Understanding "Occurrences" in Liability Insurance Policies in the Context of Construction Litigation

By Dan Bentson and Susannah Carr [1]

The primary liability insurance purchased by contractors to protect against third-party claims related to their construction operations is written on a Commercial General Liability ("CGL") form. A typical CGL policy will contain an insuring agreement similar to the following:

> **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> *** * ***
>
> **b.** This insurance applies to "bodily injury" and "property damage" only if:
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> **(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
>
> **(2)** The "bodily injury" or "property damage" occurs during the policy period. . . . [2]

Under this insuring agreement, an insurer agrees to provide liability coverage for "bodily injury" or "property damage" caused by an "occurrence," subject to the policy's other terms, conditions, limitation, and exclusions.

Because the CGL policy provides coverage only where an occurrence caused the claimant's alleged bodily injury or property damage, understanding what constitutes an occurrence, the number of occurrences, which policies an occurrence triggers, and the

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[2] ISO Props., Inc. Form CG OO 01 12 07 (2006).

applicable policy limits is important to determine the insurer's and insured's respective rights and obligations. Below we analyze these issues under Washington law, with a specific focus on their application to construction litigation.

1. The History of Occurrence-Based Coverage

Exploring the origins of the CGL occurrence requirement sheds light on its meaning and purpose. Before 1966, CGL policies provided liability coverage for bodily injury or property damage caused by "accident."[3] "Implicit in the concept of insurance is that the loss occur as a result of a fortuitous event not one planned."[4] The term "accident" is synonymous with the term "fortuitous."[5] Thus, by stating that the claimant's injury or damage must have been caused by accident, pre-1966 CGL policies simply expressed the fortuity requirement generally applicable to all forms of insurance.[6]

But these early CGL policies did not define the term "accident."[7] As a result, rival definitions began to develop within different courts.[8] A dispute arose, for example, as to whether the word "accident" referred only to "sudden" events or whether it also applied to continuous exposure to the same harmful conditions.[9] Courts also disputed whether policies provided coverage only for unforeseeable events, or, alternatively, whether coverage existed so long as the injury was unexpected or unintended.[10]

Due, in part, to the uncertainty created by these competing judicial interpretations, insurers changed the standard CGL insuring agreement and, in 1966, adopted occurrence-based forms.[11] Under the new occurrence-based insuring agreement, the term "occurrence" was first defined as:

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[3] E. Joshua Rosenkranz, *The Pollution Exclusion Clause through the Looking Glass*, 74 GEO. L. J. 1237, 1241 (1986).

[4] *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co*., 140 Wn.2d 517, 555, 998 P.2d 856 (2000) (internal quotation marks omitted) (quoting LEE R. RUSS & THOMAS F. SEGALLA, 7 COUCH ON INSURANCE 3D § 101:2, at 101-8 (1997)).

[5] BARRY R. OSTRAGER & THOMAS R. NEWMAN, 1 HANDBOOK ON INSURANCE COVERAGE DISPUTES § 802[b], at 625 (15th ed. 2010); *see also* BLACK'S LAW DICTIONARY 769 (10th ed. 2014).

[6] OSTRAGER & NEWMAN, *supra* n. 5, § 802[b], at 625.

[7] Malcolm B. Rosow & Arthur J. Liederman, *An Overview to the Interpretative Problems of Occurrence in Comprehensive General Liability Insurance*, 16 FORUM 1148, 1149 (1980).

[8] Rosenkranz, *supra* n. 3, at 1243-44.

[9] *Id*. at 1241-42.

[10] *Id*. at 1243-44.

[11] *Id*. at 1246; *see also* James A. Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551, 553 (1980).

> 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.[12]

Thus, post-1966, standard CGL policies expressly provided coverage for continuous and repeated exposure to the same harmful conditions and limited coverage to losses unexpected or unintended from the perspective of the insured.[13]

2. Determining what Constitutes an "Occurrence"

Contemporary CGL policies frequently include the following definition of the term "occurrence:"

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.[14]

Because the definition of "occurrence" includes the term "accident," Washington courts will look to the common law definition of "accident" to inform their interpretation of occurrence-based policies.[15] If necessary, they will also look to the other parts of the occurrence definition and interpret the term in the context of the policy as a whole.[16]

There is general agreement that the intended consequences of an intentional act are not an "occurrence," *i.e.* an insured cannot get coverage for intended harm.[17] However, there

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[12] Roswo & Liederman, *supra* n. 7, at p. 1149 (internal citation omitted).

[13] Rosenkranz, *supra* n. 3, at 1246-47. Prior to 1986, the typical CGL Policy expressly stated that an occurrence must neither be expected nor intended from the standpoint of the insured in the policy's insuring agreement. OSTRAGER & NEWMAN, *supra* n. 5, § 803[a], at 639. But, in 1986, policy drafters removed this specific language from the policy's insuring agreement and created a new policy exclusion for expected or intended acts. *Id.* at 641.

[14] ISO Props., Inc. Form CG 00 01 12 07 (2006).

[15] *See, e.g., Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 401, 823 P.2d 499 (1992); *Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 755, 320 P.3d 77 (2013).

[16] *See, e.g., Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 64, 882 P.2d 703, 715 (1994), *as amended* (Sept. 29, 1994), *as clarified on denial of reconsideration* (Mar. 22, 1995) (interpreting "occurrence" when the term was defined as "an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage"); *see also Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 62-64, 164 P.3d 454 (2007).

[17] *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 425, 38 P.3d 322 (2002); *Queen City Farms*, 126 Wn.2d at 71 ("To satisfy the "occurrence" definition, and to come within the coverage provision, it must be established that the harm was unexpected or unintended. There is never coverage where the harm is expected or intended.")

is disagreement among insurers and insureds over whether only the harm must be unintended, or whether the act that caused the harm must also be unintended.

Insurers will rely on cases interpreting common law definitions of accident to argue the latter. For example, insurers contend that, under the common law definition of "accident," an accident is never present where a deliberate act is performed, unless some additional unexpected, independent, and unforeseen happening occurs that produces the claimant's injury.[18] Both the means and the result must be unforeseen.[19] Thus, according to insurers, if the insured intended either the harm, or the act that caused it, the harmful event does not constitute an occurrence.

Policyholders disagree and contend Washington case law provides that intended acts resulting in unintended harm are covered. For example, in *Queen City Farms, Inc. v. Central National Insurance Company of Omaha*, the Washington Supreme Court stated that if an intentional act results in unintended consequences, the harmful event will still qualify as an occurrence:

> Thus, the driver who intentionally backs a car up, but does so negligently into the path of a vehicle having the right of way, has acted intentionally in a manner where it can be said that objectively an accident may occur. The average purchaser of insurance would reasonably understand from the policy language that coverage was provided under the occurrence clause.[20]

Needless to say, both policyholders and insurers will continue to dispute which position is better supported by Washington case law.

Washington courts apply a subjective standard to determine whether the insured expected or intended the results of its actions.[21] But this standard does not suggest that courts should ignore all objective evidence.[22] "Since proof of state of mind normally is indirect or circumstantial, even a subjective test must rely on facts from which an inference

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[18] *See Detweiler v. J.C. Penney Cas. Ins. Co*., 110 Wn.2d 99, 104, 751 P.2d 282 (1988); *Unigard Mut. Ins. Co. v. Spokane Sch. Dist*., 81, 20 Wn. App. 261, 263-64, 579 P.2d 1015 (1978).

[19] *Detweiler*, 110 Wn.2d. at 104*; Unigard*, 20 Wn. App. at 264.

[20] *Queen City Farms*, 126 Wn.2d at 66; *see also Woo*, 161 Wn.2d at 62-64 (Although dentist intended to play cruel practical joke, he may not have intended that conduct to result in his employees' injuries. Thus, the allegations in the underlying complaint potentially satisfied the policy's definition of occurrence, and the insurer had a duty to defend.)

[21] *Queen City Farms*, 126 Wn.2d at 69; *Overton*, 145 Wn.2d at 425.

[22] *Newmont USA Ltd. v. Am. Home Assur. Co*., 795 F. Supp. 2d 1150, 1158 (E.D. Wash. 2011).

about the insured's state of mind must be drawn, such as the obviousness of already occurring harm."[23]

Courts have applied limits on what harms may be unintended, even under the subjective standard. If no reasonable person could conclude that an injury was unforeseeable, the court will rule as a matter of law that there was no "accident," and thus no occurrence.[24] In *Safeco Ins. Co. of Am. v. Butler*, for example, the court rejected the insured's argument that a bullet, which was intentionally fired but that the insured contended unintentionally ricocheted and resulted in bodily injury, was an occurrence.[25]

In construction litigation, courts may look to the "kind of losses" the policy was intended to insure.[26] In *Yakima Cement Products Company v. Great American Insurance Company*, for example, the court, analyzing a products liability policy, held that the "deliberate manufacture of a product which inadvertently is mismanufactured" was an "accident."[27] Consequently, the inadvertent mismanufacture of concrete panels that resulted in their removal, refabrication, and repair was an occurrence.[28] Likewise, in *Dewitt Construction Inc. v. Charter Oak Fire Insurance Company*, a subcontractor's "unintentional mismanufacture" of concrete piles caused third party property damage, and the Ninth Circuit, applying Washington law, held that the property damage at issue constituted an "occurrence" under Charter Oak's CGL policy.[29]

The court's decision in *Indian Harbor Insurance Company v. Transform LLC* provides another example. In *Indian Harbor*, the claimant hired the insured to build condominium modules in Cle Elum, Washington, but, upon delivery, the claimant alleged that the modules were defective.[30] The insurer denied coverage and filed a declaratory judgment action against both the claimant and the insured.[31] The insurer then moved for summary judgment, seeking a judicial determination that it had no duty to defend or indemnify the insured.[32]

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[23] *Queen City Farms*, 126 Wn.2d at 69 (quoting K. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 134 (1991)).

[24] *See, e.g., Butler,* 118 Wn.2d at 401.

[25] *Id.* at 401.

[26] *See, e.g., Yakima Cement Products Co. v. Great Am. Ins. Co.*, 93 Wn.2d 210, 216, 608 P.2d 254 (1980).

[27] *Id.* at 215.

[28] *Id.* at 217.

[29] *Dewitt Constr. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1133 (9th Cir. 2002).

[30] *Indian Harbor Ins. Co. v. Transform LLC*, 2010 WL 3584412, at *1 (W.D. Wash. Sept. 8, 2010).

[31] *Id*. at *2.

[32] *Id*. at *1.

In its motion, the insurer contended that damage to the modules was not an occurrence under the insured's CGL policy.[33] The district court disagreed. According to the court, "[p]ure workmanship defects are not considered accidents or 'occurrences,' since CGL polices are not meant to be performance bonds or product liability insurance."[34] But "damages arising from workmanship defects can give rise to an 'occurrence.'[35] In concluding that the insured's mismanufacture of the modules constituted an occurrence, the court stated: "Whether there is an 'occurrence' depends on whether the mismanufacture was unintentional rather than intentional, not on whether the action is for negligence or breach of contract."[36] The court therefore determined that the insured's alleged breach of contract warranty provisions constituted an occurrence, which placed the alleged property damage within the scope of the CGL policy's insuring agreement.[37]

A. "Occurrences" and the Fortuity Requirement

As discussed above, a fortuity requirement is inherent in every insurance contract:

> The fortuity principle is central to the notion of what constitutes insurance. The insurer will not and should not be asked to provide coverage for a loss that is reasonably certain to occur within the policy period.[38]

This principle, which is sometimes referred to as the "known risk principle," entails other established insurance law doctrines, such as the "known loss" doctrine.[39]

Under the known loss doctrine, an insured cannot recover for a loss it subjectively knew would occur at the time it purchased the insurance policy.[40] This doctrine applies only if the insured knew of a substantial probability of liability of the same type that eventually occurred.[41]

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[33] *Id*. at *5.

[34] *Id*.

[35] *Id*.

[36] *Id*. at *6.

[37] *Id*.

[38] *Aluminum Co*., 140 Wn.2d at 878 (internal quotation marks omitted) (quoting ERIC M. HOLMES & MARK S. RHODES, 1 APPLEMAN ON INSURANCE 2D § 1.4, at 26 (1996)).

[39] *Id*.; *see also Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 150 P.3d 1147 (2007) (distinguishing between general fortuity doctrine and the "analogous" known loss doctrine).

[40] *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 805, 881 P.2d 1020 (1994).

[41] *Newmont*, 795 F. Supp. 2d at 1162.

In some jurisdictions, courts distinguish between the known loss doctrine and its corollary, the "loss in progress" doctrine.[42] Similar to the known loss doctrine, the loss in progress doctrine precludes coverage under policies issued after the insured knows of the initial manifestation of a loss.[43] At this time, however, it is unclear whether Washington courts distinguish between the known loss and loss in progress doctrines.[44]

B. The "Business Risk" Doctrine.

In the context of construction litigation, an issue frequently arises as to whether the insured's defective construction constitutes an occurrence. To deal with this issue, courts in some jurisdictions have developed a "business risk" doctrine. According to this doctrine, the purpose of a CGL policy is to protect the insured against unpredictable liability resulting from business accidents—not business risks.[45] "Business risks" include the insured's product deviating from the contractual standards,[46] or the insured's liability for its own defective construction work, which results in damage to its own work.[47] In other words, the business risk doctrine is based on the principle that coverage should extend only to that which is beyond the insured's control.

Washington courts have not expressly adopted the business risk doctrine. And several Washington and federal court decisions hold that negligent construction can be an occurrence.[48] Still, a principle similar to the business risk doctrine animates the Washington courts' interpretation of a CGL Policy's exclusions for "faulty workmanship," "your work," "impaired property," and the like. For example, Washington courts have held the "exclusion for the insured's faulty work is one of the primary business risk exclusions in a CGL policy."[49] And its "rationale . . . is that faulty workmanship is not a fortuitous event but a

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[42] *See* OSTRAGER & NEWMAN, *supra* n. 5, § 802[d], at 635.

[43] *Id*.

[44] *See Hillhaven Props., Ltd. v. Sellen Constr. Co*., 133 Wn.2d 751, 758, 948 P.2d 796 (1997) ("The ''known loss'' doctrine is also referred to as the ''loss-in-progress'' doctrine.") (citing *Inland Waters Pollution Control v. Nat'l Union*, 997 F.2d 172, 177 (6th Cir. 1993); *but see In re Feature Realty Litig.*, 2007 WL 141 2761, at *2, n. 1 (E.D. Wash. 2007) (suggesting that there are distinctions between the known loss and loss in progress doctrines).

[45] *See* PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., 4 CONSTRUCTION LAW, § 11.250 (2002); *Mut. of Enumclaw Ins. Co. v. Patrick Archer Const., Inc.*, 123 Wn. App. 728, 733, 97 P.3d 751, 755 (2004) (explaining that the rationale for the faulty workmanship exclusion is that faulty workmanship is not an insurable fortuitous event but instead a business risk that the insured bears).

[46] *Reins. Ass'n of Minn. v. Timmer*, 641 N.W.2d 302, 314 (Minn. Ct. App. 2002)

[47] SCOTT C. TURNER, 1 INSURANCE COVERAGE OF CONSTRUCTION DISPUTES § 3:11 (2d ed. 2014) (June 2017 Update).

[48] *See, e.g., Dewitt*, 307 F.3d at 1133 (9th Cir. 2002); *Mid-Continent Cas. Co. v. Titan Constr. Corp.*, 2008 WL 2340493, at *1 (9th Cir. 2008) (unpublished).

[49] *W. Nat. Assur. Co. v. Shelcon Const. Grp. LLC*, 182 Wn. App. 256, 263, 332 P.3d 986 (2014).

business risk to be borne by the insured."[50] In accord with the basic principles of policy interpretation, all of these exclusions are narrowly interpreted, and their application depends on specific policy language, the facts of the case and, often, the precise scope of damaged property for which the insured is seeking coverage.[51]

3. Identifying the Number of Occurrences

Because CGL policies are frequently subject to per occurrence limits, determining the number of occurrences may significantly affect the total amount of liability insurance available to the insured, the number of self-insured retentions an insured must satisfy, and whether excess coverage will attach. Courts across the country apply different tests to determine whether a harmful event constitutes one or multiple occurrences. Whereas some courts consider the number of ***causes*** to determine the number of occurrences,[52] others examine the number of ***effects***.[53] Under the effects test, the focus is on the number of injuries resulting from the act, not the number of acts performed by the insured. Under the cause test, courts determine the number of occurrences by looking to the number of "causes", "causal factors," or "liability-triggering events." The cause test has been adopted by most jurisdictions.[54]

Washington courts follow the cause test.[55] The "number of occurrences is determined by referring to the cause or causes of the damage," and the number of triggering events depends on the number of causes underlying the alleged damage and resulting liability."[56] The Washington Supreme Court first adopted the cause test in *Truck Insurance Exchange v. Rohde*.[57] In that case, the insured's car drifted over the center line of the highway and collided with three motorcycles, two of which were carrying both drivers and passengers.[58] The policy at issue contained a separate limit for each accident or occurrence and the trial court ruled that the collision with each motorcycle constituted a separate accident. On

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[50] *Id. See also Patrick Archer*, 123 Wn. App. 733.

[51] *See, e.g., Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wn.2d 255, 273, 199 P.3d 376 (2008) (if siding must be removed to repair damage caused by insured to the surfaces and interior walls underneath the siding, cost of removing and replacing the siding is covered).

[52] *See, e.g., Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982).

[53] *See, e.g., Soc. of the Roman Catholic Church v. Interstate Fire & Cas. Co.*, 26 F.3d 1359, 1364-66 (5th Cir. 1994).

[54] OSTRAGER & NEWMAN, *supra* n. 5, § 9.02, at 687. New York applies an "unfortunate event" test. *Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. Am.*, 7 N.Y.2d 222, 228-29, 164 N.E.2d 704 (N.Y. 1959). This test can be similar to the cause test in application.

[55] *See, e.g., Greengo v. Pub. Employees Mut. Ins. Co.*, 135 Wn.2d 799, 813-14, 959 P.2d 657 (1998).

[56] *Id.*, at 813-15.

[57] 49 Wn.2d 465, 303 P.2d 659 (1956).

[58] *Id.* at 467.

appeal, the Washington Supreme Court disagreed, holding that "[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage."[59]

Insurers and insureds often disagree whether "cause" refers to the cause of injury or the basis of liability.[60] Washington law seems to allow consideration of both. In *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility System*, for example, the Washington Supreme Court stated, "the number of triggering events depends on the number of causes underlying the alleged damage ***and*** resulting liability."[61] Nonetheless, if damage is continuous, a court may hold it is a single occurrence, even if the damage has multiple causes. In *Certain Underwriters at Lloyd's London v. Valiant Insurance Company*, for example, one insurer argued the damage—moisture intrusion—resulted from multiple causes and, thus, the number of occurrences was an issue of fact. The court disagreed, instead relying on the "continuous and repeated exposure to substantially the same general harmful conditions" language in the definition of occurrence to conclude there was only one occurrence:

> The key to the present case is the Zurich policy definition of "occurrence" as an "accident, including continuous and repeated exposure to substantially the same general harmful conditions." The continuous and repeated exposure of Chateau Pacific to harmful moisture that gradually intruded through the building envelope over a five year period from different sources fits this definition.[62]

In determining the number of occurrences, counsel should consider all the potentially relevant characteristics of the loss, such as the number of locations involved, the nature of the operations, and whether such operations were continuous or separated in time or space.[63]

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[59] *Id*. at 471.

[60] *See, e.g., Koikos v. Travelers*, 849 So.2d 263 (Fla. 2003) (construction defect case).

[61] *Transcont'l Ins. Co. v. Washington Pub. Utils. Dist. Util. Sys.*, 111 Wn.2d 452, 467, 760 P.2d 337 (1988) (emphasis added).

[62] *Certain Underwriters at Lloyd's London v. Valiant Ins. Co.*, 155 Wn. App. 469, 474, 229 P.3d 930, (2010); *see also Chartis Specialty Ins. Co. v. Am. Contractors Ins. Co. Risk Retention Grp.*, 2014 WL 3943722, at *5 (D. Or. 2014) (ongoing water damage was one occurrence because definition of occurrence required court to consider the cause "generally" and because plaintiffs in underlying litigation alleged cause was the developers' failure to ensure proper development of a condominium complex, not that the developers negligently performed any of the work themselves); *Navigators Ins. Co. v. Nat'l Union Fire Ins. Co.*, 2013 WL 4008826, at *6 (W.D. Wash. 2013) (ongoing water damage from multiple causes was a single occurrence); *Bayley Constr. v. Am. Guar. & Liab. Ins. Co.*, 2010 WL 4272454, at *5 (W.D. Wash. 2010) (one occurrence because defective conditions that resulted in continuous water intrusion over multiple policy periods all related to the lack of and/or improper use of sealants, transitions, flashings, or other systems).

[63] *See, e.g., Cadet Mfg. Co. v. Am. Ins. Co.*, 391 F. Supp. 2d 884, 894-95 (W.D. Wash. 2005) (environmental contamination at two sites was two occurrences, although the two sites were

The number of occurrences is often very fact dependent, and results tend to be inconsistent across courts.[64]

In most circumstances, if the parties agree on the cause of the damage and liability, determining the number of occurrences should be a question of law. Even if parties dispute the cause of the damage, but the damage is continuous, courts are also willing to determine the number of occurrences as a matter of law.[65]

4. The Trigger of Coverage under Occurrence-Based Policies

An occurrence triggers coverage under a CGL policy. And, under Washington law, an occurrence takes place when the victim's injury or property damage occurs.[66] Thus, to

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damaged by the same contaminant, from the same operations, using the same degreaser, by the same insured).

[64] *See, e.g., United Nat'l Ins. Co. v. Assur. Co. of Am.*, 2015 WL 7185453, at *9 (D. Nev. 2015) (grading and paving was a single, continuous process, but because it was performed at four different units within a development and separated by time and space, the liability arose out of four occurrences); *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 433 (9th Cir. 1994) (plaster pitting in 28 difference homes was a single occurrence because liability arose out of supplier's failure to warn that plaster was suitable only for exterior use); *Owners Ins. Co. v. Salmonsen*, 622 S.E.2d 525, 526 (S.C. 2005) (distribution of defective stucco to numerous buyers was a single occurrence); *Bethpage Water Dist. v. S. Zara & Sons*, 546 N.Y.S.2d 645, 645 (1989) (although city's water mains suffered over 250 items of damage, the damage arose out of "continuous or repeated exposure to substantially the same general conditions" *i.e.*, negligent backfilling of sewer trenches, and thus was a single occurrence); *S. Fire v. Safeco Inc. Co.*, 444 So.2d 844, 844 (Ala. 1983) (two occurrences when a contractor repaired a leaking roof, but left a section unroofed, causing further damage); *Cincinnati Ins. Co. v. Devon Int'l, Inc.*, 924 F.Supp.2d 587, 592 (E.D. Pa. 2013) (one occurrence arising from installation of defective imported drywall in multiple homes because insured's liability arose out of a single purchase and shipment of defective drywall, not negligent installation or manufacture); *Harleysville Worcester Ins. Co. v. Paramount Concrete, Inc.*, 10 F. Supp. 3d 252, 271 (D. Conn. 2014) (19 occurrences because the occurrence was not the single production of "shotcrete," but rather each time that the product caused discrete harm by cracking and causing a swimming pool to leak); *Maryland Cas. Co. v. W.R. Grace & Co.*, 128 F.3d 794, 799 (2d Cir. 1997) (each installation of asbestos-containing material in a building was a separate occurrence); *Southern Int'l Corp. v. Poly-Urethane Indus., Inc.* 353 So.2d 646, 648 (Fla. App. 1977) (negligent application of insured's roofing product to numerous buildings pursuant to a single contract was one "occurrence").

[65] *Valiant*, 155 Wn. App. at 474-75; *Navigators Ins. Co. v. Nat'l Union Fire Ins. Co.*, 2013 WL 4008826, at *6 (W.D. Wash. 2013).

[66] *Transcontinental*, 111 Wn.2d at 465 ("the time of an occurrence for insurance coverage purposes is determined by when damages or injuries took place"); *see also Wellbrock Assur. Co. of Am.*, 90 Wn. App. 234, 242-43, 951 P.2d 367 (1998) (quoting *Stillwell v. Brock Bros., Inc.*, 736 F. Supp. 201, 206 (S.D. Ind. 1990)) ("An ''occurrence'' refers to ''the fruits of a negligent act, not to the sowing of the seeds'' because it is the consequence that signifies coverage, and not the cause.").

determine whether a particular occurrence triggers coverage under a CGL policy, a court must decide when the claimant's injury or property damage occurred.

Courts across the country have developed various rules to determine when a claimant's injury or property damage takes place.[67] Some courts, for example, adopt an "exposure" trigger of coverage, according to which the injury or property damage occurs at the time the claimant is first exposed to harmful conditions.[68] In contrast, other courts adopt a "manifestation" trigger of coverage, according to which the observable manifestation of the claimant's injury or property damage triggers coverage.[69] Still other courts have adopted an "injury in fact" trigger.[70] Under this theory, neither exposure to harmful conditions, nor observable manifestation trigger coverage.[71] It is, instead, the time of the actual injury or damage that determines coverage.[72] Lastly, some courts have adopted hybrid theories of coverage, according to which multiple events (e.g., exposure, manifestation, injury in fact) can trigger coverage under a CGL policy.[73]

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[67] *See*, *generally*, OSTRAGER & NEWMAN, *supra* n. 5, § 9.03[b].

[68] *See*, *e.g.*, *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 814 (7th Cir. 1992) (holding that property damage took place at the time defective plumbing systems were installed at the claimant's property, not the time at which leaks from the system were first discovered); *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc*., 633 F.2d 1212, 1223 (6th Cir. 1980) ("Bodily injury should be construed to include the tissue damage which takes place upon initial inhalation of asbestos.") (internal quotation marks omitted); *Porter v. Am. Optical Corp*., 641 F.2d 1128, 1145 (5th Cir. 1981) (adopting exposure theory); *see also Hancock Labs., Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 523 (9th Cir. 1986) ("Under the exposure theory, which applies to diseases that are cumulative and progressive, bodily injury occurs when an exposure causing tissue damage takes place and not when physical symptoms caused by the disease manifest themselves.").

[69] *See*, *e.g.*, *Eagle-Picher Indus. v. Liberty Mut. Ins. Co*., 682 F.2d 12, 25 (1st Cir. 1982) ("the operative date for determining which of the several policies at issue here apply to a given claim or lawsuit in which damages are sought from plaintiff . . . is the date when the asbestos-related disease became reasonably capable of medical diagnosis); *United States Fid. & Guar. Co. v. Am. Ins. Co*., 169 Ind. App. 1, 9, 345 N.E.2d 267 (1976) (holding that property damage occurred on date defective bricks began to spall, rather than the date of installation); *see also Hancok*, 777 F.2d at 524 (describing manifestation trigger of coverage).

[70] *See*, *e.g.*, *Abex Corp. v. Maryland Cas. Co*., 790 F.2d 119, 127-28 (D.C. Cir. 1986); *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 765 (2d Cir. 1984).

[71] *Abex*, 790 F.2d at 127.

[72] *Id*. at 127-28.

[73] *See*, *e.g.*, *Keene Corp. v. Ins. Co. of N. Am*., 667 F.2d 1034, 1047 (D.C. Cir. 1981) ("We conclude, therefore, that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies."); *AC&S Inc. v. Aetna Cas. & Sur. Co*., 764 F.2d 968, 973 (3rd Cir. 1985) ("We hold that exposure, exposure-in-residence, and manifestation all constitute "bodily injury" within the meaning of the policies.").

Washington courts have adopted (and, in fact, pioneered) the first of these hybrid theories—the "continuous-damage" or "continuous trigger" theory.[74] Under this rule, every policy spanning the period during which property damage progresses is liable for all damages attributable to the occurrence.[75]

The Washington Court of Appeals first promulgated the continuous damage theory in *Gruol Construction v. ICNA*.[76] There, a homeowner sued Gruol Construction for dry rot damage to his home, which resulted from dirt that Gruol Construction piled up against the home during construction.[77] In the coverage litigation between Gruol Construction and its liability insurers, the court held the dry rot damage at issue triggered all of the liability policies providing coverage from the time that the condition began throughout the period that it progressively worsened.[78] Thus, under *Gruol*, where a third-party sues the insured for a condition that progressively worsens over time, the continuous damage theory imposes liability on any insurer which provides coverage during the life of the condition—*i.e.*, from the point of inception, through its worsening progression, and up to the point the condition manifests its seriousness.[79]

The Washington Supreme Court has expressly acknowledged the similarities between the continuous-damage theory and other hybrid theories that address the trigger of coverage. In a first-party property insurance case, *Villella v. PEMCO*,[80] the insured's home was damaged by earth movement after the applicable policy period ended.[81] The insured argued that the soil destabilization which ultimately damaged his home began during the policy period, triggering coverage under his homeowner's policy.[82] The court rejected this argument, holding that because the home suffered no damage during the policy period, the loss was not covered.[83] In arriving at this conclusion, the court discussed a hybrid theory of coverage and noted similarities between these theories and the continuous damage theory already adopted by the Washington courts.[84]

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[74] *Gruol Constr. Co. v. Ins. Co. of N. Am.*, 11 Wn. App. 632, 636, 524 P.2d 427 (1974).

[75] *Am. Nat'l Fire Ins. Co. v. B & L Trucking Co.*, 134 Wn.2d 413, 425, 951 P.2d 250 (1998).

[76] 11 Wn. App. 632.

[77] *Id*. at 633.

[78] *Id*. at 636.

[79] *See, e.g.*, *Walla Walla College v. Ohio Cas. Ins. Co*., 149 Wn. App. 726, 733, 204 P.3d 961 (2009).

[80] *Villella v. Pub. Employees Mut. Ins. Co*., 106 Wn.2d 806, 725 P.2d 957 (1986).

[81] *Id*. at 810.

[82] *Id*. at 810-11.

[83] *Id*. at 814.

[84] *Id*. at 813-14 (quoting *Forty-Eight Insulations*, 633 F.2d at 1222 n. 18).

The Washington Supreme Court also discussed hybrid theories of coverage in *American National Fire v. B & L Trucking*.[85] Although the court did not expressly decide when injury or damage triggers coverage,[86] it held that "[o]nce coverage is triggered in one or more policy periods, those policies provide full coverage for all continuing damage, without any allocation between insurer and insured."[87]

Courts will enforce a "deemer" provision that expressly abrogates the continuous trigger rule. In *Bayley Construction v. American Guarantee & Liability Insurance Company*, for example, the policy contained the following endorsement:

> In the event of continuing or progressive **Bodily Injury** or **Property Damage** over any length of time, such **Bodily Injury** or **Property Damage** shall be deemed to be one **Occurrence** and shall be deemed to occur only when such **Bodily Injury** or **Property Damage** first commenced.[88]

The court first considered a prior Washington Court of Appeals decision and concluded that continuing water damage was a "continuing condition" and, therefore, only one occurrence.[89] It then gave effect to the deemer clause in the policy endorsement and held that because the water damage commenced in 2002, a policy incepting in 2004 was not triggered.[90]

5. Limits Applicable to Occurrences Spanning Multiple Policy Periods

As the *Bayley Construction* case illustrates, in some instances, a single occurrence can span more than one policy period. In *Polygon Nw. Co. v. Steadfast Ins. Co*., [91] for example, Steadfast insured a contractor, Polygon, under multiple policies covering multiple policy periods.[92] Under each policy, Steadfast had no obligation to pay until Polygon first exhausted a $1 million "self-insured retention" ("SIR").[93] The policies provided that the $1 million SIR was the most Polygon would pay for any one occurrence and stated that the SIR applied "separately to each consecutive annual period."[94]

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[85] 134 Wn.2d 413, 951 P.2d 250 (1998).

[86] *Id*. at 426 ("As stated previously, the trigger of coverage is not before us.").

[87] *Id*. at 429.

[88] *Bayley Constr. v. Am. Guar. & Liab. Ins. Co*., 2010 WL 4272454, at *2 (W.D. Wash. 2010).

[89] *Id*. at *3 (analyzing *Valiant*, 155 Wn. App. at 472-74)

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[91] 682 F. Supp. 2d 1231 (W.D. Wash. 2009).

[92] *Id*. at 1232.

[93] *Id*. at 1232-33.

[94] *Id*. at 1233.

A third-party claimant sued Polygon for liability arising out of "a single construction occurrence spanning multiple policy periods."[95] Polygon contended that, under the policies, Steadfast "specifically promised [Polygon] would never need to pay more than a $1 million SIR on any one claim[.]"[96] Steadfast maintained, however, that "the policy language clearly states that [Polygon is] responsible for a new SIR for each annual period."[97] The parties filed cross motions for summary judgment regarding "whether Polygon must pay one SIR or multiple SIR amounts on a claim arising out of a single construction occurrence that spans multiple policy years."[98]

The court held that "the plain language of the insurance policy applies multiple SIRs to a claim spanning multiple policy periods."[99] Two basic reasons supported the court's holding. First, the policies' declarations and their insuring agreements limited the temporal scope of the policies; that is, for each specified time period, the insured was required to exhaust one SIR.[100] "Any SIR amounts, of course, apply only to claims that fall within that scope of coverage."[101] In addition, both the SIR and "Limits of Insurance" provisions clearly provided that policy limits "apply separately to each consecutive annual period."[102] A single occurrence spanning multiple consecutive policy periods, therefore, required the application of multiple SIRs. As the court explained, "[o]nce a new . . . policy is triggered, the coverage limits and SIR obligations under that policy go into effect."[103]

The policies at issue in *Polygon*, however, arguably did not contain "batching" or "deemer" provisions. As discussed above, "deemer" clauses stipulate that all property damage occurred at a specific time, thus limiting the number of policies that are triggered. Similarly, "batching" clauses attempt to batch multiple claims together into a single occurrence, thus limiting recovery to a single per occurrence limit. Depending on the specific policy language at issue, a "batching" or "deemer" clause may prevail over more general "Limits of Insurance" provisions under Washington law.[104]

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[95] *Id*. at 1232.

[96] *Id*.

[97] *Id*.

[98] *Id*. at 1233.

[99] *Id*.

[100] *Id*. at 1233-34.

[101] *Id*. at 1234.

[102] *Id*. at 1233-34

[103] *Id*. at 1234 n. 2.

[104] *See Philadelphia Indem. Ins. Co. v. Olympia Early Learning Ctr.,* 980 F. Supp. 2d 1266, 1273 (W.D. Wash. 2013); *Valiant,* 155 Wn. App. at 477.

In conclusion, the CGL policy remains the most prevalent form of liability insurance in the construction industry. And because a CGL policy's insuring agreement provides coverage only for bodily injury or property damage caused by an occurrence, whether an event constitutes an occurrence, the number of occurrences, and which policies are triggered by a covered occurrence can all significantly affect the availability of insurance benefits. Insureds and insurers will likely continue to debate the full implications of the cases and principles outlined in this paper. But understanding these issues is important to navigate insurance coverage disputes as they relate to construction in the state of Washington.