When 1 Progressive Loss Ends And Another Begins

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Law360, New York (January 20, 2017, 1:03 PM EST) -- Property insurance claims for damage that progresses over the course of more than one policy period often raise unique coverage issues relating to the applicable policy period. In part, this is because it can be difficult to determine when one progressive loss ends and another begins. The U.S. District Court for the Northern District of Illinois recently addressed such a claim in Temperature Service Co. Inc. v. Acuity, No. 16-CV-2271, (N.D. Ill. Oct. 14, 2016).

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In Temperature Service, a commercial building owner (the "insured" or "insured owner") noticed, decades after the building's construction, various types of cracking and other damage in different areas of the building. This prompted the insured owner to submit a first-party property insurance claim with its insurer. Although the insured's property insurance policy covered loss or damage only if it "commenced" within the policy period, some or all of the claimed damage may have begun to occur before the policy was in effect.

When presented with this type of progressive loss scenario, determining when the loss or damage began can present a number of challenging issues. Did the loss "commence" before the current policy was in effect, thereby precluding coverage under the policy? If the progressive loss initially began before the current policy period and all of the damage shares a common cause, such as settling, could there still be coverage for some or all of the loss under the current policy? And can a progressive loss effectively stop — and then start again — to trigger coverage under another policy period? As discussed in Temperature Service, the answers to these questions are not as simple as they may seem.

In short, the Temperature Service court found the term "commence" to be ambiguous in the context of whether such a loss fell within a particular policy period. The court was confronted with the question of when a progressive loss begins and whether it could have more than one beginning over more than one policy period. The court ultimately held that a

progressive and continuing loss arising from the same general cause could consist of separate instances of damage that began at different times for the purpose of coverage. This holding, of course, was subject to the insured's proof of each instance of damage that began within the applicable policy period, including the amount of such damage.[1] Thus, in certain jurisdictions, one cannot always assume that a loss or damage caused by a common event that continues to cause damage over more than one policy period has only one beginning. In effect, according to this court, the progressive loss could effectively stop and then restart within a different policy period.

The policy at issue in Temperature Service specifically covered "loss or damage commencing [d]uring the policy period," which was from Jan. 1, 2013, to Jan. 1, 2014. In 1980, the insured premises was constructed on man-made fill material and construction debris otherwise known as urban backfill. Over time, the urban backfill allegedly caused differential settlement resulting in cracked foundation walls, interior floor slabs, exterior masonry, doors, windows and walls. In August 2013, one of the insured's contractors discovered the urban backfill, which it later determined to be the cause of the progressive damage.

During litigation, the insurer moved for summary judgment based on an interrogatory response in which the insured admitted that it could not state when the direct physical loss "first occurred," but asserted that the physical loss was ongoing and occurred during the policy period. Notably, the insurer admitted that the damage to the insured's premises continued to progress during the policy period.

Prior to expert witness discovery, the insurer filed its motion for summary judgment and argued that the alleged property damage with a common cause (i.e., the differential settlement from urban backfill) can only begin once, presumably at the time the topsoil began to settle differentially and the first damage occurred. Based on the insured's admitted lack of knowledge as to when the loss or damage "first occurred," the insurer argued that the insured had not and could not meet its threshold burden of proving coverage under the policy.

In opposition to the insurer's motion, the insured argued that coverage under the policy is triggered "if any one portion of the numerous claimed damages 'commenced' during the policy period," implying the possibility of different commencement dates connected to each of the multiple losses alleged. Thus, despite the apparent common cause of those losses, at

least some of the claimed damage could have “commenced” within the policy period, thereby potentially triggering coverage.

Upon consideration of these arguments, the court held that the “policy may reasonably be read to include each identifiable instance of new damage or loss, regardless of whether similar damage or loss, or damage or loss with a common but chronologically distinguishable cause, commenced prior to the policy period.” Put another way, the court held that the insured’s claim for coverage would not be precluded by a finding that some portion of the claimed loss or damage commenced before the applicable policy period. Indeed, the court left open the door for the insured to prove, at a later time in the litigation through expert witnesses, that distinct damage commenced during the policy period. Given that the insured’s premises was built approximately 33 years before the 2013 policy period, the insured might experience great difficulty in meeting its burden of proof to establish coverage.

As there was no Illinois precedent directly on point, the court relied on several cases from other jurisdictions with similar holdings, including Kief Farmers Co-op Elevator Co. v. Farmland Mut. Insurance Co., 534 N.W.2d 28 (N.D. 1995) (denying an insurer summary judgment where there was some evidence that damage to a grain bin may have started during the policy period, but was not discovered until after the policy period and holding that “commence” was ambiguous in a policy with identical relevant language), and Ass’n of Unit Owners of Nestami v. State Farm Fire & Casualty Co., 670 F. Supp. 2d 1156 (D. Or. 2009) (denying an insurer summary judgment and holding that the term “commencing” included each identifiable instance of collapse regardless of whether a similar loss occurred prior to the policy period).

The court also distinguished a seemingly contrary holding in Gen’l Star Indem. Co. v. Sherry Brook Rev. Trust, No. 99-CV-1105 (W.D. Tex. Mar. 16, 2001), a case where a court granted summary judgment to an insurer in a similar circumstance. The court explained that the Sherry Brook court held differently because, unlike in Temperature Service, expert discovery had been conducted and no evidence had been presented of any particular damage commencing during the policy period. In contrast to Sherry Brook, the insured in Temperature Service had “minimally established that a number of parties observed multiple types of property damage in a variety of locations on the insured premises at different times, including times falling within the policy term.” Given the evidence presented by the insured and that expert discovery had not yet occurred, the court held that the issue of whether “any

new damage commenced in the coverage term cannot, at least at this time, be determined as a matter of law" and denied summary judgment.

The Temperature Service decision reiterates that in certain jurisdictions it is possible for a progressive loss from a common cause to effectively "commence" more than once for coverage purposes. If an insured can prove that part of the damage first occurred or "commenced" during the policy period, coverage could be triggered for that damage even if it shares a common cause with other damage that first occurred before the policy period. The insured, however, still bears the threshold burden of proving the existence of coverage for the claimed loss or damage, which could prove difficult to meet in progressive loss cases of this type where damage can occur over years or decades. Ultimately, even if the insured does not yet have expert evidence that some or all of the claimed damage first began during the policy period, some courts may allow insureds the opportunity to develop such evidence before granting summary judgment to an insurer.

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[1] Although not specifically stated in the decision, it appears that, due to the policy language at issue, the Court assumed that an injury-in-fact trigger would apply rather than a manifestation, continuous or exposure trigger.