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Trigger-of-Coverage for Employment Claims

The Impact of *General Security*

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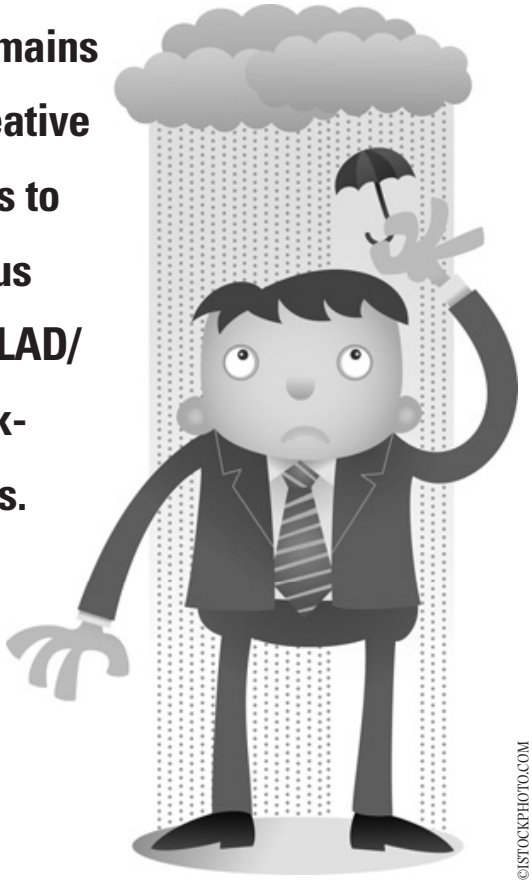
The New Jersey Appellate Division recently had occasion to address the issue of trigger-of-coverage for employment claims in the case of General Security Nat'l Ins. Co. v. N.J. Intergovernmental Ins. Fund, No. A-5591-08T1, 2011 WL 3714982 (N.J. Super App. Div. August 25, 2011), certif. den. 209 N.J. 213 (2012). The decision is unpublished and the Supreme Court did not grant review so the direct import of the holding is limited. Nonetheless, trigger-of-insurance for employment claims is an area of law so unsettled in New Jersey that any glimpse into the appellate tea leaves is worth considering.

General Security was a dispute over insurance coverage for an underlying hostile workplace claim, *Spagnola v. Town of Morristown*, No. 05-577 (JLL) (D.N.J. Dec. 7, 2006). Plaintiff Spagnola was the information technology manager for the Town of Morristown. On multiple occasions, from November 2000 through June 2004, she encountered sexually explicit material on the work computer of the town's business administrator, Eric Maurer. On Aug. 8, 2001, Spagnola complained to Maurer and the mayor, but nothing happened. The plaintiff continued to object until finally, on Aug. 13, 2004, she resigned due to the hostile work environment. She sued, and the case was later settled for $950,000 in compensatory damages. While the employment case was pending, a declaratory judgment action was instituted seeking a determination of insurance coverage for Spagnola's claims.

The door remains open for creative practitioners to argue various triggers for LAD/ hostile work-place claims.



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The central dispute in the insurance action was trigger-of-coverage for hostile workplace claims under New Jersey law. The town maintained a self-insured retention (SIR) paid by the New Jersey Intergovernmental Insurance Fund, a self-insurance pool for state municipalities. General Security issued policies in 2000 and 2001, sitting above a $100,000 SIR, indemnified by the fund. The other insurer defendants issued policies from 2002 to 2004, sitting above varying SIRs. General Security sought a declaration that the continuous-trigger doctrine applied and, following the holding of *Benjamin Moore & Co. v. Aetna Casualty & Surety Co.*, 179 N.J. 87, 105 (2004), that the town (via the fund) had to satisfy the full SIR in each triggered year from 2000 (when the pornography was first observed) to 2004 (when the plaintiff resigned from her job). The fund, on the other hand, argued that everything that happened comprised one claim and only one SIR to be satisfied. The trial court agreed with the fund, and General Security appealed.

The Appellate Division began by reviewing the continuous-trigger doctrine under New Jersey law, as framed by the seminal cases of *Owens-Illinois v. United Ins. Co.*, 138 N.J. 437 (1994); *Carter-Wallace v. Admiral Ins. Co.*, 154 N.J. 312 (1998); and *Benjamin Moore*. In the view of the court in *General Security*, the continuous-trigger doctrine is limited to environmental cases only. "We have found no case that extends the continuous-trigger theory for allocation of loss beyond cases of long-term environmental damage and do not find it appropriate to do so in this case."

Instead of applying the continuous-trigger doctrine, the appellate court discussed a "manifestation trigger" and found that Spagnola's injury manifested in 2001 when she first complained to the mayor. The court found that there was either one wrongful act in 2001 or a series of causally related wrongful acts beginning in 2001, all of which the General Security policy would treat as one claim. Even though subsequent damages took place in later years, they were attributable to the town's bad acts in 2001 and, therefore, the General Security policy in 2001 had to respond to all of the plaintiff's claims. As to the other insurers' policies in 2002-2005, the known-loss doctrine barred coverage since, as of 2001, the town knew or should have known that the plaintiff was being subjected to an actionable hostile workplace which it had failed to remedy.

The *General Security* case is being discussed by some insurance coverage attorneys as standing for the proposition that the Appellate Division has applied a manifestation trigger to hostile workplace claims and, further, that the continuous-trigger doctrine has no application beyond environmental cases. A close reading of the case, however, indicates that the court made no such sweeping rulings. It is true that the appellate court rejected the application of the continuous-trigger doctrine, however, this was because it was possible to make a coverage determination based on the policy language at issue. The court properly recognized that continuous-trigger is a judicially created doctrine resorted to when the parties can't pinpoint a specific occurrence triggering coverage.

There was no need to resort to this judicial fiction because the General Security policy at issue contained a type of "deemer" clause which collapsed all bad acts into one claim. The policy provided that "[a]ll claims against any Insureds *arising out of the same Wrongful Act, or logically or casually [sic] connected Wrongful Acts,* will be considered one Claim." (Emphasis in original.) Since the policy deemed all logically connected bad acts to be one claim, there was only one occurrence in one policy period and no need to consider continuous-trigger. The court's discussion of the continuous-trigger doctrine, therefore, was simply dicta.

Further, despite the court's pronouncement, the continuous-trigger doctrine in New Jersey is not limited to only environmental cases. For example, in *Firemen's Ins. Co. of Newark v. National Union Fire Ins. Co.*, 387 N.J. Super. 434, 450 (App. Div. 2006), the appellate court appears to have applied a continuous trigger to allocate defense costs among successive primary insurers in a construction defect case. The continuous-trigger doctrine still remains a viable proposition wherever there is progressive, indivisible damage spanning multiple years, whether it be presented in a case alleging toxic tort, construction defect or hostile work environment.

Similarly, the *General Security* court's discussion of the manifestation trigger did not inform the basis of its holding. The General Security policy covered "wrongful acts" within the policy period. The date when the injury manifested was simply not determinative of when a wrongful act occurred. As the Appellate Division properly noted, there is a long-standing principle that an insurer indemnifies for all damages attributable to an accident, even though the injuries might not be realized until the policy lapses. See, e.g., *Polarome Int'l, Inc. v. Greenwich Ins. Co.*, 404 N.J. Super. 241, 266-67 (App. Div. 2008), certif. den., 199 N.J. 133 (2009); *Champion Dyeing & Finishing Co. v. Centennial Ins. Co.*, 355 N.J. Super. 262, 276 (App. Div. 2002). The insurance policy in force of the date of the accident responds, even though, for example, surgery or medical treatment occurs during a different policy period. Since the General Security policy deemed all related bad acts to have occurred in the policy period of the first bad act, the date when subsequent damage manifested was simply not relevant and the court's discussion of the manifestation trigger was also dicta.

In discussing the idea of damage subsequent to the policy period the *General Security* court cited to *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982) (applying Pennsylvania law), which held that the adoption of a discriminatory policy or the negligent hiring or supervision of an abuser constitutes one single occurrence and all injuries flowing therefrom arise from that one common source. Even though it cited to *Appalachian Ins.*, the appellate court never ruled that New Jersey would employ this type of rule, which universally collapses all events into one policy period even absent policy language so requiring. Indeed, such a rule could very well run counter to the idea of a "continuing violation" under New Jersey's Law Against Discrimination (LAD). See, e.g., *Shepherd v. Hunterdon Developmental Ctr.*, 174 N.J. 1, 18-22 (2002); *Wilson v. Wal-Mart Stores*, 158 N.J. 263, 272-74 (1999). In short, *General Security* does not stand for the proposition that New Jersey employs an *Appalachian Ins.*-type rule.

In the end, what are the lessons to be learned from *General Security*? At bottom, trigger-of-coverage for employment cases remains unsettled. Uncertainty remains, not simply because *General Security* is unpublished, but because the actual holding of the case is grounded in unique policy language that likely won't readily reappear. Despite what appear to be sweeping pronouncements in the decision, the continuous-trigger doctrine remains alive and well. Further, a manifestation trigger is not necessarily dictated in employment cases and the rule of *Appalachian Ins.* is, at present, not the law of this jurisdiction. The door remains open for creative practitioners to argue various triggers of coverage for LAD/hostile workplace claims. ■