



## Alerts

### U.S. District Court Applies Manifestation Trigger in Coverage Dispute Regarding Chinese Drywall

December 14, 2010

*Insurance Coverage Alert*

There are four generally accepted “trigger of coverage” theories: exposure, manifestation, continuous trigger, and injury-in-fact. Although Florida courts are split between the injury-in-fact and manifestation theories, the latter has fast been gaining traction as the prevailing theory. On November 30, 2010, the U.S. District Court for the Southern District of Florida applied the manifestation trigger in an insurance coverage dispute involving Chinese drywall. *Amerisure Ins. Co. v. Albanes Popkin The Oaks Dev. Group*, Case No. 09-81213-CIV-MARRA.

In *Amerisure*, an insurer sought a declaration that it had no duty to defend or indemnify the defendants in an underlying suit by homeowners against the builder of their house and the drywall subcontractor for property damage caused by the installation of defective Chinese drywall. The insurer argued that there was no coverage because it was specifically alleged in the underlying complaint that property damage manifested prior to the inception of its policies, which were in effect from January 16, 2008, to January 16, 2010. The homeowners countered that manifestation was not the correct trigger because the damages occurred continuously.

In granting summary judgment for the insurer, the court looked solely to the allegations of the underlying complaint. The homeowners specifically alleged that they first noticed a sulfur smell and damage to the coils in one air-handling unit in December 2006. Based on this allegation, the court concluded that the homeowners “admitted in their underlying complaint that they first noticed the damage prior to the policy period.” Summary judgment was accordingly entered for the insurer without reaching the carrier’s primary argument that its policies’ total pollution exclusions barred coverage.

The court distinguished *Trizec Properties, Inc. v. Biltmore Const. Co., Inc.*, 767 F.2d 810 (11th Cir. 1985), which is the leading case for injury-in-fact. The *Trizec* court found a duty to defend because the language of the underlying complaint “at least marginally and by reasonable implication” could be construed to allege that damage occurred during the policy period — even though the complaint alleged a manifestation date after the policy expired. The *Trizec* court held that the important inquiry when dealing with an occurrence policy is when the insured sustained actual damage and, presumably, if this fact can be construed from the complaint, the manifestation analysis is irrelevant. The *Amerisure* court distinguished *Trizec* on the ground that manifestation was relevant to the facts before it because the manifestation date established that the homeowners had sustained actual damage before the policy in question took effect.

The court’s holding in *Amerisure* is instructive for myriad reasons. First, the decision reaffirms the prevailing view that “Florida courts follow the general rule that the time of occurrence within the meaning of an ‘occurrence’ policy is the time at which the injury first manifests itself.” Second, it eliminates the continuous trigger theory as a viable coverage position. To be sure, the court specifically stated that “the fact that the damage was continuous in nature is irrelevant to the [c]ourt’s analysis.” Finally, it is noteworthy that the court did not find multiple occurrences even though the underlying complaint alleged that additional damages were observed to other air-handling units throughout 2008 and that between April 2009 and May 2009, damage to electric wiring, metals and plumbing fixtures was discovered. Instead, the court focused solely on the first date when the homeowners noticed damage of any kind.

#### Practice Note



Despite the court's holding in *Amerisure*, practitioners should remain wary of applying manifestation in every circumstance due the court's implication that, under *Trizec*, injury-in-fact may be applicable where the date of the actual injury is known, alleged, or can be reasonably inferred from the allegations. In the end, there remains a degree of uncertainty regarding what the prevailing trigger of coverage theory is in Florida. Until the Florida Supreme Court weighs in on the issue, one should pause before declaring Florida an absolute manifestation state.

*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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