



## Alerts

### Manifestation Trigger in Florida: Discovery or Discoverable?

February 8, 2011

*Insurance Coverage Alert*

*United Nat. Ins. Co. v. Best Truss Co.*, 2010 WL 5014012 (S.D. Fla. Dec. 3, 2010) arose out of the construction of an Amtrust Bank building that began in 2001. Best Truss contracted with All-Miami Contracting to fabricate and deliver trusses for the building. The trusses were installed by All-Miami by the beginning of January 2002. The certificate of occupancy for the building was issued on February 28, 2003. Best Truss was insured for the policy periods of December 11, 2001, to December 11, 2002, and December 11, 2002, to December 11, 2003, under two consecutive commercial general liability policies issued by United National Insurance Company (United National).

In 2007, Amtrust's facilities manager observed a "clearly visible" crack on an interior soffit. The bank was constructed such that the trusses were not visible from inside the building and were inaccessible because they were hidden from view by a sheetrock ceiling immediately below the trusses, and a drop ceiling below that. The trusses also could not be viewed from above because they were underneath an exterior roof made of ceramic tiles. The soffits were located below the drop ceiling.

Amtrust hired GSD Contracting to inspect the ceiling and soffits in April 2008. The inspection revealed that the roof tiles were buckling in the middle of the roof. GSD cut a hole into the sheetrock ceiling in order to make the first visual inspection of the trusses, which were noted to have sustained physical damage. The truss area had not been visible inside or outside the building before the inspection, and no evidence had previously been presented that the area containing the trusses had been actually viewed since original construction.

In June 2008, Best Truss's expert also inspected the building and noted that "trusses were excessively loaded, causing failure of certain connector plates and truss members shortly after their installation at the time when the excessive loads were applied."

On November 6, 2008, Amtrust sued Best Truss, All-Miami and other contractors for damages arising from the defective trusses. United National filed a declaratory judgment action against Best Truss, and moved for summary judgment that it had no duty to defend or indemnify Best Truss because Amtrust's property damage occurred after the expiration of its second policy issued to Best Truss. United National argued that the cracks in the soffits were first discovered and reported in 2007—establishing that the damage manifested after December 11, 2003—which was after the expiration date of the second policy period.

Best Truss did not dispute that the damage was first discovered in 2007, or that this initial discovery of the damage was beyond the policy periods of the United National policies issued to Best Truss. Instead, it submitted the affidavit of its expert with the following statement: "[A]lthough the damage caused by the overloading of the bottom chords was, in the end, visible from the exterior of the building as a deflection in the roof and from the interior space as the soffits sagged and cracked, the damage *would have been visible* inside the attic space long before the time the exterior signs were evident, beginning around the time the excessive loads were applied to the bottom chords." (Emphasis added.) Despite the fact that Best Truss's expert did not opine on the visibility issue in his initial report, the court determined that it could properly consider the affidavit in its disposition of the summary judgment.



The court acknowledged that coverage in Florida is triggered when property damage manifests. But it nevertheless followed in the footsteps of *Mid-Continent Cas. Co. v. Frank Casserino Const., Inc.*, 721 F. Supp. 2d 1209, 1217 (M.D. Fla. 2010) (“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. CED’s expert has opined that it did and there is sufficient—though perhaps disputable—evidence in the record to support that opinion”). Hence, the court ruled that “[c]ontrary to [United National’s] assertion, visibility from within the enclosed and inaccessible attic does constitute manifestation. Through its expert, Best Truss has made a showing sufficient to establish the existence of an element essential to the case on which it bears the burden of proof at trial.” (Emphasis added.)

### **Practice Note**

This case is significant because it shows an emerging trend in the interpretation of the manifestation trigger theory from “discovery” of damages to “discoverable” damages. Under *Best Truss*, the discovery of the visible damage is inconsequential to summary judgment because an expert can create an issue of fact by simply opining that damages—which are not visible without destructive testing—*would have been visible* before exterior signs of damage were visible. Winning summary judgment under a manifestation trigger theory just got harder in the state of Florida.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*

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