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Supreme Court of Texas.
DON'S BUILDING SUPPLY, INC., Appellant,
v.
ONEBEACON INSURANCE COMPANY, as Assignee of Potomac Insurance Company, Appellee.
No. 07-0639.

February 7, 2008.

Appearances:
Thomas B. Alleman, Winstead, PC, Dallas, Texas, for petitioner.
Gene F. Creely, II, Cozen O'Connor, Houston, TX, for appellee.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Texas Supreme Court Justices, en banc.

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CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to hear similar argument in 07-0639, Don's Building Supply v. OneBeacon Insurance Company.

SPEAKER: May it please the Court. Mr. Alleman will present arguments for petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MR. THOMAS B. ALLEMAN ON BEHALF OF THE PETITIONER

MR. ALLEMAN: May it please the Court. I think we're up to our 32nd through 40th corners if I multiply eight corners times five cases over two days, all addressing similar issues. Speaking to one, we don't have cell phones today although if I may speak for just a moment as amicus curiae, I would suggest to the Court that the mental anguish I feel when my children's cell phone bills are opened does constitute bodily injury under any standard.

JUSTICE: But is it biological injury? That's the question.

MR. ALLEMAN: It certainly is, your Honor. I used to be six foot four. With that said, we address today the same question Chief just heard. So let me take this on from the perspective that the Court has addressed and then I think that the recent opinion that the Court issued in the Frank's Casing matter helps us address how to parse the

issues before.

In that opinion, that slip opinion and it came out of page 6 on my computer, the court noted that insurance, purchased insurance, to deal with two kinds of things: one as risks, what are risks. Risks are losses. So that's an indemnification duty. But the other thing that insured purchased insurance for is to hedge against litigation costs which is a separate set of costs.

In the world of insurance, the insurers control the risks they are willing to assume. That is to say, those kinds of cases they are willing to indemnify and insure for, and they are also in charge of picking out the kinds of litigation costs they wish to assume. So when we look at this case which is a duty to defend case, we are looking at the insurer's choices as to the kinds of litigation costs it wished to pick up.

JUSTICE HECHT: But when damages occur, it's going to be the same for duty to defend and for indemnification.

MR. ALLEMAN: Not quite, your Honor, if I may disagree slightly. On -- in -- on the litigation risks side, the point is it's the potential for them to occur during that period of time.

JUSTICE HECHT: Well, they still have the same rule though.

MR. ALLEMAN: I think that's right but I think that the level of proof is different. So we look to the choices that the insurer made.

JUSTICE HECHT: Well, I understand. I understand the level. We're looking at eight corners versus proof in the end, but we still need to know when do damages occur.

MR. ALLEMAN: And the answer is, we look to the language of the policy that the insurer put. And you will notice that all other things that have been told to the court that they occur when they manifest. Or that that damage occur, property damages occur when it manifests. Or a lot of it manifests. Or all of it manifests. Or it's enough that someone trips and falls and sustains an actual injury. All of those are perfectly acceptable choices in theory, but none of them are included in this policy. They only know where to get --

JUSTICE HECHT: That's, that's, that's the part I don't understand, because it seems to me that -- just saying that -- injury in fact is the only thing in the policy, does not help us to understand when that injury is actually there. Is it when you put the siding up? When it can leak, is it the first time it leaks? Is it later on when it leaks and starts hurting things? When is it?

MR. ALLEMAN: Then let's look to the facts that are alleged against us and use them as the clinic to answer those questions. Here, Don's is alleged to be the distributor of this siding material. So we're not the builders, we don't have some of the Lamar Homes' issues. We are alleged to have distributed the defective product. It's applied to the home. At some point, according to the petitions which we must accept as true, within six months to a year thereafter, it cracks. Now with 22 petitions I have, all have installation dates during the period of the OneBeacon policy. So under the Court's decision in Lamar Homes, there is property damage alleged during the policy period right there. But let's go on because that's not --

JUSTICE HECHT: But I want you to refine it for me. Is it when you put the siding up?

MR. ALLEMAN: Right. It is not when you put the siding up.

JUSTICE HECHT: Then when is it?

MR. ALLEMAN: It is when the siding cracks, that's the first time.

JUSTICE HECHT: Okay, when it actually cracks --

MR. ALLEMAN: Yes, sir. That's the first moment.

JUSTICE HECHT: Or when -- or when -- it's likely to crack?

MR. ALLEMAN: No, when it cracks. Not when it's likely to crack. But when it cracks.

JUSTICE WILLETT: Or not when you see it cracked?

MR. ALLEMAN: Right. I may not see it. I may have a defective roof, but it may be two stories up and I can't get up there to get on a ladder to see it. But it's still defective and it's still cracked.

JUSTICE WAINWRIGHT: And if the crack is on the side of the house, five feet high where you could see it that it's internal but not external so that you can see it, then what?

MR. ALLEMAN: It is still actual injury.

CHIEF JUSTICE JEFFERSON: And what if it's a neighbor's, two neighbors, and you look to your neighbors, same side on both houses six months apart, you see that your neighbor's siding is defective.

MR. ALLEMAN: Then I have --

CHIEF JUSTICE JEFFERSON: It hasn't cracked on your house yet.

MR. ALLEMAN: The answer to that is that at that point I have some obligation to investigate and that investigation may reveal that there's actual injury in existence or on the way. But that's not the timing. The fact that my neighbors have a hurt doesn't mean that I'm hurt. It's when it cracks on my house. But that's just the beginning, because it continues.

The suit papers here allege that once the cracks are there, water gets in behind the eaves. Now, common sense tells us that water shouldn't be behind the outside of my house. I don't have to ask whether raining on a structure is, is in itself damages. When my house is built and water is getting in from the outside where it shouldn't, that's wrong. That's what's alleged here. That water got in every time it rained. And that every time it got in, it got behind the eaves and it began to damage other pieces of property inside the house.

JUSTICE JOHNSON: Let me ask a question there. We heard last argument that once you get water on raw wood, you start having damage. Does that make a difference on a duty to defend whether it did or did not have damage if they alleged that it was damaged?

MR. ALLEMAN: There's two ways to address that, your Honor. The first is to say that's not alleged here so I didn't think about it. But the more obvious one is that if I was alleged to have allowed construction materials to sit outside and get wet improperly so that I could, so that they could rot and ultimately become defective or cause other damage, that might be so. But here, there's no such allegation. The point is that the allegation here is the product's defective. It cracks, it lets water in. Water started to come in, according to the plaintiffs. I should say for the record we dispute the allegations, but that's -- they have to be taken as true.

JUSTICE BRISTER: But you say property damage tears each one of those places?

MR. ALLEMAN: Every time there's a crack and every time there's rain.

JUSTICE BRISTER: So you disagree with Counsel in the opposing case that said if property damage occurs during our coverage period, we have to cover everything. You think that's not true?

MR. ALLEMAN: I believe that it --

JUSTICE BRISTER: They only have to cover the -- so if current cracks develop over a three-year period then each -- and there's three different insurers for each year, then this one covers these cracks and this one covers these cracks and this one covers these cracks.

MR. ALLEMAN: Now, under -- Not under the court's existing

precedent. In APIE v. Garcia, at page 854 I believe, the Court said that the insurer's obligation was several. Yes, it is at 854. The insurer's obligations are several so that the insured was allowed to pick an individual insurer who would become responsible for paying that lawsuit and being in charge as it were, and then that individual insurer might have rights over against other insurers depending upon their contractual situation. So the answer is, that the law, so far, on this State is a little bit different. To get back to the points --

JUSTICE BRISTER: A property damage occurs whenever the plaintiff's want it to.

MR. ALLEMAN: I would hope not. From a defense lawyer's standpoint --

JUSTICE BRISTER: This said they could pick one. You just said they are all --

MR. ALLEMAN: All I said --

JUSTICE BRISTER: If I can finish --

MR. ALLEMAN: I'm sorry, your Honor.

JUSTICE BRISTER: You just said all the property, all of them are property damage and the plaintiff can pick whichever one they want --

MR. ALLEMAN: No, the insurer picks under Garcia, your Honor. If the insured has --

JUSTICE BRISTER: Don't look to, don't look to the petition.

MR. ALLEMAN: Once it's established under the petition that more than one policy may apply, the insured, under the Garcia opinion, has the right to determine which carrier should take the lead at this point. That's not in dispute in this case.

JUSTICE BRISTER: But the insured picks one property damage for insurance.

MR. ALLEMAN: The insured picks the carrier.

JUSTICE BRISTER: Picks one property when damage occurs.

MR. ALLEMAN: No, because by definition the insured has options when the property damage occurred in more than one location. The point is that if the property damage occurs in your three year cycle, there's property damage under each of the three policies using this definition. Each is potentially responsible if the issue becomes how do we then allocate the burdens among them, something that is not in dispute in this case because we only have one insurer who didn't respond. That's for another day. But right now, as of this -- and Garcia addresses that. But in this case at this time, it -- the policy that was written, the standard policy said, if it occurs, if it takes place or happens in our period, we're responsible for it. So under the eight corners rule, if it potentially occurred during our policy period, we will defend you. Now, why would we go to occurrence? It was brought up in the prior argument. We used the word manifest and it comes up often. But the drafters of this policy got rid of the word manifest several years before this policy was brought into the world.

JUSTICE HECHT: Could, could I be clear about something else?

MR. ALLEMAN: Yes, sir.

JUSTICE HECHT: And that is, we, we were here in the last argument -- and the respondent's position is that once damage occurs, it's that insurer's responsibility and not any subsequent insurer's responsibility.

MR. ALLEMAN: The policy-driven answer is decided that may be so and it may not be so. If there's different damage at different times, multiple insurers may be responsible as well.

JUSTICE HECHT: Well, in this case, he came citing the cause is wood rot.

MR. ALLEMAN: There may be more cracks. There may be more leaks. I can foresee --

JUSTICE HECHT: Every crack. Every leak. Every rain.

MR. ALLEMAN: The other answer to that goes back to the drafter's answer to that question. These hypotheticals, or -- are ones like them, were run by the drafters of this policy, the guys who wrote it. And one of them was run by it and it's contained in our brief at page 18, was a situation where acid is poured down a drain over a period of three years as it happens, without anybody knowing that. And under the language that we see before us today, the drafters of the policy said each of the three policies in effect during that period of time would be responsible for the damages. So the -- what you're hearing is called in the trade the deemer clause. Everything is deemed to happen as of a certain date, and in fact, this policy has deemer clauses in it. The laws of use definitions that are contained in the policy say that all loss of use from property that's not physically injured shall be deemed to occur on a particular date or time. So there are contractual ways of compressing all of this so that one policy can take care of it. But that option was not chosen here, it's not in this policy.

JUSTICE HECHT: Well, just --

JUSTICE WILLETT: You said the policy drafter -- I'm sorry. You said the policy drafters also, once upon a time, used the word manifest but then scrapped it.

MR. ALLEMAN: Yes. The reason they did so, your Honor, was because they could not answer the question that Justice Wainwright posed the last counsel: manifest to whom, when, and how. The problem with putting a manifestation trigger here is that we see that what may be identifiable, too often, is subjective rather than objective. And remembering that I buy insurance as a hedge against litigation costs, why should my ability to get something I've paid thousands of dollars for, depend upon subjective impressions of somebody else. Don's didn't go after these houses. We didn't -- we aren't alleged to have installed this stuff. We're having to depend for our insurance upon someone else's impression or when two people later on decide that it was reasonable to assume.

JUSTICE WILLETT: How's injury, in fact, any less objective? How's, how's, how's pegging a specific time when injury in fact, in fact occurred any less objective?

MR. ALLEMAN: It really isn't because -- although it could be argued so and undoubted will be -- the point is, the difference is this, for the underlying claimant to prevail in their tort action, they're gonna have to prove causation and damages. So they're gonna have to prove the injury and causation and damages as a part and parcel of their underlying claim. So that gets attended to by the fact that it's going to be resolved in its part of the underlying lawsuit. And we rely, we don't rely -- good heavens, I hope quite frankly -- they don't win. But the point I make to you is, your Honor, is that during that underlying lawsuit, these issues get discussed as a matter of course in order to establish a cause of action and get to the jury.

JUSTICE HECHT: Am, I was not clear about your position on the situation where a homeowner buys the home after the policy period -- but there has been damage to the home before that. Do you contend that that is covered by --?

MR. ALLEMAN: Yes, I do. In the two case -- there's no -- this case is the Dodge Union case and Union filed an amicus brief advancing, previewing this issue the day before yesterday. The two most important cases on point are the Hoang, H-o-a-n-g case out of the Colorado

Supreme Court which was handed down in January of 2007, holding that it didn't matter whether the purchase was there and the Tufts University case that comes from Massachusetts. They're both cited in various of the briefs. The point here is that this is another issue that goes to the underlying case. I may not have a cause of action as a subsequent purchaser, but Don's bought a hedge against litigation costs for claims that could potentially be covered.

CHIEF JUSTICE JEFFERSON: Any further questions. Thank you.

MR. ALLEMAN: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Court is ready to hear argument from the appellee.

SPEAKER: May it please the Court. Mr. Creely will present argument for respondent.

ORAL ARGUMENT OF MR. GENE F. CREELY II ON BEHALF OF THE RESPONDENT

MR. CREELY: May it please the Court. Good morning. This Court knows from reviewing the briefs we were dealing with one key pivotal issue and that is, what is the appropriate trigger to be applied in the context of construction defect claims such as the underlying eaves claims. We are not dealing with bodily injury claims like the cell phone, alleged cell phone injury claims that were heard yesterday, so we are not dealing with issues throughout the -- sufficiently alleged bodily injury where no plaintiff was actually harmed or related trigger issue of when the plaintiff was harmed. This is also not an environmental case. It's also not an asbestos property damage case. This deals with coverage for construction defect claims. Before getting to the --

JUSTICE MEDINA: There are similar facts in those type of cases where you don't know exactly when the damage occurred. If it's a continuing damage, it's --

MR. CREELY: That could be true but courts recognize that there's a different entry causing process and different resulting harm. And I believe Justice Hecht was right on the money when he says in this case, in a construction defect case, manifestation goes to when there is damage. And that's what triggers serve to, to -- they sort of -- there are rules employed as a matter of policy construction to term when a claimant has been damaged. Why is that important? Well, there's a basic kind of liability coverage that is not when the insurer's conduct was performed or when an injury-causing event or process occurs, but it's when the plaintiffs -- the claimants suffers injury or damage. That determines which policy has to respond. In other words, which policy is triggered.

JUSTICE O'NEILL: And what, what do you do with the problems inherent in manifestation -- to whom, when, how much. I mean in certain -- I mean -- one might seem simpler at one level and another might seem simpler at another level. It's easier for me to get my mind around damage occurs when the water intrudes regardless of limit manifest.

MR. CREELY: Well --

JUSTICE O'NEILL: But it's also easy to put all the policies under manifestation rule but determining what's manifestation is difficult.

MR. CREELY: Well, I'm not saying that manifestation is without certain issues. So it makes sense when you consider the relevant policy language. There's a little bit of misdirection going on here, it might

be.

I have a different view. Don's counsel, the counsel the prior case have been focusing on, want to call the sub-requirement that property damage must occur during the policy. But you can't consider that in isolation. That's only part of the analysis. You must look at the insuring agreement. I know this may sound odd, but liability coverage does not cover property damage in the abstract. It covers liability or damages suffered by a claimant to the property damage. And so there has to be some nexus between the loss suffered by the claimant and the policy period. And that's what the rules, the trigger rules, seek to determine. And in the context of a construction defect claim, it makes particular sense because, until there has been manifestation of a problem, the plaintiff has not been harmed. There's been no loss of use. There's been no loss of function. There's been no loss of appearance. He's not been harmed. And that's why I believe Justice Hecht is correct. Manifestation goes what is damaged, it also goes to the time that the damage suffered by the claimant which is a requirement under the basic tenet of liability insurance.

JUSTICE HECHT: Do you agree with the respondent in the earlier argument that once damages occur, that's the insurer who must respond as opposed to subsequent insurers?

MR. CREELY: I look at it a little differently. It's when the claimant has been injured or damaged. That's -- that dictates which policy has to respond.

JUSTICE HECHT: All right, but the petitioner argues that every time it rains, there's new damage.

MR. CREELY: I know that's the petitioner's position.

JUSTICE HECHT: And what's your thoughts?

MR. CREELY: Again, whether -- let's say -- I want to clarify one thing. First of all, the allegations don't allege cracks. Basically, allegations say that within six months to a year after construction, there was a failure of the seals of the eaves system that allow water to collect behind the panels. Okay? The, the fact that there may be, and again there have been a whole host of metaphysical questions, the ones are raised in my question -- some of which have been raised here today that they come into play as to when there has been, in fact, property damage. I won't go over there. It's irrelevant. What's important is, when has the plaintiff suffered injury or damage. And that is the test.

JUSTICE WAINWRIGHT: And you think that's an easier question than the one you don't want to answer?

MR. CREELY: Certainly. And --

JUSTICE HECHT: I still don't understand. Their allegation is, it started leaking on day one and then at a subsequent time, it leaked some more. And then at a subsequent time, the wood got wet, some of it is going to start rotting. And a subsequent time, it was really rotting pretty badly. And later, it was rotting so badly the house is going to fall down. Now, are all of those occurrences of damages?

MR. CREELY: It's really hard for me to say. Certainly, at some point in time, and we can all debate what point in time that could be, and I think it's going to bring in a whole host of experts, and what we're trying to do here is achieve predictability and avoid -- debate, and let's face it, without some sort of relative bright line test that's just going to open the door to debate and controversy.

JUSTICE BRISTER: Well, but petitioner is arguing some bright line test. Answer is all of them.

MR. CREELY: But that is not consistent with the policy language

and the intent of the coverage that is there to provide coverage for liability for damages suffered by third party because of property. That's the risk that's assumed.

JUSTICE JOHNSON: Well, under your theory then, if, going back to Justice Hecht's scenario, you get a little damage, you get a little damage next year, you get a little damage after that, but you really don't have any damages until the wall falls down because that's the first point anybody has any damage. So that would be -- that will have to be your answer to that question.

MR. CREELY: That's correct. There's been no harm for the claimant until such time as a manifested problem.

JUSTICE JOHNSON: Okay. So if somebody go, if somebody goes out and, and then, and a wall falls down, we know that's damage. If someone goes out and happens to hit a baseball up against a house, one of the tiles falls off or something, somebody says, "Whoa, there's wood rot in there." Now is that damage? Wall hasn't fallen down, some -- some kind of wood rot in there.

MR. CREELY: But the problem has manifested itself. It's become evident. It's going to become readily apparent at that time.

JUSTICE JOHNSON: What, what damage, but what damage is there by simply seeing it now and we didn't see it before they hit the baseball on the house and knocked part of it off? How has the plaintiff been damaged under your construct here?

MR. CREELY: Well --

JUSTICE JOHNSON: Well wood rot's the same whether we see it or don't see it.

MR. CREELY: But there's a difference because it affects the value of the property. There's a difference between a property that has a latent defect, that hasn't been made manifest, or become evident and that which -- which has.

JUSTICE JOHNSON: For analysis, if I just put that siding back up there, there's not any damage to the property but the plaintiff knows about it but hadn't any structural damage or anything like that. Now we know about it, but there's no structural harm yet, it's just wood rot. Under your scenario, there's still no damage to the plaintiff although we know there's property damage in there. It seems like we have to get that conclusion if we follow your line of thinking.

MR. CREELY: Well, until such time, there, there -- at the earliest, there would have not have been any damage before that time because there was no knowledge of the problem. It didn't affect the, the functionality, use, enjoyment or the, or the appearance or the value of the property.

JUSTICE JOHNSON: So is there damage to the plaintiff that puts, puts it back up on the siding back up, sells the house, walks off? Has the plaintiff been damaged?

MR. CREELY: Well, I suggest that may present a -- [inaudible]

JUSTICE JOHNSON: [inaudible] no problem but I'm asking you, has the plaintiff been damaged even though there's damage to the house, no economic damage to the plaintiff, has the plaintiff been damaged under your construct? Has there been damage?

MR. CREELY: I'm not quite sure how to answer that, your Honor, because we have to look at the pleadings of the claimant. And that gets to another issue in this case, to see what the plaintiff here is actually alleging in terms of what damage they've suffered, when it -- when it was manifested, and that gets to the specific claims in this case. We would -- another issue in this case is what are the appropriate standards? It kind of gets to Justice O'Neill's question.

And we -- I know this Court is aware that there's a substantial body in Texas law out there, and every one of the cases with the exception of Pienot which adopts an exposure trigger and doesn't really deal with this issue about when the claimant has --

JUSTICE: Exposure? I mean --

MR. CREELY: Yes, it adopted an exposure trigger. That has a rule that's -- that has been applied to volumes of cases. It's the only one I know that applies an exposure trigger in a property damage case. All other Texas courts, including alumni of this Court, have concluded that manifestation trigger's appropriate in context of a construction defect claim. And in those cases, they have adopted, as have the courts in other jurisdictions have adopted a manifestation trigger, the standard for manifestation, that is, when does the property damage become manifested, when it becomes reasonably apparent, when it's easily capable of being perceived, recognized, or understood. And that's the standard that we ask this Court to adopt.

Now, that might gets to the pleadings in this particular case. We're dealing with 22 lawsuits and the pleadings are basically identical. And by the way, as an aside, getting back to Justice Hecht's inquiry going back to subsequent purchaser issue, there is at least three law suits that involve a subsequent purchaser -- Jackson, Cannes, and Walter. So that issue is in this case now. Of course, it's also in the Don's v. Union Standard case. But in all those cases, they have included what I call discovery, slash, manifestation allegations. They don't just -- they just don't -- and why they include both discovery and manifestation allegations, I don't know. But they don't just allege that the problem wasn't discovered and could not have been discovered if they exercised reasonable diligence, but they go beyond that. They say it wasn't manifested. There's latent, inherently -- inherently undiscoverable, was not capable, was not really apparent and not capable of being easily recognized which is the standard for manifestation.

JUSTICE WILLETT: You say we need a bright line test that's consistent with the policy language. And my question is how does manifestation, how does that track and honor the policy language? It may be easy and simple to apply or maybe simpler than the other tests, but how is it consistent with the policy language?

MR. CREELY: Well, again, the policy language focuses on damages suffered by a claimant because of property damage. And these rules are void if the person -- when claimant has been answered. And there are [inaudible] that deal with different -- different trigger and the pros and cons, the benefits, the disadvantages. The, there has to be a resulting injury, and that is the trigger, and whether you call it injury in fact or in this case, manifestation.

In fact, let me talk about some of the cases in other jurisdictions. If you limit it to coverage cases dealing with trigger in a CD context in the other jurisdictions, there's really no disagreement. I mean there is disagreement, there is no agreement. There, there are many cases that apply manifestation and there are other cases applying injury in fact. But when we look at those injury in fact cases in a CD context -- when I say CD context, I'm talking about construction defect context -- they focused on when was the resulting injury to the plaintiff. And in fact, many of those cases apply, in effect, a manifestation trigger as an approximation of when the plaintiff suffers damage -- the earliest point where a plaintiff suffers damage. In fact, there are a couple of cases, there's on our brief that says, "Manifestation of CD context is the functional

equivalent of injury in fact." Again, the key is when was the resulting injury or damage to the plaintiff.

JUSTICE WILLETT: Ascertainable injury. A sort of out of sight, out of mind, out of the policy -- but once you see it, then you've suffered injury. Is that your view?

MR. CREELY: Sort of. Although this concept of resulting injury is in the policy.

CHIEF JUSTICE JEFFERSON: Do you agree with counsel from last argument that the -- if we adopted the manifestation rule, we'd have -- I mean sometimes it would favor insured and sometimes the insurers and vice versa.

MR. CREELY: Oh, absolutely.

CHIEF JUSTICE JEFFERSON: Let me ask one question about that. Isn't it -- wouldn't it be more advantageous to the insurer to have a policy coverage over multiple years? I mean if it's, if you're just talking about one year of coverage, you might not have enough coverage to insure the claim.

MR. CREELY: Not necessarily so. They may have periods of uninsured exposure. They may have periods of self-insured exposure. So and as --

CHIEF JUSTICE JEFFERSON: But if you have three, you know, three policy years, three insurers all contributing to, you know, to adjust the claim. It seems like, assuming that you purchase insurance throughout the entire period, that you got more, in effect, more coverage, more ability to have that loss remedy.

MR. CREELY: I guess there's some logic to that, but what we're talking about is construing the policy at hand.

CHIEF JUSTICE JEFFERSON: I was just asking the question about favoring the insured or the insurer. Well, if that even matters, I don't know.

MR. CREELY: Well, let me address that a little further as it relates to my client. First of all, my client did not make the decision to stand on the manifestation trigger in this context lightly. And let's forget the fact that there's 20 to 30 Texas cases that routinely apply the manifestation trigger in a CD context. Because, as you have suggested, you know, it may help my insurer in this case, but it could come back to bite him the next. He handles a lot of construction defect claims. And so if embraced, if he's adopted a manifestation trigger because he believes it's a pragmatic rule, it's a common sense rule, it -- it's -- it affords predictability, and it certainly is consistent with the intent of the coverage in line with the relevant policy terms particularly the insurance language for purposes on damages suffered by the third party because of property damage, as well as concerning the nature of CD claims and the resulting damage. And so that's why my client has adopted a manifestation trigger knowing that it may hurt him the next time.

JUSTICE MEDINA: Mr. Alleman said that the word manifestation was deleted from this policy years ago. Would -- that seems pretty significant to me. What's your response?

MR. CREELY: Well, I know he's referring on so-called drafting history. And I don't know if the Court has found a copy of that, that article which was a compilation of arguments that have been made long -- years. There was a proposal to include it but it was so unnecessary. And what's, what's interesting about the language here, and I know my client doesn't even like this word, but there, the language is, in a sense, elegant, because it allows flexibility on how the insuring agreement is applied to the different claims, whether it be bodily injury or environmental or asbestos or CD. But the key is still, when

was the plaintiff harmed. And that is the test of that -- the trigger we -- seek to determine.

JUSTICE HECHT: One difficulty with it is it's different from the accrual rule, right? Because, generally, we say a cause of action accrues whenever the injury occurs regardless of whether the damage has -- the full damages had result. So for limitations purposes, wouldn't, doesn't, don't these causes of actions, the causes of action, accrue basically when the sidings break?

MR. CREELY: I haven't looked at that, your Honor. I don't know. I don't have a particular position on that. Certainly, I would think that the cause of action did not accrue until the plaintiff suffered harm, suffered damages that would be part of the cause of action. And in this case, that's until, at least after manifestation.

JUSTICE JOHNSON: Counsel, so your interpretation would make the policy read, "This insurance applies to property damage only if the property damage -- only if the plaintiff suffers damage during the policy period." What it reads now is I understand that this insurance applies to property damage only if the property damage occurs during the policy period. You, your interpretation would be only if the plaintiff is economically damaged as to -- during the policy period.

MR. CREELY: Well, I think the Court is seizing on the, I call, sub-requirement 2 -- that property damage must occur during the policy period. But again, you can't consider that in isolation with regard with the insuring agreement itself that says that there is coverage for sums that the insurer may become obligated to pay as damages because of property damage. And so, again, there has to be a nexus between the harm suffered by the claimant and the policy period. And that's what we're dealing with and that's what trigger rules serve.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you.

MR. CREELY: I've -- reserved arguments to the briefs.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

JUSTICE: Is there a drafting history in the record or not in the record?

REBUTTAL ARGUMENT OF MR. THOMAS B. ALLEMAN ON BEHALF OF THE PETITIONER

MR. ALLEMAN: The drafting -- may it please the Court. The drafting history is contained in an article that is cited to in the reply brief. The genesis was the California Unified Asbestos Property Damage cases in the 1980s just -- to give you a cite to the reply brief which compiles the locations. The importance of the language --

JUSTICE: I can, I can --

MR. ALLEMAN: It's in the reply brief, your Honor, and if I see it before we leave, I will certainly pass it on. I have a sense of déjà vu as I hear some of the points that are being made by counsel. When the plaintiff suffers damages, are they economic losses? Are the damages -- this Court dealt with that in Lamar Homes.

We see here as we stand here today, there is a test. And all of the arguments that were made across the way could have been written into the policy. But they weren't. Even if the manifestation standard was discussed and agreed upon by the drafters, which it wasn't, this policy doesn't say that. It doesn't say when the plaintiff actually suffers damages. It doesn't say when a reasonable person would have

discovered the damages. It doesn't say when the cause of action accrues. There is a conflation here of the plaintiff's discovery that they are damaged, whether they were reasonable, unreasonable or otherwise, with the idea that that's when the damage occurred.

So you're not just asked to write change occurred and manifest. It really asks to change this policy from occurred to manifest, but wait -- manifest doesn't occur until they discovered it. Now, why is this? Now if you'll notice the two people who've come to this Court on behalf of the insurance companies, they are all carriers who are alleged, who are on the risk when the damage was alleged to be ongoing but before it was discovered. So there is a certain flag of convenience that's being raised. I'm saying that it's a later trigger when it was actually discovered.

JUSTICE BRISTER: Did the people that buy the homes, their damage occurs when they bought the homes? They always plead the discovery rule because -- if it doesn't occur later but there's no question it accrues and they have to allege that they were damaged when they bought the house because they hadn't had any dealings with the builder since.

MR. ALLEMAN: But, with all respect, your Honor, most of the people here were the first purchasers. So they bought direct from the builder. All but two or three. And I don't generally dispute Mr. Creely's comments on how many bought or sold, that's apparent from the record, and I think he's about right. The point is it isn't whether they bought the home. That's another point that could have been put in the policy. All of these claims that are made to limit coverage are things that could have been accrued. Put it --

JUSTICE BRISTER: They -- they have to allege the petitions which we always look to for duty to defend. They have to allege, I was damaged when I bought the house. because they haven't had any dealing with the builder or the subcontractor since.

MR. ALLEMAN: And that is exactly the point where the allegations in the suit papers are conflicting or ambiguous as to what really happened.

JUSTICE BRISTER: Why would they be ambiguous?

MR. ALLEMAN: I was injured -- In this case? They really aren't because the suit papers clearly say, "I was injured beginning six months to a year after this eaves material was put on my home. Those injuries continue 'til today. I didn't happen to discover them."

JUSTICE BRISTER: But the suit is against the builder.

MR. ALLEMAN: And the, and the product distributor. And the product distributor.

JUSTICE BRISTER: And those people didn't come out and hammer on the wall six months after they bought the house?

MR. ALLEMAN: No, sir. Our --

JUSTICE BRISTER: They're, they were out of the picture.

MR. ALLEMAN: But remember, I'm a product distributor. So whether or not, there is subsequent purchase here or a first purchase here, it doesn't matter. If my product is allegedly defective, those rights in this state have run to subsequent purchasers for many, many years.

JUSTICE BRISTER: But I'm just wondering if the rule is, on construction defect cases, and maybe it has to be a different occurrence for every kind of category you are talking about. But construction defect cases, if damage occurs when you buy the house, that has the advantage that the insurer whose cover period it is, can go out and watch how you're building the houses during that year if they want to limit their liabilities.

MR. ALLEMAN: The, the answer to that question of course is, that

in theory, on a prospective basis, an insurer could insist upon that in their policy language. But they didn't. And as, as a policy solution to this problem, that may well have considerable merit, your Honor. But as a reading of a contract that was agreed to by the parties and for which they accepted thousands of dollars, it isn't the law.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Mr. Alleman. The cause is submitted. That concludes the arguments for this morning, and the marshal will adjourn the court.

SPEAKER: All rise. yeah Oyez, oyez, oyez. The honorable, the Supreme Court of Texas, now stands adjourned.

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