

# HANNA & PLAUT LLP

ATTORNEYS AT LAW

## ***OneBeacon Ins. Co. v. Don's Building Supply, Inc.*, 2007 WL 2258192 (5<sup>th</sup> Cir. Aug. 8, 2007): Fifth Circuit Seeks Clarification on “Trigger” for Coverage of Property Damage**

Various homeowners sued Don's Building Supply and other defendants for allegedly defective Exterior Insulation and Finish Systems (“EIFS”) that allowed water to leak into their homes and cause damage between 2003 and 2005. The homeowners alleged that the damage began to occur within six months to a year after application of the EIFS even though the damage was not discoverable until later. As a result, the homeowners alleged “continuous and repeated” water intrusion and damage to their properties.

Don's sought a defense from OneBeacon under the CGL policies in effect from 1993-1996 when the EIFS was applied. Because the first suit was filed in August 2003, the homeowners all pled that the damage could not have been discovered prior to August 2001, which was long after OneBeacon's policies expired. OneBeacon thus sought a declaration that it had no duty to defend or indemnify Don's in the underlying suits. The federal district court granted summary judgment in favor of OneBeacon, holding that none of the underlying suits alleged property damage that manifested during OneBeacon's policy periods so as to trigger coverage.

On appeal, the Fifth Circuit concluded that Texas intermediate appellate courts have split on the issue of when property damage occurs or when that damage triggers coverage of an occurrence-based liability policy. While some courts have applied the manifestation trigger to property damage claims, the Houston Courts of Appeals have applied the exposure trigger for property damage in certain cases. The court also noted that the discovery rule could influence the scope of the trigger. Because the Texas Supreme Court has not addressed these issues, the Fifth Circuit certified the following [paraphrased] questions:

1. Which 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, is the duty to defend and indemnify 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?

### **Comment**

Most practitioners assume that the supreme court will accept the certified questions. The supreme court's answers to the trigger questions will affect not only which carriers are on the hook for a particular loss, but also, potentially, how many carriers are on the hook for that loss. Obviously, as insurance policies and their coverage change, the timing of the exposure is also critical. This is an important case that we will continue to watch – though the answers from the supreme court probably will not come anytime soon.