DELVING INTO THE STATUTE OF LIMITATIONS QUESTIONS AND ANALYSIS THAT IMPACT CONSTRUCTION LITIGATION

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I. THE STATUTE OF LIMITATIONS AND FACTORS IMPACTING ITS APPLICATION

Defining the statute of limitations is not difficult, but applying it in practice can be challenging. The statute of limitations establishes the time limit by which a plaintiff must file a suit. Generally, a plaintiff must file its claim before the statute of limitations expires; otherwise, the plaintiff's claims will be time barred. If the statute of limitations has expired and cannot be extended or avoided, a defendant will not be liable to the plaintiff. The length of the statute of limitations depends upon the type of claim brought. The statute of limitations and its related deferments, exceptions and so on create many legal challenges that both the plaintiff and defendant must address. These challenges can work to one's detriment or benefit.

Some of the questions that must be addressed when one considers the statute of limitations include the length of the statute of limitations, when did the claim accrue, can the accrual date be deferred, and was the limitations period tolled. In construction litigation, there are some legal maneuvers that we have sees utilized repeatedly including claims for contribution and the designation of responsible third parties. In addition, an insured involved in construction litigation may also face coverage investigation and/or litigation. The coverage aspects of a claim may cross over to impact the statute of limitations.

A. Some Common Statutes of Limitation

The statute of limitations varies depending on the claim(s) that plaintiff filed. Many statutes of limitations are set by statute. However, if a statute does not define the limitations period, a court will look to the common law to determine the accrual date. Following are some of the statute of limitations one encounters; be aware that these limitations periods can be impacted by other factors such as whether they can be modified under the law or whether the accrual date can be extended.

Chapter 16 of the TEXAS CIVIL PRACTICE & REMEDIES CODE ("CPRC") addresses some of the statute of limitations in Texas as follows:

One-Year Statute of Limitations, CPRC §16.002: applies to claims for malicious prosecution, slander, libel, breach of promise of marriage. A suit to set aside the sale of property seized under SubChapter E of Chapter 33 in the Tax Code must be brought within one after the date the property is sold.

Two-Year Statute of Limitations, CPRC §16.003: applies to claims for trespass for injury to the estate or property of another, conversion of personal property, taking or detaining personal property of another, personal injury, forcible entry and detainer, and forcible detainer. Many tort actions are governed by a two year statute of limitations.

Four-Year Statute of Limitations, CPRC §16.004: applies to claims for specific performance of a contract for the conveyance of real property, penalty or damages on the penal clause of a bond to convey real property, debt, fraud, and breach of fiduciary duty. This section will encompass most claims for breach of contract including breach of contract for sale. However, a person can contract to lower the statute of limitations for breach of contract to two years; anything shorter than that will be void in Texas unless the contract is for the sale of a business with a value of not less than $500,000. CPRC §16.070.

Additional statute of limitations in Texas to be aware of include:

Deceptive Trade Practices Act: 2 years under BUSINESS & COMMERCE CODE §17.565.

Unfair insurance practices: 2 years under INSURANCE CODE §541.162(a).

Breach of the duty of good faith and fair dealing in denying insurance coverage: 2 years

under CPRC §16.003(a), but this statute of limitations does not apply if there is an express denial.

Breach of the *Stowers* duty to handle the lawsuit prudently: 2 years under CPRC §16.003(a).

Death: 2 years under CPRC §16.003(a).

Fraud: 4 years under CPRC §16.003(a)(4).

Negligence: 2 years under CPRC §16.003(a).

Negligent misrepresentation: CPRC §16.003(a).

Products liability, generally: CPRC §16.003(a).

Products liability against the manufacturer and/or seller: 15 years from sale of product by defendant under CPRC §16.012(b).

Products liability against manufacturer or seller when a manufacturer warranted in writing that the product had a useful life of more than 15 years: within the useful life of the product as warranted. CPRC §16.012(c).

Suit against a design professional who designs, plans or inspects the construction of improvements or equipment attached to real property: 10 years after substantial completion or beginning of operation of equipment. CPRC §16.008(a).

Suit against person who constructs or repairs improvement to real property: 10 years after substantial completion of the improvement. CPRC §16.009(a).

Tortious interference with a business relationship: 2 years under CPRC §16.003(a).

Indemnity: four years under CPRC §16.004(a)(3). *See Ingersoll-Rand Co. v. Valero Energy Corp.,* 997 S.W.2d 203, 206, 210-11 (Tex.1999).

Express warranties

Goods: 4 year statute of limitations under TEXAS BUSINESS & COMMERCE CODE §2.725(a) (sales) and §2A.506 (leases).

Services: 4 year statute of limitations under the common law.

Implied Warranties

Merchantability: 4 year statute of limitations under TEXAS BUSINESS & COMMERCE CODE §2.725(a) (sales) and §2A.506 (leases).

Fitness: 4 year statute of limitations under TEXAS BUSINESS & COMMERCE CODE §2.725(a) (sales) and §2A.506 (leases)

Good & workmanlike performance: 2 year statute of limitations for repair and modification services under the common law; 4 year statute of limitations for home construction under the common law.

Habitability (residential property): 4 year statute of limitations (most likely) under the common law.

Suitability (commercial lease): 4 year statute of limitations (most likely) under the common law.

B. When Does the Statute of Limitations Accrue?

Accrual is the date when the statute of limitations begins to run, or, stated another way, when the plaintiff first has a legal claim. The accrual date can be defined by statute or under the common law. Under Texas' common law, there are two methods for determining the accrual date: the legal-injury rule and the continuing-tort doctrine. When a claim accrues is a question of law for the courts to determine.

Under the legal-injury rule, a plaintiff's cause of action accrues on the date when the defendant's act causes a legal injury. *Lubbock Cty. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002). Even if the legal injury is very slight, the statute of limitations

begins to run. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967).

The continuing-tort doctrine constitutes an exception to the legal-injury rule. A continuing tort is a repeated injury caused by repetitive wrongful acts; it is NOT an ongoing, continuous injury that results from one wrongful act. *Krohn v. Marcus Cable Assocs.,* 201 S.W.3d 876, 880 (Tex.App.—Waco 2006, pet. denied). When the continuing tort doctrine applies, the statute of limitations does not accrue until the tortious conduct ceases. *Id.*

C. Deferring the Accrual Date of the Statute of Limitations

Texas law allows the accrual date to be deferred for many claims. There are two methods that give rise to this deferment: the discovery rule and fraudulent concealment. Essentially, both methods do not trigger the statute of limitations until the plaintiff discovers and/or should have discovered the facts giving rise to plaintiff's cause(s) of action.

1. Discovery Rule

The discovery rule defers the accrual of plaintiff's cause of action until such time as the plaintiff knows or should know, through the exercise of due diligence, of facts giving rise to the claim. *Barker v. Eckman* 213 S.W.3d 306, 311-312. The discovery rule is not dependent upon plaintiff knowing or becoming aware of the cause of the injury, the identity of the defendant, the full extent of the injury, or the chances of avoiding the injury and/or the extent of the injury. *Exxon Corp. v. Emerald Oil & Gas. Co.,* 348 S.W.3d 194, 207 (Tex. 2011). The burden is placed on the plaintiff to plead the discovery rule and prove the injury was inherently undiscoverable and objectively verifiable. *Barker*, 213 S.W.3d at 312. Be aware that the discovery rule does not apply to all claims. Its applicability must be assessed on a claim by claim basis.

For plaintiff to establish that the injury was inherently undiscoverable, the court will examine whether the injury is generally discoverable through the exercise of reasonable diligence. *Via Net v. TIG Ins. Co.,* 211 S.W.3d 310, 314 (Tex. 2006). The plaintiff need only show that the injury was difficult to discover, not that it was impossible. *See S.V. v. R.V.,* 933 S.W.2d 1, 7 (Tex. 1996). There is no set definition of what injuries are inherently undiscoverable. However, some categories of injuries have arisen under this standard. These include injuries arising from breach of fiduciary duty, *S.V.*, 933 S.W.2d at 8; latent diseases arising from work-related activities, *Childs v. Haussecker*, 974 S.W.2d 31, 37-38 (Tex. 1998); and privately made libelous statements. *See Kelley v. Rinkle,* 532 S.W.2d 947, 949 (Tex. 1976). Examples of injuries that will not qualify as inherently undiscoverable are an immediate and traumatic event such as a car accident, *Howard v. Fiesta Tex. Show Park, Inc.,* 980 S.W.2d 716, 721 (Tex.App.—San Antonio 1998, pet. denied); when the injury arises due to defendant's failure to provide publically available information, *AT&T Corp. v. Rylander*, 2 S.W.3d 546, 556 (Tex.App.—Austin 1999, pet. denied); and a quantum meruit injury wherein a party is not paid for services rendered. *See Quigley v. Bennett,* 256 S.W.3d 356, 362 (Tex.App.—San Antonio 2008, no pet.).

The second prong that plaintiff must prove requires that plaintiff show that the injury was objectively verifiable. An objectively verifiable injury comes about when the injury's existence and the defendant's wrongful conduct cannot be disputed and the facts on which liability is based are demonstrated by direct physical evidence. *Hay v. Shell Oil Co.,* 986 S.W.2d 772, 777 (Tex.App.—Corpus Christi 1999, pet. denied). An example of such evidence would be expert testimony based on a settled scientific view combined with objective evidence that is not entirely dependent on plaintiff's assertions. *See S.V.*, 933 S.W.2d at 18.

2. Fraudulent Concealment

Fraudulent concealment extends the statute of limitations when a defendant deceitfully conceals wrongdoing. The accrual period is deferred until such time as the plaintiff discovers or should have discovered the deceitful conduct or facts upon which the cause of action is based.

Kerlin v. Sauceda, 263 S.W.3d 920, 925 (Tex. 2008). The plaintiff must establish the following elements in order for fraudulent concealment to toll the statute of limitations: (1) the defendant possessed actual knowledge of the wrong, (2) the defendant concealed the wrong by remaining silent when there was a duty to speak and/or making a misrepresentation that concealed the wrong; (3) the defendant had a fixed purpose to conceal the wrong, and (4) plaintiff relied on the defendant's misrepresentation or silence. *See Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001).

Plaintiff must come forward with proof establishing each of the four prongs of fraudulent concealment. For the first element, plaintiff must prove the defendant possessed actual knowledge of the wrong committed; merely asserting that the defendant should have known it was committing a wrong will not be enough. *See Earle v. Ratliff,* 998 S.W.2d 882, 888 (Tex. 1999); *Texas Gas Expl. Corp. v. Fluor Corp.,* 828 S.W.2d 28, 33 (Tex.App.—Texarkana 1991, writ denied).

The second element requires plaintiff establish that the defendant used deception to conceal the truth. A misrepresentation supports fraudulent concealment when it prevents the plaintiff from discovering defendant's wrongful act. The defendant must intend for the misrepresentation to influence the plaintiff. *See Ernst & Young, LLP v. Pacific Mut. Life Ins. Co.,* 51 S.W.3d 573 (Tex. 2001). The other option for plaintiff is to show defendant remained silent when there was a duty to speak and that the defendant's silence prevented plaintiff from discovering defendant's wrong. *AT&T,* 2 S.W.3d at 557-558. A duty to disclose information will rarely arise outside of the context of a special relationship, i.e. doctor-patient or attorney-client. *See id.*

Finally, the concealment must be undertaken with a fixed purpose and reasonably relied upon by the plaintiff. The third element requires that plaintiff establish defendant had a fixed purpose to conceal facts necessary for plaintiff to discover the cause of action had accrued. *DiGrazia v. Old,* 900 S.W.2d 499, 503 (Tex.App.—Texarkana 1995, no writ). The final element requires that plaintiff show it reasonably relied on the misrepresentation or silence; this is done by establishing that it lacked enough information to discover the concealment despite exercising reasonable diligence. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997); *Mitchell Energy Corp. v. Bartlett,* 958 S.W.2d 430, 442 (Tex.App.—Fort Worth 1997, pet. denied).

D. Tolling the Statute of Limitations

Tolling actually suspends the running of the limitations period after accrual of the cause of action. *See S.V. v. R.V.,* 933 S.W.2d 1, 4 (Tex. 1996). Some ways a statute of limitations can be tolled are as follows:

1. Disability: if a person is under the age of 18 or of unsound mind. CPRC §16.001(a), 16.022(a).

2. Military service ("active duty") under Servicemembers Civil Relief Act. 50 U.S.C. app. §526.

3. Death: the period can be tolled for 12 months after the death of the person possessing the claim and/or against whom the claim exists. CPRC §16.062(a).

4. Absence from the state. CPRC §16.063. Absence means the defendant is not amenable to service and/or when the state does not have personal jurisdiction over the defendant.

5. Lack of jurisdiction when the court dismissed the suit for lack of subject-matter jurisdiction and plaintiff refilled the same action in a different court of proper jurisdiction within 60 days of the dismissal. CPRC §16.064(a).

6. Misnomer and misidentification. Misnomer occurs when the plaintiff misstates the defendant's name but actually serves the correct party. *Diamond v. Eighth Ave. 92, LC,* 105 S.W.3d 691, 695 (Tex.App.—Fort Worth 2003, no pet.). Misidentification arises when the defendant sued is not the party with an interest in the suit; this can arise in a situation where to entities possess similar names and the petition

identifies the wrong one. *See Chilkewitz v. Hyson*, 22 S.W.3d 825, 828 (Tex. 1999). Misidentification can toll the limitations period when the correct entity had notice of the suit and was not misled or disadvantaged by the misidentification. *See id.* at 830.

A more common form of tolling the statute of limitations involves the parties entering into an agreement to do so. Parties can agree to waive the statute of limitations if they do so before the limitations period expires. *See American Alloy Steel v. Armco, Inc.,* 777 S.W.2d 173, 177 (Tex.App.—Houston [14th Dist.] 1989, no writ); *Squyres v. Christian,* 253 S.W.2d 470, 472 (Tex.Civ.App.—Fort Worth 1952, writ ref'd n.r.e.); *Titus v. Wells Fargo Bank & Union Trust Co.,* 134 F.2d 223, 224 (5th Cir.1943). Such an agreement must be specific and for a pre-determined length of time. *American Alloy,* 777 S.W.2d at 177. A general agreement to simply waive or not plead the statute of limitations on a particular claim is void against public policy. *Id.* at 177; *Squyres,* 253 S.W.2d at 472; *Titus*, 134 F.2d at 224.

E. Exempt Governmental Entities.

Some governmental entities are exempt from applicable statutes of limitations under common law or by statute. The State of Texas is not subject to the defenses of limitations, laches or estoppel. *Monsato Co. v. Cornerstone M.U.D.*, 865 S.W.2d 937, 939-940 (Tex. 1993). However, the common law did not protect all governmental entities from the statute of limitations. It excluded a county that does not sue substantially on behalf of the State, *Bitter v. Bexar Cty,* 11 S.W.2d 163, 167 (Tex.Comm'n App. 1928, judgm't adopted); a city, *Hatcher v. State*, 81 S.W.2d 49, 500-501 (Tex. 1935); a school district, *id.* at 500; and an irrigation district. *Texas & Pac. Ry. V. Ward Cty. Irrigation Dist.,*270 S.W.542, 543 (Tex.Comm'n App. 1925, judgm't adopted). TEXAS CIVIL PRACTICE & REMEDIES CODE §16.061(a) exempts specific governmental entities from the limitations periods contained in the CPRC's Chapter 16; these entities include a political subdivision of the State, counties, an incorporated town or city, a navigation district, a municipal utility district, a port authority, a school district and an entity acting under Chapter 54 of the TRANSPORTATION CODE.

F. Other Issues Impacting the Statute of Limitations in Construction Cases

"The general rule in construction defect cases is that limitations begin to run when the [claimant] becomes aware of property damage." *Hickman v. Dudensing*, 2007 Tex.App. LEXIS 4053 (Tex.App.—Houston [1st Dist.] May 24, 2007, pet. denied), citing *Tenowich v. Sterling Plumbing, Co.*, 712 S.W.2d 738, 740 (Tex.App.—Houston 14th Dist.] 1986, no writ); *see also Dean v. Frank W. O'Neil & Assoc.*, 166 S.W.3d 352 (Tex.App.--Fort Worth 2005, no pet.) (statute of limitations in construction defect case began to run when homeowners first became aware of distress in home regardless of whether homeowners had reason to suspect negligence or who was at fault). There are many instances in which the statute of limitations is not even that straight forward and/or not applicable.

1. A Defendant's Claim for Contribution

A contribution claim is a loophole in the applicability of the statute of limitations that exists for defendants. TEXAS CIVIL PRACTICE & REMEDIES CODE §33.016 allows a defendant to bring a claim for contribution against each person who is not a settling person and who is liable to the plaintiff. A claim for contribution is derivative of the plaintiff's right to recover from the contribution defendant. *Shoemake v. Fogel, Ltd.,* 826 S.W.2d 933, 935 (Tex. 1992). Whether or not the statute of limitations has run on plaintiff's claim against the contribution defendant is immaterial. "A suit for contribution may be brought and considered timely even if the original plaintiff's lawsuit against the contribution defendant would be barred by limitations." *In re Martin*, 147 S.W.3d 453 (2004-284 Tex. App.–Beaumont 2004). A defendant with a contribution claim will not know until liability is established whether it will owe a judgment and have an injury claim against

the third party defendant; it is at that time that the statute of limitations on the contribution claim begins to run. *Id. See also Goose Greek Consolidated Independent School District of Chambers and Harris Counties, Texas v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486, 492 (Tex.App.–Texarkana 2002) ("[A]n action for indemnification or contribution does not accrue for limitations purposes until a plaintiff recovers damages or settles its suit against a defendant.").

A contribution claim against a third-party defendant will not provide plaintiff with an opportunity to sue the third-party defendant if the statute of limitations on plaintiff's claim(s) has already expired. TEXAS CIVIL PRACTICE & REMEDIES CODE §16.069(a) provides that cross and counterclaims are not barred by limitations if they arise out of the same transaction or occurrence that is the basis of plaintiff's claims. The cross and/or counterclaims must be field not later than the 30th day after the date on which the party's answer is due. §16.069(b). The exception provided by §16.069(a) does not apply to a plaintiff's potential claims against a third-party defendant because the claim would not be a cross or counterclaim. Instead it would be a claim against a third-party defendant. *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.,* 192 S.W.3d 189, 199-202 (Tex.App.—Houston [14th Dist.] 2006, no pet.).

2. Designation of a Responsible Third Party and H.B. 274

A loophole that could previously be used by plaintiff was TEXAS CIVIL PRACTICE & REMEDIES CODE §33.004(e); however, this option has been closed by the Texas Legislature. Under TEX. CIV. PRAC. & REM CODE §33.011(6), a responsible third party is defined as a "person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission . . . ." Under §33.004(a), a defendant can designate a non-party as a responsible third party. The previously existing loophole provided by §33.004(e) allowed a plaintiff to join that person or entity in the action, even if the statute of limitations had run on plaintiff's claims, as long as plaintiff did so not later than 60 days after the person or entity was designated as a responsible third party. However, the Legislature repealed §33.004(e) in H.B. 274 last year. As a result, that loophole no longer exists.

In addition, the Legislature also used H.B. 274 to limit a defendant's ability to designate a responsible third party. Now, a defendant may not designate a responsible party after the statute of limitations expires if it "failed to timely comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the TEXAS RULES OF CIVIL PROCEDURE." TEX. CIV. PRAC. & REM. CODE §33.004(d).

3. Statute of Repose

A limitations issue that impacts both defendants and plaintiffs is the statute of repose. Under TEXAS CIVIL PRACTICE & REMEDIES CODE §16.008 and §16.009, the ten year statute of repose bars claims against design professionals and contractors. Both statutes apply to claims for "(1) injury, damage, or loss to real or personal property; (2) personal injury; (3) wrongful death; (4) contribution; or (5) indemnity." §16.008(b) and §16.009(b). §16.008(a) provides as follows:

> A person must bring suit for damages for a claim listed in Subsection (b) against a registered or licensed architect, engineer, interior designer, or landscape architect in this state, who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property, not later than 10 years after the substantial completion of the improvement or the beginning of operation of the equipment in an action arising out of a defective or unsafe condition of the real property, the improvement, or the equipment.

TEX. CIV. PRAC. & REM. CODE §16.008(a). §16.009(a) provides the same protection for "a person who constructs or repairs an improvement to real property. *See* TEX. CIV. PRAC. & REM. CODE §16.009(b). The 10 year limitation period will be extended by two years if a plaintiff presents a written claim for damages, contribution or indemnity to the protected defendant; the two year extension begins to run on the day the claim is presented. §16.008(c) and §16.009(c).

II. CAN INFORMATION GATHERED IN COVERAGE LITIGATION IMPACT THE STATUTE OF LIMITATIONS?

In construction cases, the question as to when the statute of limitations began to run often focuses on when did the damage occur and/or when was it discovered. The issues relating to answering these questions can overlap with coverage questions. In a coverage case, the search for information often focuses on a defendant; the insured's knowledge, such as in the case of the known loss doctrine; or on when the damage first occurred, as in the question of whether coverage is triggered. Neither of these issues looks at the plaintiff's perspective or when the plaintiff discovered the damage. However, the information used to analyze these issues may cross over to impact the statute of limitations. In determining the occurrence date for coverage purposes, an insured must establish when the damage first occurred, not when it was discovered by plaintiff. As a result, frequently the statute of limitations analysis as to plaintiff's claims may not carry over or even impact the coverage analysis. However, if the discovery rule is not pled, it can aid in supporting a statute of limitations defense. The known loss doctrine examines whether the defendant possessed prior knowledge of the claim. Issues relating to the defendant's knowledge can be relevant for a statute of limitations deferral argument such as fraudulent concealment. The overlap between the coverage litigation the statute of limitations needs to be considered by an insured as one moves forward with defending a claim and possibly engaging in related coverage analysis and/or litigation.

A. Comparing the Analysis of Statute of Limitations and Coverage Triggers

In construction cases, the statute of limitations analysis does not generally focus solely on when the damage first arose. A plaintiff often pleads the discovery rule which will defer the accrual date as to many of plaintiff's claims. In the past, the discovery rule and whether coverage was triggered could overlap. However, after *Don's Bldg. Supply v. OneBeacon Ins. Co.,* 267 S.W.3d 20 (Tex. 2008), the deferred accrual date will not aid in determining when the defendant's coverage is triggered under current Texas law.

Before *Don's Bldg. Supply*, the issue of the statute of limitations' accrual date and the trigger date for coverage could often overlap. The trigger theory followed by the majority of Texas Courts of Appeals was the manifestation rule under which the property damage had to manifest or become apparent during the policy period in order for there to be coverage. *See Summit Custom Homes, Inc. v. Great American Lloyds Ins. Co*., 202 S.W.3d 823, 827 (Tex. App. – Dallas. 2006, pet. filed); *State Farm Fire & Cas. Co. v.Rodriguez,* 88 S.W.3d 313, 322 (Tex.App.-San Antonio 2002, pet. denied); *State Farm Mutual Automobile Insurance Company vs. Joel Kelly,* 945 S.W.2d 905, 910 (Tex. App.-Austin 1997, writ denied); *Cullen/Frost Bank of Dallas v. Commonwealth Lloyds Ins. Co.,* 852 S.W.2d 252, 258 (Tex.App.—Dallas 1993, writ denied); *Dorchester Development Corp. v. Safeco Ins. Co.,* 737 S.W.2d 380, 383 (Tex.App.—Dallas 1987, no writ). The analysis required for the manifestation rule in a construction case was very similar to the analysis applied to determining the statute of limitations for many of plaintiff's potential claims. The evidence supporting the manifestation of the damage could also be used to establish when the plaintiff knew or should have been aware of the damage under the discovery rule.

The Texas Supreme Court's decision in *Don's Bldg. Supply v. OneBeacon Ins. Co.* changed the trigger date for coverage in construction cases. The Court held as follows:

> Pinpointing the moment of injury retrospectively is sometimes difficult, but we cannot exalt ease of proof or administrative convenience over faithfulness to the policy language; our confined task is to review the contract, not revise it. Our prevailing concern is not one of policy but of law, and we must honor the parties' chosen language--covering third-party claims if damage to the claimant's property occurred during the policy period. The policy asks when damage happened, not whether it was manifest, patent, visible, apparent, obvious, perceptible, discovered, discoverable, capable of detection, or anything similar. Occurred means when damage occurred, not when discovery occurred. In this case, property damage occurred when the home in question suffered wood rot or some other form of physical damage.

Don's Bldg. Supply v. OneBeacon Ins. Co., 267 S.W.3d 20 (Tex. 2008).

Thus, the focus in analysis of whether coverage has been triggered shifted to when the damage first occurred. At times, this question may overlap with the statute of limitations if the plaintiff does not plead the discovery rule and/or fraudulent concealment. Under Texas law, an insured must establish that the claim falls with a policy's coverage and the policy period. *See State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 320-21 (Tex. App.–San Antonio 2002, no pet.); *Utica Nat'l Ins. Co. of Texas*, 141 S.W.3d 198 (Tex. 2004). To establish the actual date that the damage occurred on, an insured will need to rely on expert testimony. *See Don's Building; supra; Qualls v. State Farm Lloyds*, 226 F.R.D. 551, 2005 U.S. Dist. LEXIS 5049 (N.D. Tex. 2005)*;* T.R.E. 702. Such information could be very helpful in establishing the accrual date for the statute of limitations. However, construction cases frequently involve application of the discovery rule as the damage is often not discovered by plaintiff until it becomes apparent. As a result, establishing the actual date of the damage's occurrence may not help the defendant with its statute of limitations defense.

B. The Known Loss or Fortuity Doctrine Focuses on the Insured's Prior Knowledge

The statute of limitations generally focuses on the accrual date of a cause of action, but it can be deferred based upon the discovery rule and/or fraudulent concealment. While the discovery rule focuses on the plaintiff's knowledge, fraudulent concealment involves also examining the defendant's knowledge and/or actions, as discussed above. Information that comes to light from an examination of the defendant's acts and/or knowledge may also impact the defendant's coverage for plaintiff's claim(s). The knowledge of the defendant is a central focus in application of the known loss or fortuity doctrine.

Under Texas law, the known loss or fortuity doctrine generally excludes coverage for known losses or losses the insured knew or should have known were ongoing before the policy issued. *See Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 687-88 (Tex. App.--Houston [14th Dist.] 2006, pet. denied). *See also Warrantech Corp. v. Steadfast Ins. Co*., 210 S.W.3d 760, 767 (Tex. App.--Ft. Worth 2006, no pet.); *Two Pesos, Inc. v. Gulf Ins. Co.,* 901 S.W.2d 495, 502 (Tex. App.--Houston [14th Dist.] 1995, no writ); *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72, 75 (Tex.App.-Dallas 2001, pet. denied). The doctrine derives from the principle that "[i]nsurance is designed to protect against unknown, fortuitous risks," not those that are certain. *Burlington Ins. Co. v. Tex. Krishnas, Inc.*, 143 S.W.3d 226, 230 (Tex. App.--Eastland

2004, no pet.). *See also Scottsdale Ins. Co. v. Travis,* 68 S.W.3d 72, 75 (Tex. App.--Dallas 2001, pet. denied) ("[B]ecause insurance policies are designed to insure against fortuities, fraud occurs when a policy is misused to insure a certainty."). A known loss is one that the insured knew had occurred at the time it purchased the policy. *Travis*, 68 S.W.3d at 75. A loss in progress occurs when the insured is, or should be aware of, an ongoing progressive loss at the time the policy was purchased. *Two Pesos*, 901 S.W.2d at 501. Insurance coverage is precluded for both known losses and losses in progress. *Travis*, 68 S.W.3d at 75. "Texas has long recognized that it is contrary to public policy for an insurance company knowingly to assume a loss occurring prior to its contract." *Two Pesos*, 901 S.W.2d at 501.

The information relied upon by the plaintiff to establish fraudulent concealment could overlap with and aid a carrier in establishing that a defendant/insured had prior knowledge of a known loss. Both fraudulent concealment and the known loss doctrine protect against a defendant benefiting from fraudulent action. In the case of a statute of limitations, a defendant should not be allowed to benefit from a statute of limitations running when it has taken steps to hinder and/or prevent a plaintiff from discovering its wrongful conduct. Similarly, a defendant should not be covered under a policy for a loss that it already knew about or should have known about; as a result, a carrier can take advantage of the known loss doctrine. Thus, the information supporting a plaintiff's assertion of fraudulent concealment could have a significant impact on the insured's coverage for plaintiff's claims.

III. CONCLUSION

In any litigation case, but particularly in construction defect litigation, the statute of limitations' analysis is often not an easy or straight forward undertaking. The questions of when did the wrongful act occur, what are the claims, and what is the applicable statute of limitations are just the starting point of the analysis. The next step becomes addressing all the other issues such as the accrual questions, deferments, and exceptions; these all create traps that plaintiffs and defendants must be aware of and know how to navigate. Further, other aspects of the case can overlap and impact the statute of limitations issues. As addressed, the information gathered through coverage litigation could potentially aid in establishing that the accrual date was earlier than plaintiff claims and/or benefit plaintiff's argument of fraudulent concealment. Conversely, information supporting plaintiff's assertion of fraudulent concealment could eliminate a defendant's coverage. As a result, the plaintiff and the insured need to be cognizant of the potential impact and reach of the evidence pertaining to the statute of limitations and/or coverage issues related to the case.