

DON'S BUILDING
– TRIGGER OF COVERAGE –
MISFIRE OR DIRECT HIT

16TH ANNUAL INSURANCE SYMPOSIUM

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DALLAS, TEXAS

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I. Introduction

In its decision in *Don's Bldg. Supply v. OneBeacon Ins. Co.*,¹ the Texas Supreme Court reversed numerous cases and many years of authority that most judges and most coverage attorneys had thought was well-established and was the rule of law in Texas. The implications from the *Don's Building* decision are indeed far-reaching and have not yet been fully realized or fully recognized. This paper will examine the paths that lead us to the decision in *Don's Building* and the future implications for insureds, insurers, and plaintiffs as a result of this decision.

II. Underlying facts of *Don's Building*

Don's Building Supply, Inc. ("Don's Building"), is a distributor of construction supplies and materials. From the period of December 1, 1993, to December 1, 1996, Don's Building was insured by three CGL policies issued by Potomac Insurance Company of Illinois. Potomac later assigned the three policies to One Beacon. During the period of 2003 to 2005, some twenty-six lawsuits were filed against Don's Building and other construction supply distributors, manufacturers, and contractors. The allegations in these underlying lawsuits were virtually identical. These allegations were that the defendants manufactured, distributed, sold and installed Exterior Insulation and Finish Systems (EIFS) in their homes with knowledge that the products were defectively designed and that it failed to provide water-tight cladding as intended; that the defendants knew that anyone's structures adjacent to the EIFS would be vulnerable to wood rot and other damage because of the defective design of the EIFS; and that as a result of defendants' conduct, plaintiffs' homes have suffered extensive damage, resulting in the diminution of the value and the need to retrofit or replace EIFS. The legal theories asserted in the underlying petitions included allegations of

negligence, gross negligence, fraudulent nondisclosure, fraudulent misrepresentation and violations of the Texas Deceptive Trade Practices Act.

Don's Building made demand upon One Beacon to defend it in the underlying actions and to indemnify it from any liabilities that might result from the lawsuits. Initially, One Beacon provided defense of Don's Building. It later denied it owed any obligations under the policies asserting that there were no allegations that property damage occurred during the policy periods of the One Beacon policies.

III. Litigation History

In 2005, One Beacon filed a declaratory judgment suit against Don's Building in the United States District Court for the Northern District of Texas. On May 23, 2006, Judge Jane Boyle granted summary judgment for One Beacon. In the trial court, One Beacon contended that the property damage "occurred" when the property damage "manifested." Don's Building urged the court to apply an exposure trigger theory to the property damage, relying upon the *Pilgrim Enterprises, Inc. v. Maryland Casualty Co.*² decision. In that case the court found the policies covered physical injury or property damage caused by exposure during the policy period, even if the contamination began before the policy inception.

The District Court concluded that the manifestation rule was the appropriate rule to govern triggers for property damage and granted summary judgment to One Beacon.

An appeal was filed from the United States District Court for the Northern District of Texas to the Fifth Circuit. Because of the divergence among courts addressing this issue and because there was no controlling Texas Supreme Court

¹ 267 S.W.3d 20 (Tex. 2008)

² 24 S.W.3d 488, 497-98 (Tex.App.—Houston [1st Dist.] 2000, no pet.)

precedent, the Fifth Circuit certified two questions to the Texas Supreme Court. Those questions were as follows:

1. When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for purposes of an occurrence-based commercial general liability insurance policy?

2. Under the rule identified in the answer to the first question, have the pleadings in lawsuits against an insured alleged that property damage occurred within the policy period of an occurrence-based commercial general liability insurance policy, such that the insurer's duty to defend and indemnify the insured is triggered, when the pleadings allege that actual damage was continuing and progressing during the policy period, but remained undiscoverable and not readily apparent for purposes of the discovery rule until after the policy period ended because the internal damage was hidden from view by an undamaged exterior surface?³

The certification was accepted by the Texas Supreme Court. The case was argued on February 7, 2008, and the opinion was delivered on August 29, 2008.

IV. Trigger Theories Recognized by the Courts

The number of trigger theories for property damage is indeed limitless. To add to the confusion, many courts will provide a label to one theory when, in actuality, it is another theory. Some theories that have been recognized by courts across the country include the following.

³ *Onebeacon Ins. Co. v. Don's Building Supply, Inc.*, 516 F.Supp.2d 615 (N.D. Tex. 2006), question certified by 496 F.3d 361 (5th Cir. 2007).

- The "pure" or "strict" manifestation rule—triggers coverage upon actual discovery of injury;⁴
- The "relaxed" manifestation rule—triggers coverage in the first policy period during which discovery of injury is possible;⁵
- The "exposure" rule—triggers coverage in any policy period in which exposure to cause of injury occurred;⁶
- The "injury-in-fact" rule—sets trigger in personal injury cases at point when body's defenses are "overwhelmed;"⁷ and
- The "multiple" or "triple-trigger" rule—requires coverage under all policies during period of continuing exposure and manifestation.⁸

It is from these theories and others that the parties and the Texas Supreme Court were forced to select a theory which would be appropriate to the policy language contained in the One Beacon policy.

V. History of Trigger Theories for Property Damage in Texas

Prior to the *Don's Building* decision, the prevailing ruling among Texas courts of appeals has been the manifestation rule. This rule was first adopted by the Dallas Court of Appeals in

⁴ *Eagle-Picher Industries, Inc. v. Liberty Mutual Ins. Co.*, 523 F.Supp. 110, 118 (D.Mass. 1981).

⁵ *Eagle-Picher Industries, Inc. v. Liberty Mutual Ins. Co.*, 682 F.2d 12, 24 (1st Cir. 1982, cert. denied), 460 U.S. 1082 (1983).

⁶ *Insurance Company of North America v. Forty-eight Insulations, Inc.*, 633 F.2d 1212, 1223 (6th Cir. 1980).

⁷ *American Home Products Co. v. Liberty Mutual Ins. Co.*, 565 F.Supp. 1485, 1497 (S.D. N.Y. 1983).

⁸ *Keene Corp. v. Insurance Company of North America*, 215 U.S.App.D.C. 156, 667 F.2d 1034 (D.C. Cir. 1981).

*Dorchester Development Corp. v. Safeco Ins. Co.*⁹ In that case, the court held that:

Under the authority cited above, no liability exists on the part of the insurer unless the property damage manifests itself, or becomes apparent, during the policy period.

Since Dorchester has admitted (by failing to answer the Requests for Admissions) that such damages just were not manifested during the policy period, there was no “occurrence” during the policy period.

The *Dorchester* opinion was also followed by later Dallas Courts’ of Appeals opinions and opinions from the San Antonio Courts of Appeals and Austin Courts of Appeals in *Cullen/Frost Bank of Dallas v. Commonwealth Lloyds Ins. Co.*,¹⁰ *State Farm Mutual Automobile Insurance Company vs. Joel Kelly*,¹¹ *State Farm Fire & Cas. Co. v. Rodriguez*,¹² and *Summit Custom Homes, Inc. v. Great American Lloyds Ins. Co.*¹³

A minority line of cases had developed from the Houston Fifth and Fourteenth Courts of Appeals which had adopted the exposure rule. The first case to adopt such a rule was *Pilgrim Enterprises, Inc. v. Maryland Cas. Co.*¹⁴ In that case, after surveying the Texas cases that applied to the manifestation rule, the court held that “for CGL policies covering continuous or repeated exposure to conditions [damage] can occur as the exposure takes place.”¹⁵ Later, the

Pilgrim decision was followed by the Fourteenth Court of Appeals in *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*,¹⁶ where the court applied the exposure rule to a case involving property damage from water intrusion due to a defective EIFS siding.

The Fifth Circuit Federal Court of Appeals prior to the *Don's Building* decision had followed the manifestation rule. See *Snug Harbor Ltd. v. Zurich Ins. Co.*,¹⁷ *American Home Assurance Co. v. Unitramp Ltd.*,¹⁸ and *Guaranty National Ins. Co. v. Asrock Industries, Inc.*¹⁹

Interesting, prior to *Don's Building*, neither a Texas Court of Appeals nor had the Fifth Circuit decided a case involving the trigger for property damage under a CGL policy where the injury-in-fact rule had been applied.

VI. Argument of *Don's Building* in Supreme Court

The position of *Don's Building* in the supreme court was that the time at which property damage occurs for purposes of an occurrence-based commercial general liability policy is when that damage happens or takes place, whether it is patent or latent, hidden or visible, discoverable or undiscoverable, and whether actually discovered. In support of this position, *Don's Building* first pointed to the drafting history of the ISO form. In particular, *Don's Building* pointed to a second draft version of the insuring agreement which was circulated between June and August of 1960, which would have deemed the bodily injury or property damage to “occur at the time and place at which

⁹ 737 S.W.2d 380, 383 (Tex.App.—Dallas 1987, no writ).

¹⁰ 852 S.W.2d 252, 258 (Tex.App.—Dallas 1993, writ denied).

¹¹ 945 S.W.2d 905, 910 (Tex. App.—Austin 1997, writ denied).

¹² , 88 S.W.3d 313, 322 (Tex.App.—San Antonio 2002, pet. denied).

¹³ 202 S.W.3d 823, 827 (Tex. App. – Dallas. 2006, pet. filed).

¹⁴ 24 S.W.3d 488, 490-91 (Tex.App.—Houston {1st .Dist.] 2000, no pet.).

¹⁵ *Id.* at 497-98.

¹⁶ No. 14-05-00487-cv; 2006 Tex.App. LEXIS 5950, 2006 WL 1892669 (Tex.App.—Houston [14th Dist.] July 6, 2006), reversed ___ S.W.3d ___ (Tex. 2009).

¹⁷ 968 F.2d 538, 544 (5th Cir. 1992).

¹⁸ 146 F.3d 311, 313 (5th Cir. 1998).

¹⁹ 211 F.3d 239, 246-47 (5th Cir. 2000).

the first of any such injury or damage became manifest.”²⁰

Don's Building pointed out that a contemporaneous memorandum circulated by the joint drafting committees stated that:

The word “manifest,” which means “visible, open, clear, evident,” seems to us to be the most satisfactory word for our purpose to express the time when injury occurs. The word “occurs” itself is too vague as it may range from near exposure to culmination.²¹

The August 1960 draft was the last draft in which the appearance of the word “manifest” appeared in the insuring agreement of the standard CGL policy.

Second, *Don's Building* argued that an “actual injury” trigger reconcile the prior Texas cases addressing the trigger questions. For example, in *Pine Oak Builders*, *Don's Building* noted that though it used the term “exposure” as the trigger theory, the actual application was an actual injury. The same was true with the *Pilgrim Enterprises* case as well.

With respect to the prior cases applying a manifestation trigger, *Don's Building* pointed out that in *Dorchester Development Corp. v. Safeco Ins. Co.*,²² the court’s discussion of “manifestation” was based upon two decisions, one from Florida and one from Idaho.²³ In the *Gayfer's* case, the insured argued that a CGL policy should be construed to provide coverage

if its negligence occurred during the policy period “even though that negligence is not manifest until damage occurs beyond the policy period.”²⁴ The Florida Court of Appeals rejected this argument stating that:

We find, to the contrary, that the phrase “caused by an occurrence” informs the insured that an identifiable event other than the causative negligence must take place during the policy period. The term “occurrence” is commonly understood to mean that the event in which negligence manifests itself in property damage or bodily injury, and it is used in that sense.²⁵

In fact, *Don's Building* pointed out that the Eleventh Circuit has since used an actual-injury trigger in applying Florida law on point.²⁶

Don's Building argued that the analysis of *Bailey* resulted in the same result. The only mention of “manifest” in the opinion is the following passage:

We are of the opinion that this case clearly falls into that class of cases which involves “the commission of a wrongful act which produce no discernible harm for a period of time and then suddenly manifests itself in a burst of damages.

In such cases, the time of the accident is the time that the damage occurs.²⁷

Don's Building argued that the *Bailey* opinion involved the same question as *Gayfer's*. Whether it is negligence or the property damage which much actually occur in the policy period for there to be coverage, as noted by the terms of the policy it is the property damage.

²⁰ Robinson, *The Best of Intentions: Drafting the 1966 Occurrence, and 1973 Pollution Exclusion Policy Language* (PLI Comm. Law & Practice Course Handbook Series) (1994) 690 PLI/Comm 565 at 592.

²¹ *Id.* at 592.

²² 737 S.W.2d 380 (Tex.App.—Dallas 1987, no writ)

²³ *Travelers Ins. Co. v. C. J. Gayfer's & Company, Inc.*, 366 So.2d 1199, 1201 (Fla. 1st DCA 1979); and *Millers Mut. Ins. Co. of Texas v. Ed Bailey Inc.*, 103 Idaho 377, 647 P.2d 1249 (1982).

²⁴ *Id.* at 1201.

²⁵ *Id.* at 1202.

²⁶ *Trizec Properties, Inc. v. Biltmore Construction Co.*, 767 F.2d 810, 813 (11th Cir. 1985).

²⁷ 647 P.2d at 1253.

Finally, *Don's Building* pointed out that according to its review, the injury-in-fact trigger has been adopted by the clear majority of jurisdictions considering the question.

VII. *One Beacon's* Position in the Supreme Court

One Beacon countered with several points of its own. First, *One Beacon* countered that to adopt the actual injury-in-fact rule would represent a major shift in existing Texas law. With the exception of the *Pilgrim* and *Pine Oak* decisions, *One Beacon* pointed to some twenty-three other decisions applying Texas law that had adopted the manifestation rule. To adopt the position argued by *Don's Building*, *One Beacon* argued, would require reversal of some thirty years of well-established and well-followed Texas law.

Second, *One Beacon* pointed out the fact that *Don's Building* had changed its own position. For the first time in that case, *Don's Building* was arguing the injury-in-fact rule. While in the District Court and the Fifth Circuit, *Don's Building* had argued the exposure rule. To argue that the injury-in-fact rule was clearly the rule was disingenuous on the part of *Don's Building*. Finally, *One Beacon* argued that in order to comply with the provisions of the policy including notice provisions, the manifestation rule is the only rule that makes sense. Otherwise, the courts would be requiring the insured to give notice for claims when no one was aware the claims were occurring or had occurred.

VIII. Supreme Court of Texas Holding

The first certified question to be addressed by the supreme court was as follows:

When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for the purposes of an occurrence based commercial general liability insurance policy?

The starting point for the supreme court was the policy's definition of "property damage." The policy in question defined "property damage" to mean "physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to have occurred at the time of the physical injury that caused it."

The court then noted that under the insuring agreement, it required that the property damage occur during the policy period. Viewing those two provisions together, the court concluded that:

Considering these provisions together and reading them for their plain meaning, we hold that property damage under this policy occurred when actual physical damage to the property occurred.²⁸

The court held that the date the physical damage is or could have been discovered is irrelevant under the policy. The court reviewed both the manifestation cases as well as the exposure cases. With respect to the manifestation rule, the court noted that the policy simply makes no provision for it. The policy in straight-forward wording provides coverage for the property damage that occurs during the policy period.

Similarly, the court noted that the policy does not support adoption of the exposure rule, at least where there is no physical injury to tangible property. The court did note that pinpointing the moment of injury retrospectively is sometimes difficult, but the court cannot substitute ease of proof or administrative convenience over the language of the policy adopted by the parties.

IX. Unresolved Issues

While the supreme court did address the issue of how property damage to tangible property was to trigger coverage under general

²⁸ *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008)

liability policies, the court left open numerous issues, some of which are raised by the opinion and some of which were not raised by the opinion. Many of these issues are very real and troubling and, no doubt, will lead to litigation in the future.

A. Pleadings Silent

One of the first issues that present itself by the *Don's Building* opinion is the issue of silent pleadings. In the *Don's Building* case, the underlying pleadings were very clear when they alleged that the penetration of moisture behind the EFIS was “within six months to one year after the application of the EFIS.”²⁹

However, in many petitions, there may be complete silence as to when the property damage occurred. Sometimes this is unintentional. Other times it may be intentional so as not to trigger a defense based upon the statute of limitations or statute of repose.

The issue presented though is how a court should apply the eight-corners rule when there is total silence as to when the property damage occurred. No Texas court has yet addressed this exact situation. However, in the *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*,³⁰ it would seem to indicate that where there are no allegations and where the issue upon which extrinsic evidence is sought to be introduced is not an issue to be determined in the underlying litigation, that resort to extrinsic evidence may be taken. However, if there is a statute of limitations issue, under *GuideOne*, resort to extrinsic evidence may not be allowed since this may be an issue in the underlying case. The question then presented is whether the insured would be entitled to a defense at all. Assume that the insurance has uninterrupted coverage during the relevant time period, should the insured be

entitled to no defense? By the same token, which insurers should be charged with the responsibility of defending the insured? This issue was fairly clear and straightforward under the manifestation rule. However, the application of the actual injury rule may leave the insured without a duty to defend under certain situations. This result seems inequitable and perhaps the supreme court will take steps to address this issue.

B. Multiple Triggers – Deductible

Many policies issued to contractors have significant deductibles for the contractors to pay before there is a duty to indemnify on the part of the insurer. If there are multiple policies triggered as a result of the actual injury rule, the question is whether the insured will have to pay multiple deductibles. In some cases, the deductibles could be quite substantial. A suggestion of the answer to the issue may be found in Footnote 45 of the opinion. There the court states that:

Because as to all of the underlying claims, the EIFS was installed during the three-year policy period of the OneBeacon policies, see supra note 2 and accompanying text, this case does not require an analysis of coverage questions in circumstances where property damage occurred in the course of a continuing process, but began before the inception of the term of the policy in issue. Nor do we understand the Fifth Circuit to have asked how OneBeacon's indemnity obligations are determined if the facts ultimately show that property damage began during the OneBeacon policy period but continued beyond that period, perhaps into periods covered by other policies. We express no opinion on these questions, but see *Am. Physician's Ins. Exch. v. Garcia*, 876 S.W.2d 842, 855 (Tex. 1994) (“If a single occurrence triggers more than one policy . . . all insurers whose

²⁹ *Id.* at 22.

³⁰ 197 S.W.3d 305 (Tex. 2006)

policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.”³¹

In the *Garcia* case the court indicated that the insured was entitled to only one policy's coverage. That is the insured was not entitled to stack the coverages. However, the court indicated that the insured was entitled to select which policy would pay. Clearly, the insured could select the policy of an insurer which had lower or no deductible. Since only one policy can be called upon to pay, the answer to the deductible question would seem to suggest that only one of the deductibles can be required since only one policy can be triggered. However, this analysis ignores the continuing language in *Garcia* which says that the one carrier whose policy is selected to pay may receive contribution from all other insurers whose policies are triggered. When contribution is sought from all the other insurers whose policies were triggered, the question is who pays for the deductible in those policies. Is the insured? Is it the insurer who is seeking contribution? Or, is it the insurer who has to pay the contribution in order to reduce the claim against him by the amount of the deductible? These are all questions which are unanswered and will be required to be answered at some point in time.

C. Determining the Date of Loss

One issue which the supreme court admitted existed but did not propose a solution was the difficulty in retrospectively determining the date of actual injury. “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. . . .”³² This is especially true in those cases where there is not a continuing injury, but rather a specific injury. If the injury has occurred some ten or fifteen years ago, the statute of limitations may not have run

because of the discovery rule. However, it will still be incumbent upon the insured to establish the exact moment in time when the injury occurred. Under Article 554.002 of the Texas Insurance Code, the burden of demonstrating that a claim falls within coverage is on the insured. In this case, the insured will have the burden of demonstrating when over the last ten to fifteen years the actual damage took place. This may prove to be impossible. This may be further compounded by rules adopted by the Texas Supreme Court regarding expert witnesses on the reliability and foundation required for expert opinions. How will an expert be able to opine that the loss occurred in year twelve versus fourteen? What will be the foundational basis for such opinion? How is such methodology applied outside the context of litigation? Clearly the actual injury rule will be a boon for expert witnesses. It should be anticipated that in coverage litigation involving specific injury or continuing injury that all parties will have expert witnesses an expert opinions to support their positions. However, just because the parties have these expert witnesses does not mean that their opinions will survive judicial scrutiny.

D. Multiple and Different Defects

A similar issue is presented in the situation where the claims are not brought for one specific defect, but for multiple different defects. The fact that one defect occurred during a particular policy period does not at all establish the fact that other defects occurred during the same policy period. Whereas, under the manifestation rule, if all the damages manifested during the same period, that was the end of it. However, under the actual injury rule, it will be up to the insured to demonstrate when each distinct injury occurred. Moreover, the same problems regarding expert witnesses addressed above in Section IX, C will also apply to these cases as well.

E. Burden of Proof

As mentioned in Subsection IX, C, the burden of proof to show that a loss falls within

³¹ *Don's Bldg.*, 267 S.W.3d 20, 31 (FN 45) (Tex. 2008).

³² 267 S.W.3d at 29.

the policy period is clearly upon the insured.³³ If there was some contemporaneous observation of the actual damage, then expert testimony will probably not be required. However, if there was no contemporaneous observation of the damage, then expert testimony in all likelihood will be required. The effect of this will be to greatly increase the expense to the insured to bring a case to establish coverage. Not only will the cost of the trial be greatly increased because of the expert testimony required, in addition, such a rule will also likely be to a greater number of appeals due solely to the fact that there may be multiple contests regarding the admissibility or reliability of the expert testimony.

F. Loss in Progress

The policies in place today have loss-in-progress endorsements which exclude coverage if the loss began prior to the time that the policy incepted. Under these endorsements, even though there may be actual damage during the policy period, there would be no coverage if that actual damage commenced prior to the inception date of the policy period. Such endorsement will, of course, change the result under *Don's Building* as well as the ability of the insured to select coverage under *APIE v. Garcia*.³⁴

G. Spiking of Policies

Another issue left unaddressed by the *Don's Building* decision, but touched upon *APIE v. Garcia*, is whether in a continuing injury case, if the insured selects a particular policy year to pay the claim, does that selection extend to excess coverage. In *APIE v. Garcia*, the Texas Supreme Court stated that:

If a single occurrence triggers more than one policy, covering different policy periods, then different [policy] limits may have applied at different times. In such case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage period of the

triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies [fn 24] that would maximize coverage. Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights."³⁵

Footnote 24 goes on to provide that:

As we observed in note 23, multiple policies may provide an aggregate limit under certain circumstances, such as if the insured purchased concurrent excess liability insurance.³⁶

This would suggest that if the insured does select a particular policy year, that not only the primary policies in that policy year would be triggered but also the excess policies that would be applicable. It would then be up to the primary and excess policies to exercise subrogation rights as they may exist against other insurers.

H. Bodily Injury, Advertising Injury and Personal Injury Claims

No conclusions can be drawn from the *Don's Building* case regarding the triggers for bodily injury, personally injury, and advertising injury cases. Footnote 43 of the opinion states:

We express no opinion as to when a claim for "bodily injury," "personal injury," or "advertising injury" occurs under the policy or whether the rules for determining coverage for these claims are different from the rule we adopt today for property damage claims under the policy.³⁷

However, while the supreme court has specifically stated that it is announcing no

³³ Article 21.58, Texas Insurance Code

³⁴ *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994)

³⁵ *Id.* at 855 (Tex. 1994).

³⁶ *Id.*

³⁷ 267 S.W.3d at 31.

specific rule for triggers of policies under those coverages, one can safely assume the court will apply a literal reading of the policy as it has under the *Don's Building* decision.

I. Loss of Use Only

The rule announced in *Don's Building* would not apply in those cases where the only claim is for loss-of-use property where the loss of use of tangible property where there has been no physical injury to the property itself. In *Don's Building*, the definition of property damage went on to provide that the term “property damage” meant:

Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the “occurrence” that caused it.³⁸

Therefore, in those cases where there is only loss of use of property and there has been no actual physical damage to the claimant's property, the trigger of the coverage will be when the occurrence took place.

X. Don's Building and Public Policy

There are many who argue that the rule announced by *Don's Building* does not represent sound public policy in Texas. Some of those arguments will be examined below.

A. Cost to Preparers

One argument made concerning public policy is that the cost to preparers which will be assessed against the insured will be in terms of current dollars. If in fact the actual damage to the property took place twenty years ago, in all likelihood the limits of liability will be estimated to be at some point in time twenty years later. This would expose the insured to a later likelihood of being uninsured since the limits of liability reflected a consumer price index of 20 years earlier while the costs of repairs reflected the current consumer price index.

B. Premium Charged

The same argument can be made on behalf of the insurer. If the actual loss took place twenty years ago, the premiums charged for that coverage were based upon the consumer price index as it existed twenty years ago. However, the cost to repair the property will be based upon a consumer price index that is twenty years later. This would require the insurer to pay the loss in current dollars even though the premiums that were charged for this coverage reflected a consumer price index twenty years earlier.

C. First Party Policies

The same issues will in all likelihood arise under the commercial property forms. For example, the CPOO10 form provides:

We will pay for direct physical loss of or damage to covered property at the premises located in the declarations caused by resulting from any covered cause of loss.

Section H entitled “Additional Conditions” provides in subpart 9 that:

Under this policy:

a. We cover loss or damage commencing:

1. During the policy period shown in the declarations; and
2. Within the coverage territory.

Therefore, there must be actual physical loss or damage commencing during the policy period. If there is a continuous loss which is undiscovered by the named insured, and there are numerous insurers on the risk during the period of this continuing loss, no doubt there will be the same issues raised regarding when the actual damage occurred and whether the evidence presented by the insured complies with *Robinson* and *Havner* standards to make it trustworthy and reliable. Such litigation will no doubt be a boon to experts and to the testimony that they bring to the table. However, as noted

³⁸ *Id.* at 24.

by our supreme court, this is what the policies say. If the parties had wanted to use different language, no doubt they could have in order to change the result.

XI. Conclusion

In conclusion, the supreme court has followed a trend that it started earlier with *Lamar Homes* and has read the policy literally and applied the literal terms that the parties chose when entering into the contract. Custom, practice and usage have been rejected by this court when the terms of the parties are clear and unambiguous. While the court has answered many questions in the *Don's Building* decision, it has created as many questions by its holding. Whether the *Don's Building* decision is insurer friendly or insured friendly remains to be seen.