

7th Circ. ‘Trigger’ Ruling May Up Risks For Property Insurers

By **Jeff Sistrunk**

Law360, Los Angeles (December 04, 2014, 7:12 PM ET) -- The Seventh Circuit's recent ruling that Chubb Indemnity Insurance Co. must pay a claim for water damage sustained over 16 years under Wisconsin's "continuous trigger" theory could leave property insurers with broadly worded policies on the hook for losses not detected during a policy period, experts say.

An appellate panel ruled last month that Chubb must cover progressive water damage to policyholders Randal and Diane Strauss' home under a first-party property policy, even though the couple didn't discover the damage until 2010 — five years after the policy had expired.

In its decision, the panel rejected Chubb's invitation to establish a universal rule requiring the use of the "manifestation trigger" theory — which holds that a compensable injury doesn't arise until it manifests as ascertainable property damage — for the analysis of all first-party property policies under Wisconsin law.

Some industry groups, including the American Insurance Association and the Property Casualty Insurers Association of America, have denounced the decision, saying in a proposed amicus brief filed Tuesday in support of Chubb's motion for rehearing that the panel's use of the continuous trigger theory could potentially expose property insurers in Wisconsin to "risks from the distant past they did not contemplate and for which they have charged no premium."

"In this instance, if left to stand, the court's decision will create a climate of uncertainty that can be expected to adversely affect the property insurance market in Wisconsin," the industry groups' attorney, Sheila M. Sullivan of Bell Moore & Richter SC, wrote in the brief.

However, given the Seventh Circuit's focus on the specific language of the policy at issue and its refusal to adopt a single coverage trigger theory for all first-party property policies, the ruling will likely only affect property insurers whose policies contain similar wording to Chubb's, some attorneys say.

"If you have a first-party property policy that's written this way, then you should expect that you're going to have to provide the coverage that you extended to your policyholder," said John Mathias, chair of Jenner & Block LLP's insurance recovery and counseling practice.

The Seventh Circuit's decision provides guidance to property insurers on how to write their first-party policies in the future to avoid unexpectedly becoming liable for progressive damage that doesn't manifest until after a policy expires, attorneys say.

Dan Worker, managing partner of Lewis Brisbois Bisgaard & Smith LLP's Chicago office and vice chair of the firm's insurance coverage and bad faith practice group, pointed out that the Seventh Circuit explicitly stated in its opinion that insurers remain free to craft policies as they see fit.

"The Seventh Circuit didn't see any public policy prohibition against such policy limitations," Worker said. "That's an indication that they're not rejecting the applicability of a manifestation trigger analysis in cases involving different policy language."

In applying the continuous trigger theory in the Strauss case, the Seventh Circuit noted that Chubb's policy provided that "continuous or repeated exposure to substantially the same general conditions" constituted a single occurrence.

Moreover, the appellate panel declined to find that the Strausses' suit was time-barred because it concluded that the requirement in Chubb's policy that claims be filed within one year "after a loss occurs" was "ambiguous as applied to a progressive loss and can entirely reasonably be interpreted to mean after a loss completes." The limitations language in Chubb's policy deviated from that in a Wisconsin statute establishing that property indemnity insurance claims must be filed within one year "after the inception of the loss."

"This ruling gives direction to carriers: If they are trying to limit coverage, they should mirror the language of Wisconsin's statute of limitations and carefully look at the language in the policy outlining what constitutes a triggering event for covered loss," Worker said.

Finley Harckham, a senior litigation shareholder at Anderson Kill PC who represents corporate policyholders, said that the Seventh Circuit's ruling could be applicable outside the circuit's jurisdiction in a variety of property insurance coverage matters, including disputes involving progressive water damage, environmental contamination and earth movement.

"Even though this ruling involves a personal-lines policy, I think the rationale applies equally to commercial property policies, so it could have a wide-ranging impact," Harckham said. "The issue of what constitutes a trigger for covered property loss has been percolating along in various states. This decision is well-reasoned and should provide an impetus for more courts to reach the same conclusion that more than one property policy period can respond to a property loss that takes place over a period of years."

U.S. District Judge Virginia M. Kendall and Circuit Judge David F. Hamilton sat on the panel for the Seventh Circuit.

The Strausses are represented by Andrea L. Murdock of Halloin & Murdock SC.

The Chubb defendants are represented by Frederick J. Strampe of Borgelt Powell Peterson & Frauen SC and Todd S. Schenk of Tressler LLP.

The amici are represented by Ward I. Richter and Sheila M. Sullivan of Bell Moore & Richter SC.

The case is Strauss et al. v. Chubb Indemnity Insurance Co. et al., case number 13-2580, in the U.S. Court of Appeals for the Seventh Circuit.

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