covers bodily injury or property damage that occurs *during the policy period*, while the joint and several approach abandons that premise altogether.

Third, the *France* court relied on the definition of "occurrence" as a justification for imposing joint and several liability.<sup>121</sup> Because the definition of "occurrence" includes "continuous or repeated exposure to conditions which result in bodily injury,"<sup>122</sup> the court reasoned that injury occurring over a long period of time likewise must be covered.<sup>123</sup> In so concluding, the court confused the concept of "bodily injury" with the concept of "occurrence." Bodily injury refers to "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."<sup>124</sup> Occurrence refers to "an accident, including continuous or repeated exposure to conditions, which results in bodily injury."<sup>125</sup> Although the occurrence can take place at any time, the bodily injury must take place during the policy period.<sup>126</sup> Because the *France* and

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118. *J.H. France Refractories Co.*, 626 A.2d at 507.

119. *Id.* at 508.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. See ABRAHAM, *supra* note 1, at 287 (quoting from the 1973 standard CGL policy).

125. *Id.* at 288 (quoting from the 1973 standard CGL policy).

126. In pre-1966 CGL policies, an occurrence was defined simply as an "accident." See *id.* at 299 (quoting from the 1966 standard CGL policy). This definition was consistent with the fundamental notion that the purpose of insurance is to provide coverage for damages owed as a result of a fortuitous event. See *supra* note 58 and accompanying text. The definition of occurrence was changed in 1973 to reflect the realization that some accidents

*Keene* courts failed to distinguish the two concepts, they applied joint and several liability to cases that did not warrant its application. In short, each of the grounds that the *France* court offered to support the joint and several approach fails to withstand close scrutiny.

### B. *Pro Rata Liability*

Some courts have concluded that if an insured party offers expert testimony showing that there is no basis for determining how the bodily injury or property damage should be apportioned among the policy periods, and if no insurer is able to offer contradictory testimony, then the injury or damage claim should be allocated pro rata among the policy periods.<sup>127</sup> Applying Maryland law, Judge Motz of the United States District Court for the District of Maryland recently employed the pro rata approach in *Scottsdale Insurance Co. v. American Empire Surplus Lines Insurance Co.*<sup>128</sup>

*Scottsdale Insurance Co.* involved the question of which of three insurers was responsible for covering lead poisoning claims asserted on behalf of a child.<sup>129</sup> From her birth on January 17, 1983, until June 6, 1985, Candace Anthony resided on Homestead Avenue in Baltimore City.<sup>130</sup> On June 6, 1985, Candace and her mother moved to 2534 Garrett Avenue, where they lived until July 1986.<sup>131</sup> For the thirteen months that Candace lived at 2534 Garrett Avenue, the property was insured; the first four months were covered by American Empire, and the remaining nine months were insured by Scottsdale.<sup>132</sup>

In 1986, Candace's mother filed suit individually and on Candace's behalf in the Circuit Court for Baltimore City alleging that

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occur over a period of time. See ABRAHAM, *supra* note 1, at 288. Thus, the definition of occurrence was modified to include "continuous or repeated exposure to conditions." *Id.* (quoting from the 1973 standard CGL policy).

The definition of "bodily injury," however, continued to include only "bodily injury, sickness or disease sustained by any person which occurs during the policy period." *Id.* at 287 (quoting from the 1973 standard CGL policy). This definition is not limited to bodily injury that results from a single exposure, but encompasses bodily injury that results from a continuous or repeated exposure to conditions over an extended period of time.

127. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224-25 (6th Cir. 1980), *reh'g granted and clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1392-93 (E.D.N.Y. 1988); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 76 (E.D. Mich. 1987).

128. 811 F. Supp. 210 (D. Md. 1993).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* The Garrett Avenue address was insured by American Empire from June 6, 1985 until October 8, 1985, and by Scottsdale from October 8, 1985 until October 8, 1986.

Candace had sustained lead poisoning as a result of ingesting lead paint at both the Homestead Avenue and the Garrett Avenue addresses.<sup>133</sup> This suit was settled for \$190,000, with Scottsdale contributing \$152,500 and GEICO, which insured the Homestead Avenue property, contributing \$37,500.<sup>134</sup> American Empire did not contribute to the settlement.<sup>135</sup>

Following the settlement of Candace Anthony's lead paint claim, Scottsdale sought contribution or indemnity from American Empire.<sup>136</sup> Judge Motz recognized that, although the Maryland Court of Appeals did not expressly overrule *Jacobson* in *Lloyd E. Mitchell* or *Harford County*, *Jacobson's* manifestation trigger no longer was the law in Maryland.<sup>137</sup> American Empire apparently conceded this point. Nevertheless, it argued that Scottsdale was not entitled to contribution or indemnity because Scottsdale could not prove the amount of the lead paint poisoning that occurred during American Empire's four-month policy period.<sup>138</sup>

The court disagreed, finding that even though Scottsdale could not prove precisely what portion of the child's lead poisoning had occurred during the first four months of her thirteen-month residency at 2534 Garrett Avenue, it had not failed to prove its claim.<sup>139</sup> The court awarded Scottsdale pro rata contribution based upon the respective lengths of Candace's residency at 2534 Garrett Avenue during the two policy periods.<sup>140</sup> Thus, in the absence of more accurate proof, the court employed a pro rata approach to determine the amount of injury that occurred during each policy period and to apportion the resulting liability.

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 210.

137. *Id.* at 215 ("[A]lthough the Court of Appeals has not specifically addressed the 'trigger' question in the lead poisoning context, it is clear to me that the transition from *Mraz* to *Harford County* demonstrates that exposure plus bodily injury (even if unmanifested) is now sufficient under Maryland law to trigger coverage.")

138. *Id.* Anthony's medical expert, Dr. Chisolm, could not state the exact time at which Candace first ingested lead at 2534 Garrett Avenue. *Id.* at 211. He testified that Candace sustained lead poisoning throughout the duration of her residence there, however. *Id.* American Empire adopted the position that if Scottsdale could not prove the amount of bodily injury that occurred during American Empire's policy period, Scottsdale's claim would fail altogether. *Id.* at 215-16.

139. *Id.*

140. *Id.* at 217-18.

C. *The Implications of Pro Rata and Joint and Several Liability*

As between pro rata and joint and several liability, the pro rata approach is more consistent with the language of the standard CGL policy. The approach that Maryland courts finally choose to adopt will have significant repercussions. The choice between pro rata and joint and several liability will affect not only whether an insurer is liable for injury occurring during periods of time which the insured carried no insurance,<sup>141</sup> but also whether the insured can select which of the triggered policies will pay the claim.<sup>142</sup>

1. *The Effect of Self-Insured Years.*—Under the joint and several approach to liability, the insured party would have responsibility for injury that occurred during years in which it purchased no insurance at all.<sup>143</sup> In other words, the joint and several approach fails to incorporate Judge Weinstein's truism that "[s]elf-insurance is called 'going bare' for a reason."<sup>144</sup>

The rationale that each insurer is obligated to pay "all sums" for which the insured party becomes liable, which was advanced by the *France* court in support of joint and several liability among insurers,<sup>145</sup> effectively would shield insureds from liability for uninsured years.<sup>146</sup> The crux of the "all sums" theory is that an insurer on the risk for even one year is responsible for all sums owed by the insured for injury, any portion of which, however small, occurred during that year.<sup>147</sup> From this theory, it follows that if the insured party purchased coverage for only one year of a twenty-year period of loss, the insurer would be obligated to cover the entire loss, thereby absolv-

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141. See generally ABRAHAM, *supra* note 1, at 126-28 (discussing "The Problem of Uninsured Years").

142. See generally *id.* at 120-22 (describing differences between pro rata and joint and several liability). The selected insurer would have contribution rights against the other triggered policies. *Id.* at 122.

143. See *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508 (Pa. 1993). In a surprising twist, the *France* court decided that the insured was not responsible for uninsured years because to hold otherwise would create "a judicial fiction which cannot be supported, viz., that J.H. France was self-insured under a policy the terms of which are ascertainable so that J.H. France may be included among the insurers in apportionment of liability." *Id.* Apparently, the court believed that the absence of an actual contract of self-insurance absolved J.H. France from liability. See *id.* This is akin to the argument that a law student should suffer no consequences from failing to appear for an exam because the professor could not grade the exam that the student failed to write.

144. *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1392 (E.D.N.Y. 1988).

145. See *supra* text accompanying notes 113-114.

146. See *supra* note 142 and accompanying text.

147. See *supra* text accompanying notes 113-114.

ing the insured of any responsibility. This illogical conclusion demonstrates that the "all sums" basis of joint and several liability is faulty.

Employing reasoning analogous to that of the *France* court, the *Keene* court likewise concluded that the insured bears absolutely no responsibility for uninsured years.<sup>148</sup> The *Keene* court rhetorically inquired as to what the limits of liability would be if the insured party were held responsible for the uninsured years.<sup>149</sup> This question erroneously assumes that the insured's liability for uninsured years should be limited by something other than the actual amount owed to third parties.<sup>150</sup> On the contrary, the appropriate limit on a partially insured party's liability logically should be the balance above the sum owed by insurers on triggered policies. Self-insurance is, by its nature, without limits.

2. *Which Policies Will Pay the Claim.*—The *France* court found that, under a joint and several approach to liability, the insured is "free to select the policy or policies under which it is to be indemnified."<sup>151</sup> Furthermore, "each insurer which was on the risk during the development of an asbestos-related disease is a primary insurer."<sup>152</sup> This rule permits the insured party to obtain indemnification for multiple years of injury from one year of coverage.<sup>153</sup> Doing so permits the insured party to impose liability on an excess carrier, which collected a relatively small premium in relation to its limit of liability, before the insured seeks indemnification from a first-layer carrier, which collected a significantly higher premium. This is manifestly un-

148. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1048-49 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982).

149. *Id.* at 1049.

150. Furthermore, the fact that the court sought to limit the insured party's exposure to liability at the expense of the insurers, even if the insurers had never assumed the risk of that liability, is reminiscent of the court's general result-oriented desire to expand the boundaries of insurance coverage. See *supra* notes 11-26 and accompanying text.

151. *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508 (Pa. 1993).

152. *Id.*

153. See ABRAHAM, *supra* note 1, at 227-28.

[E]xcess policies normally afford coverage in excess of the "underlying" limits of liability afforded by the insured's primary or lower-layer excess policies . . . . The question then arises, which "underlying" limits of liability must be exhausted in order to trigger a particular excess policy—only the limits of liability of the policy issued in the same year as a triggered policy, or the limits of all the primary policies that have been triggered to provide coverage against the liability in question? Although few courts have as yet addressed whether there must be *exhaustion by years* or *exhaustion by layers*, the issue promises to become increasingly important as primary limits of liability are pierced and excess coverage against environmental liability is potentially triggered.



fair. Moreover, it is unfair to allow the insured party to reap the benefits of coverage for multiple years of ongoing injury while paying a deductible in only one year.

Thus, the joint and several liability approach adopted in *Keene Corp.* and *J.H. France Refractories Co.* produces three paradoxical results. First, it allows insureds who choose to remain uninsured to escape liability altogether, so long as they have purchased at least one insurance policy during the period of injury. Second, it gives the insured the choice of seeking indemnification from excess policies prior to triggered primary policies. Finally, it permits insureds to unfairly obtain coverage for multiple years of injury while paying only one year's deductible. In short, the consequences of the joint and several liability approach violate both the language of the CGL insurance policy and common sense. The pro rata approach, however, yields none of these illogical results.

#### CONCLUSION

In choosing to abandon the manifestation trigger in favor of the injury-in-fact trigger, the Maryland Court of Appeals has taken a significant step in the right direction. Maryland courts now must consider how to apportion coverage properly among two or more triggered policies where evidence concerning the rate at which bodily injury or property damage occurred is not available. The analytically sound solution is to apportion liability pro rata among triggered policy periods. Under this method, the insurers in each year of coverage would be liable for the percentage of the total loss that occurred during that year. The insured party would be held responsible for paying the applicable policy deductibles in each year for which coverage is triggered and would not escape liability for injury occurring during years in which it had purchased no insurance.