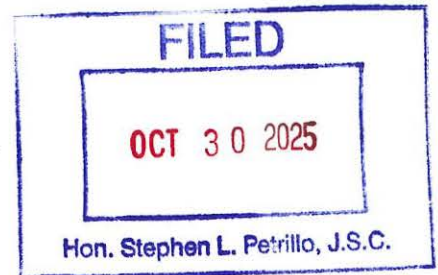


SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ESSEX VICINAGE
DOCKET NO.: ESX-L-1080-22



NORTHFIELD MASS ASSOCIATES, LLC and BNE INVESTORS VII, LLC,
Plaintiffs,

v.

THE TRAVELERS INDEMNITY COMPANY, UNITED SPECIALTY
INSURANCE COMPANY, SCOTTSDALE INSURANCE COMPANY, ARCH
SPECIALTY INSURANCE COMPANY, et al.,
Defendants.

OPINION

Petrillo, J.S.C.

I. INTRODUCTION

This matter comes before the court on plaintiffs Northfield Mass Associates, LLC and BNE Investors VII, LLC's ("plaintiffs") Motion for Partial Summary Judgment seeking declaratory relief against defendants United Specialty Insurance Company ("USIC"), Scottsdale Insurance Company ("Scottsdale"), and Arch Specialty Insurance Company ("Arch") (collectively, "defendants"), with respect to policy provisions that purport to limit coverage for continuous or progressive damage arising out of alleged construction defects at the Vizcaya Condominium project. Defendants oppose the motion and, in the case of Arch, cross-move for summary judgment seeking enforcement of the contested policy exclusions.

After careful review of the parties' submissions and the controlling legal precedents in New Jersey regarding the continuous trigger doctrine and non-cumulation provisions, the court finds the policy limitations at issue unenforceable as a matter of law with respect to continuous or progressive damage in construction defect claims. The court further finds defendants' factual and procedural objections unpersuasive and insufficient to preclude summary judgment. Plaintiffs' motion is hereby **GRANTED**, and defendant Arch's cross-motions is **DENIED**.

II. FACTUAL BACKGROUND

Plaintiffs are insureds or additional insureds under various commercial general liability insurance policies issued respectively by each defendant. The policies contain endorsements and exclusions purporting to restrict coverage for “property damage” that commenced prior to the inception date of the policy, or that is a continuation of pre-existing damage. Specifically, the USIC Policies contain a “Pre-Existing Injury or Damage Exclusion” (PEID), the Scottsdale Policies contain a “Continuing or Ongoing Damage Exclusion” (CODE), and the Arch Policy contains a prior injury/damage exclusion in both its insuring agreement and an endorsement.

Plaintiffs are defendants in the underlying case: Vizcaya Condominium Ass’n, Inc. v. Northfield Mass Assocs., LLC, et al., ESX-L-7766-17, wherein the plaintiff condominium association alleges damages that include continuous and progressive water infiltration spanning multiple policy periods. Plaintiffs in this case tendered their claims for defense and indemnification to defendants, who invoked the above- referenced policy exclusions to deny or limit coverage.

The operative policies include:

- Travelers Policy (Jan. 28, 2010 – Jan. 28, 2011)¹;
- USIC Policies (2015–2016 and 2016–2017) with Pre-Existing Injury/Damage Exclusion (SUMF ¶¶ 4-6);
- Scottsdale Policies (2010–2011, 2011–2012) with Continuing/Ongoing Damage Exclusion (SUMF ¶¶ 7-9);
- Arch Policy (Aug. 11, 2012 – Aug. 11, 2013) with express exclusion for damage commencing prior to the effective date (SUMF ¶¶ 10-11).

The relevant insurance policies all contain, in substantially similar forms, language that purports to:

- Limit coverage where property damage is “ongoing” or “progressive,” if such damage began before the inception of the particular policy;
- Exclude coverage for damage that is a “continuation of” or “arises out of” injury or damage that commenced prior to the policy period;

¹ Travelers has not opposed the motion.

- Or, as in some instances, reduce the available “Each Occurrence” limit by amounts previously paid under prior policies (so-called “non-cumulation clauses”).

III. SUMMARY OF THE MOTIONS

A. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs seek a declaration that the USIC PEID Exclusion, the Scottsdale CODE Exclusion, and the Arch Prior Injury Exclusion (the “Non-Cumulation Provisions”) are unenforceable under New Jersey law as applied to continuous or progressive damage in construction defect cases. Plaintiffs rely chiefly on the New Jersey Supreme Court’s reasoning in Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994), Spaulding Composites Co. v. Aetna Cas. & Sur. Co., 176 N.J. 25 (2003), and Air Master & Cooling, Inc. v. Selective Ins. Co. of Am., 452 N.J. Super. 35 (App. Div. 2017).

B. Defendants’ Oppositions and Cross-motions

Defendants argue that the exclusions are not, strictly speaking, “non-cumulation clauses,” and that their enforcement is not contrary to public policy. Defendants also contend that plaintiffs have failed to establish that the damage alleged in the underlying litigation is truly progressive or indivisible, and that the motion is premature because fact discovery is ongoing. Arch cross-moves for summary judgment, arguing that its policy language unambiguously excludes coverage for damage commencing prior to the policy inception date.

IV. LEGAL ANALYSIS

A. New Jersey’s Continuous Trigger Doctrine and Public Policy

1. Continuous Trigger and Allocation of Coverage

The seminal case of Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994), established the doctrine of the continuous trigger for progressive, indivisible injury or property damage, allowing coverage to be triggered in each policy year from initial exposure or damage through its manifestation. The purpose, as reaffirmed in subsequent cases, is to maximize insurance coverage in the face of

long-tail losses, especially where injuries or damage cannot be distinctly allocated to a single point or policy period.

This doctrine has since been extended to construction defect cases involving latent, progressive property damage, as confirmed by Air Master & Cooling, Inc. v. Selective Ins. Co. of America, 452 N.J. Super. 35 (App. Div. 2017), and The Palisades At Ft. Lee Condominium Association, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 434 (2017). The public policy underlying these decisions is the recognition that damages from construction defects, such as water infiltration, may progress undetected over time, warranting coverage across all implicated policy years. Plaintiffs rely heavily on the decision in Air Master, 452 N.J. Super. 35, and cite The Palisades, 230 N.J. 427, to support their position that the “continuous trigger” theory applies to construction defect cases in New Jersey.

In their briefing, plaintiffs note that New Jersey courts recognize that the public policy underlying application of the continuous trigger to toxic or environmental contamination applies with equal force to cases involving construction defects. See Air Master, 452 N.J. Super. at 42 (“The public policies favoring a continuous-trigger approach in progressive injury matters are likewise germane here ... The progressively-worsening nature of a variety of construction defects, such as water infiltration or mold, logically support the application of the continuous-trigger doctrine.”); Potomac Ins. Co. of Illinois ex rel. OneBeacon Ins. Co. v. Pennsylvania Mfrs.’ Ass’n Ins. Co., 215 N.J. 409, 425 (2013) (noting the continuous trigger methodology has “been applied to a variety of disputes”); The Palisades, 230 N.J. 427, 434 (highlighting the public policy concern that “many construction defects will not be obvious immediately”). That this is the law of New Jersey is not at all in dispute and that it operates here, to support the relief requested is, to this court, is equally obvious.

The court further finds persuasive plaintiffs’ argument in their reply brief regarding the relevance of the holding in Air Master: “As the New Jersey Appellate Division in Air Master explained, ‘The progressively-worsening nature of a variety of construction defects, such as water infiltration or mold, logically support the application of the continuous-trigger doctrine.’” Air Master, 452 N.J. Super. at 48 (citing The Palisades, 230 N.J. at 454); see also Air Master, 452 N.J. Super. at 47 (holding “a continuous-trigger theory of CGL coverage sensibly applies to claims for third-party, progressive property damage in construction defect cases”). The complaint in the underlying litigation, which seeks damages because of alleged property damage and consequential damage caused by purportedly defective work at the Vizcaya Condominium project, including but not limited to “water infiltration

to various [condominium] units” falls squarely within the purview of Air Master and necessitates application of the continuous-trigger doctrine.

2. Non-Cumulation Provisions and Exclusions

In Spaulding, 176 N.J. 25, the New Jersey Supreme Court addressed whether insurers could enforce non-cumulation clauses to avoid their pro-rata share of liability for progressive losses spanning multiple triggered policies. The Court ruled that such clauses are void and without effect in circumstances where the continuous trigger applies, because enforcement would frustrate the pro-rata allocation and coverage maximization central to Owens-Illinois. Spaulding, 176 N.J. at 44.

The Supreme Court in Spaulding, specifically held that these clauses—which purport to reduce liability or accumulation of limits for damages spanning multiple policy periods—are incompatible with the continuous trigger and pro rata allocation methodology of Owens-Illinois: “[O]nce the court turns to pro rata allocation, it makes sense that the non-cumulation clause, which would allow the insurer to avoid its fair share of responsibility, drops out of the policy.” Spaulding, 176 N.J. at 44.

Plaintiffs, relying on Spaulding argue that the exclusions at issue—although not always explicitly labeled “non-cumulation” clauses—operate in precisely the same manner, seeking to bar or reduce coverage triggered in policy years where progressive or continuous damage spanned multiple insurers.

The central purpose of continuous trigger methodology under New Jersey law is to “make insurance coverage available, to the maximum extent possible, to redress such matters as toxic contamination of property,” and, by extension, progressive construction defect damage. Farmers Mut. Fire Ins. Co. of Salem v. N.J. Property-Liability Ins. Guar. Ass’n, 215 N.J. 522, 528 (2013).

Further, Spaulding makes clear that the label given to a clause (“non-cumulation”) is not dispositive; it is the practical effect that governs. Any clause that prevents insurers from sharing responsibility for continuous and progressive damage across policy periods undermines the continuous trigger and is unenforceable.

B. Application of Law to the Disputed Policy Provisions

1. USIC Pre-Existing Injury or Damage Exclusion and Scottsdale CODE Exclusion

Both USIC and Scottsdale attempt to distinguish their respective exclusions from the “non-cumulation” clauses addressed in Spaulding. However, the essence of the exclusions, as revealed in the record, is to deny coverage for any damage that began before the policy period—even if such damage continued or progressed

New Jersey law does not require exclusions to carry the “non-cumulation” label to be invalidated; rather, the operative question is whether the exclusion, as applied, would impermissibly thwart the pro-rata allocation and maximization of coverage for progressive harm. The Spaulding Court rejected the notion that technical characterization controls, focusing instead on substantive effects. Spaulding, 176 N.J. at 42.

Spaulding and Owens-Illinois address public policy, not semantics: “Characterization of a policy provision as a non-cumulation clause . . . is not dependent on technical characterizations . . . [A] non-cumulation clause governs successive policies and prevents the accretion of limits when the policies have been triggered by a single occurrence . . . [and is] unenforceable under the continuous trigger regime.” Spaulding, 176 N.J. at 42.

Plaintiffs correctly argue that exclusions in the USIC, Scottsdale, and Arch policies, while not labeled “non-cumulation” clauses, functionally have the same purpose and effect: excluding coverage for property damage that began before a particular policy period, even when such damage continues and manifests during the policy period.

To permit exclusions that bar coverage for continuous property damage solely on the basis that such damage began prior to the policy period would allow the insurer to avoid its fair share of pro rata responsibility—directly contrary to New Jersey law and public policy.

The court concludes that defendants’ policy exclusions are, in substance, non-cumulation provisions as they would bar coverage for any damage not originating within the specific policy year, regardless of its progressive or indivisible character.

Under New Jersey law, such policy mechanisms are unenforceable for claims involving continuous damage.

USIC argues that its "Pre-Existing Injury or Damage Exclusion" is valid and not the equivalent of a non-cumulation clause, seeking refuge in out-of-state authority and unpublished New Jersey decisions. USIC's reliance on unpublished and out-of-state decisions does not override the binding authority and public policy articulated in Owens-Illinois and Spaulding. USIC's exclusion functions as a non-cumulation clause by precluding coverage for continuous, indivisible damage merely because it began prior to the policy period. Under Spaulding, such exclusions are unenforceable as they frustrate pro rata allocation under the continuous trigger doctrine.

Scottsdale asserts that its Continuing/Ongoing Damage Exclusion is not a non-cumulation clause and that plaintiffs have not proven the existence of progressive damage or the factual details necessary to apply continuous trigger. As discussed, legal characterization is irrelevant—the effect of the exclusion is what the law considers. Further, the record supports the progressive nature of the injury. The claims in the underlying action allege ongoing water infiltration and construction defect damages that are latent and indiscernible. The application of continuous trigger is proper, and exclusions seeking to limit coverage for continuous damage are unenforceable.

2. Arch Prior Injury Exclusion and Insuring Agreement Opposition & Cross Motion²

Arch argues that its policy exclusion and insuring agreement embody a clear and unambiguous intent to deny coverage for damage commencing prior to its effective date, and that such a provision is not subject to judicial override under Spaulding or Owens-Illinois. Arch distinguishes its exclusion from non-cumulation by characterizing it as a simple coverage grant limitation.

However, as with USIC and Scottsdale, the operative effect of Arch's exclusion is to prevent coverage for damage that began before its policy period, despite the continuous trigger doctrine's mandate that all implicated policies share responsibility for progressive injury. Spaulding instructs that any such attempt by an

² Arch failed to submit a statement of material facts in support of its cross-motion as required by R. 4:46-2(a)—a procedural deficiency plaintiffs argued required denial of the cross-motion. The cross motion was considered despite this argument.

insurer to avoid a fair allocation for its time on the risk, by introducing exclusions that conflict with continuous trigger principles, cannot be enforced. This reading is further justified by the policy rationale articulated in Farmers Mut., 215 N.J. 522, 528. (“The purpose of the methodology is to make insurance coverage available, to the maximum extent possible, to redress such matters as toxic contamination of property”).

Arch contends that its policy unambiguously excludes coverage for property damage that commenced prior to its policy period and that such language is not a non-cumulation provision but instead a valid, clear exclusion. Arch additionally asserts that enforcement of this exclusion does not contravene public policy or Owens-Illinois.

This argument fails both factually and legally. As set forth above, Spaulding and Owens-Illinois focus not on form but on function. The Court in Spaulding invalidated provisions that would allow insurers to reduce or avoid coverage for continuous damage simply because the damage originated prior to a particular policy period. The Arch exclusion, though written as a “prior injury or damage” exclusion, serves exactly that function. Whether an insurer frames its limitation as a non-cumulation clause, a “prior damage” exclusion, or some variant, if the clause has the practical effect of undermining pro rata allocation under continuous trigger, it is unenforceable.

Arch’s reliance on out-of-state authority is unavailing, as New Jersey has uniquely fashioned its common law to protect insureds from forfeiture of coverage for progressive, indivisible damage. Spaulding, 176 N.J. at 44; Farmers Mut., 215 N.J. at 522.

Arch asserts that the motion is premature and that plaintiffs must prove, factually, that the damage is “progressive and indivisible” to apply continuous trigger. This is not a genuine issue of material fact requiring denial of summary judgment. The underlying complaint explicitly alleges progressive, ongoing property damage due to water infiltration. Further, the record includes expert reports and discovery confirming such damage is latent, continuous, and precisely the type covered by the continuous trigger doctrine. The legal issue, the enforceability of the exclusion, is ripe for adjudication, as the material facts relevant to policy interpretation are not in genuine dispute.

Arch's cross-motion for summary judgment therefore fails, as its policy exclusions are unenforceable under New Jersey law in this context. The court

determines that enforcing Arch's exclusion would frustrate the maximization of coverage for continuous construction defect claims, and such exclusions are therefore unenforceable as a matter of law.

C. Factual Arguments and the Issue of Prematurity

Defendants additionally argue that Plaintiffs have not factually established that the alleged damages in the underlying litigation are truly "progressive and indivisible," or "latent and undetected," and that the motion is premature due to ongoing discovery.

Plaintiffs do not seek a factual determination at this stage regarding the timing or nature of the alleged damages. Rather, they request a legal declaration that, when continuous or progressive damage is established, non-cumulation exclusions cannot be enforced to bar coverage under New Jersey law. The complaint in the underlying litigation specifically alleges ongoing water infiltration and consequential damage occurring over an extended period, which under Air Master is quintessential progressive property damage triggering the continuous trigger doctrine.

Even assuming further discovery may refine factual details, the legal principle controlling these exclusions is ripe for determination. The public policy articulated in Owens-Illinois, Spaulding, and Air Master is not contingent on individual manifest facts but applies broadly when continuous damage is alleged and supported. Thus, summary judgment as to the legal (un)enforceability of these exclusions is appropriate.

Air Master adopts the continuous trigger theory for construction defect cases, especially in claims involving latent, progressive property damage (such as water infiltration or mold as alleged here). The opinion finds that these kinds of defects are not immediately obvious and can worsen over time, thus justifying the application of continuous trigger coverage across multiple policy periods.

The Palisades supports the broader proposition that "many construction defects will not be obvious immediately," reinforcing the underlying public policy that insurance coverage for such latent damage should not be artificially restricted to a single policy period due to limitations or exclusions. This supports maximizing coverage availability.

These precedents are directly on point because the underlying Vizcaya litigation involves claims of ongoing, progressive water infiltration caused by construction defects (which may have begun unnoticed and worsened over time), the continuous trigger theory should apply. This theory allows multiple insurance policies over different years to respond, rather than just the policy in effect when the damage first began. Thus, plaintiffs incorrectly argue that non-cumulation and similar exclusions or limitations that would thwart this approach are unenforceable under New Jersey law and public policy in the context of progressive, indivisible property damage suits stemming from construction defects.

The court agrees that Air Master and The Palisades both support the proposition that New Jersey's continuous trigger theory and the associated public policy rationale apply not only to toxic torts and environmental contamination, but also to construction defect cases. Plaintiffs correctly argue that this precedent compels insurance coverage across all applicable policy years for progressive, indivisible injuries (like water intrusion), and defeat attempts by insurers to limit such coverage via non-cumulation or prior damage exclusions, assuming the underlying disputed facts are found to otherwise warrant and not preclude coverage. This is not an opinion and order finding that coverage exists. This is an order finding that any attempt to preclude coverage based on the non-cumulation exclusions addressed in this opinion is not allowed under New Jersey law.

VI. CONCLUSION

In sum, this court finds that New Jersey's law and public policy, as established in Owens-Illinois and Spaulding, require that policy exclusions which deny coverage for continuous and progressive property damage, under the guise of non-cumulation or similar provisions, must yield to the principle of coverage maximization and pro-rata allocation across all implicated policy years. This approach applies in toxic tort, environmental, and construction defect cases, including the instant matter.

For the reasons set forth above, the court **GRANTS** plaintiffs' Motion for Partial Summary Judgment. The Non-Cumulation Provisions—USIC's Pre-Existing Injury or Damage Exclusion, Scottsdale's Continuing or Ongoing Damage Exclusion, and Arch's Prior Injury Exclusion and insuring agreement clause—are declared unenforceable as applied to continuous or progressive property damage claims in construction defect litigation under New Jersey law. Defendant Arch's cross-motion is **DENIED**.³

³ A memorializing order will be filed simultaneously with this opinion.