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Alerts

Court Holds That Manifestation Trigger Is Date That Property Damage Became Discoverable

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Insurance Coverage Alert

Four trigger-of-coverage theories are generally applied by courts in determining whether coverage exists under a CGL policy: (1) exposure; (2) manifestation; (3) continuous trigger; and (4) injury-in-fact. For many years, federal district courts in Florida were opposed to an injury-in-fact trigger. In perfunctory fashion, all of them applied the manifestation trigger, which is a simple, bright-line test. However, in three recent opinions issued by federal district courts in Florida, including *Mid-Continent Cas. Co. v. Siena Home Corp.,* 2011 WL 2784200 (M.D. Fla. July 8, 2011), the courts held that the insuring agreement is triggered when the damage becomes *discoverable* not when it is actually discovered. This essentially means injury-in-fact even though the courts continue to call it manifestation.

The central issue in *Sienna Home* was whether damage to single family homes occurred during the coverage period of a policy issued by plaintiff insurer. Defendant insured was the developer of a residential real estate project containing 447 single family homes. The homeowners in that project filed a class action suit against the insured, alleging that the homes had defectively constructed exterior wall assemblies that did not create an acceptable barrier to prevent moisture and water from penetrating into the wall systems and interiors. The insurer filed a declaratory judgment action against the insured and the homeowners for a determination that, among other things, its policies were not triggered because property damage "manifested" outside its coverage period.

The court examined the applicable trigger theory under Florida law and concluded that the "manifestation" rule is uniformly applied in Florida. It held:

Thus, in Florida, the "occurrence" and resulting coverage of "property damage" under a Commercial General Liability ("CGL") insurance policy is the "manifestation" of the damage, not when the alleged negligence occurred or the moment that the resulting injury or damage itself first occurred.

Having established manifestation as the trigger, the court next examined whether "manifestation" means "the date or moment in time that the property damage was discovered, or the date that it became discoverable[.]" To answer this question, the court looked to *Mid-Continent Cas. Co. v. Frank Casserino Const.,* 721 F. Supp. 2d 1209 (M.D. Fla. 2010), a recent case presenting similar facts. In that case, the court held:

That no one saw or "discovered" damage caused by water intrusion during the policy period is of no moment. Under Florida's applicable 'trigger' theory and the unambiguous language of the CGL policies at issue here, the only relevant question is whether physical injury to the buildings manifested itself during the period of coverage.

Based on this holding, the date when the damage was first observed or discovered was of no moment. The court further noted that the U.S. District Court for the Southern District of Florida recently reached that same conclusion in *United National Ins. Co. v. Best Truss Co.,* 20101 WL 5014012 (2010). In that case, the court added that manifestation exists whenever the property damage would have been visible upon a prudent engineering investigation, even if removal of building components would be necessary to gain access to the damaged area. Based on this line of authority, the *Siena Home* court accordingly concluded that

"*the 'manifestation' of the 'occurrence' of property damage, for purposes of determining coverage of the Mid–Continent policies was the time that such damage was discernable and reasonably discoverable either because it was open and obvious or upon a prudent engineering investigation, and not the time of actual discovery where the two circumstances come about in sequence at different times*." (emphasis added).

In the end, the court concluded that there was an issue of fact as to when the damage was first discoverable.

Practice Note

The practical effect *Siena Home* is that manifestation is no longer a bright-line test, which is the very reason the theory was attractive to insurers. Now, just like with injury-in-fact, insurers must engage in battles of expert opinion regarding when damage was first discoverable, making resolution on summary judgment exceedingly more difficult.

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