IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

JOHNSON-GRAHAM-MALONE, INC.,
a Florida corporation,

Plaintiff,

CASE NO.: 16-2009-CA-005750-XXXX-MA
Division: CV-F

v.

AMERISURE INSURANCE COMPANY, a Michigan
Insurance company,

Defendant.
_____/

DEFENDANT AMERISURE INSURANCE COMPANY'S RESPONSE TO PLAINTIFF'S, JOHNSON-GRAHAM-MALONE INC., MOTION FOR SUMMARY DECLARATORY JUDGMENT

The Defendant, AMERISURE INSURANCE COMPANY (herein "Amerisure"), by and through undersigned counsel, and for their Response to Plaintiff's, Johnson-Graham-Malone, Inc. (herein "Johnson"), Motion for Summary Declaratory Judgment, or in the Alternative, Partial Summary Declaratory Judgment As To Amerisure's Duty To Defend and Indemnify Johnson For Damages Which Occurred "In Fact" During the Amerisure Policy Periods (herein "Motion"), states as follows:

INTRODUCTION

Johnson's Motion does much to detract from the sole, legal issue that will likely prove dispositive of this matter – whether the operative, underlying Second Amended Complaint (the "underlying complaint") in the underlying lawsuit styled *Property Reserve, Inc. v. Johnson-Graham-Malone, Inc., et al.*, Case No.: 16-2007-CA-003589-XXXX-MA (herein "underlying lawsuit") alleges the initial manifestation of construction deficiencies within Amerisure's policy

periods. To resolve this issue, Johnson appropriately concedes that Florida courts need only look to the allegations of the underlying complaint. *See Johnson Motion*, pg. 14 (citing *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007) ("Importantly, the duty to defend is much broader than the duty to indemnify, as it is based **solely** upon the allegations of the complaint against the insured . . . .") (emphasis added in original). When considering the underlying allegations, Florida law instructs and compels this Court to adopt and apply the manifestation "trigger" for purposes of placing this alleged loss. *See Travelers Insurance Company v. C.J. Gayfer's and Company*, 366 So.2d 1199, 1202 (Fla. 1st DCA 1979); *Amerisure Ins. Co. v. Albanese Popkin The Oaks Development Group, L.P., et al.*, No. 9:09-cv-81213, 2010 U.S. Dist. LEXIS 125918 (S.D. Fla. Nov. 30, 2010); *Essex Builders Group Inc. v. Amerisure Ins. Co.*, 485 F.Supp.2d 1302, 1311 (M.D. Fla. 2006) ("manifestation" theory places the "occurrence", under a CGL policy, at that point in time when "property damage" first manifests itself or is discovered for purposes of determining which CGL policy is "triggered."). Here, the allegations in the underlying complaint unequivocally and undisputedly allege that the loss first outwardly manifested itself ten (10) months after Amerisure's policies expired on January 1, 2005. *See* Joint Compendium of Documents, Exhibit I, ¶ 17 ("[d]ue to their latent nature, the construction defects did not begin to be discovered until approximately October 2005, when they began to manifest themselves outwardly."). *Stare decisis* and the undisputed facts, therefore, warrant granting summary judgment, on this purely legal issue, in Amerisure's favor.

RESPONSE TO JOHNSON'S "UNDISPUTED FACTS"

In its brief, Johnson includes a series of factual statements purportedly representing the "undisputed facts" of this matter. *See Johnson Motion,* pgs. 2-9. Many of these statements,

however, are not supported by the parties' agreed-upon joint record. To the extent Johnson's "undisputed facts" find mooring in the parties' Stipulation and Compendium of Documents,[1] Amerisure agrees that such facts are undisputed.[2]

By relying on extrinsic evidence for its so-called "undisputed facts," this Court should strike and disregard such documents and those statements contained therein as running afoul of both the parties' agreement and Florida law. Particularly, Johnson relies on improper and self-serving affidavits, which are the subject of Amerisure's motion to strike as being impertinent, immaterial and proscribed, (*see* Amerisure's Motion to Strike), for much of its purported "undisputed facts". By way of example, Johnson, in its "The Damage to the Project" subsection, *see Johnson Motion,* pgs. 4-5, attempts to use its affidavits to alter, modify and/or supplement the allegations in the underlying complaint. Johnson's untoward efforts reveal the absence of a covered claim by virtue of the underlying complaint's allegations alone. Importantly, however, Florida courts prohibit such behavior. *See Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 10 (Fla. 2004) ("[A]n insurer's obligation to defend is determined solely by the claimant's complaint if suit has been filed."). Thus, allegations that cannot be supported by the parties' joint compendium and/or are based entirely on improper affidavits, should be stricken and disregarded by this Court.

---

[1] The compendium contains all the necessary documents the parties agreed to rely upon in filing cross-motions for summary judgment and which are needed for a resolution of this duty to defend claim – namely, all iterations of the underlying complaint and the allegations contained therein, all relevant Amerisure policies and Johnson's declaratory judgment complaint which initiated this suit. Furthermore, the parties submitted an agreed order to the Court memorializing their intent to use the documents contained in the compendium.

[2] This statement should not be construed as admitting all alleged facts in Johnson's declaratory judgment complaint as true. Amerisure's response and position concerning the allegations of Johnson's complaint can be found in its Answer to the complaint.

ARGUMENT

I. FLORIDA HAS ADOPTED THE "MANIFESTATION" TRIGGER FOR PURPOSES OF PLACING A LOSS WITHIN A CGL POLICY PERIOD

This Court is called upon to make a single, legal determination that both parties concede will likely prove case-dispositive, *i.e.*, the applicable "trigger" mechanism under Florida law. On this issue, Johnson improperly suggests that, in Florida, the potential dates in which damage "in fact" occurred, known as the "injury in fact trigger", places a loss within a policy period for purposes of coverage. However, this assertion misrepresents the wealth of Florida jurisprudence on the issue clearly adopting the "manifestation trigger" as the appropriate vehicle for use in establishing the timing of a loss. Indeed, Florida courts, emp loying the "manifestation trigger" have established that the date when the damage/loss initially manifests itself, or is discovered, is the date used to place a loss for insurance coverage purposes. Here, the underlying complaint's allegations undisputedly establish that the alleged construction deficiencies first outwardly manifested and/or were initially discovered *after* Amerisure's policies[3] had expired. Therefore, under Florida law, Amerisure's policies have not been "triggered", and Amerisure owes no duty to defend or indemnify Johnson in connection with the underlying, alleged loss.

[3] Amerisure issued three CGL policies to Johnson, which include: (1) CPP1384487000000, effective 1/1/2002 to 1/1/2003; (2) CPP1384487010003, effective 1/1/2003 to 1/1/2004; and (3) GL 2017328000000, effective 1/1/2004 to 1/1/2005 (collectively "CGL policies"). *See* Joint Compendium of Documents, Exhibit A-C. Amerisure Mutual Insurance Co. also issued three (3) Umbrella Liability policies, which include: (1) CU-1384488, effective 1/1/2002-1/1/2003; (2) CU-1384488, effective 1/1/2003-1/1/2004; and (3) CU-1384488, effective 1/1/2004 to 1/1/2005 [See Joint Compendium of Documents, Exhibit D-F] (collectively "umbrella policies") (all policies collectively referred to herein as the "Amerisure policies").

A. The Duty to Defend is Determined Solely From the Allegations of the Underlying Complaint and Subject Policies

There is no dispute that, for purposes of determining an insurer's duty to defend, Florida jurisprudence is clear; the adjudication of an insurer's duty to defend is determined solely from the allegations of the underlying complaint and the subject policy(s). *See Johnson Motion*, pg. 14; *see also Higgins*, 894 So. 2d at 10; *see also St. Paul Fire & Marine Ins. Co. v. The Medical Protective Co. of Fort Wayne, Indiana, et al.*, No. 2:04cv0391, 2006 U.S. Dist. LEXIS 89422 at *13-14 (M.D. Fla. Dec. 8, 2006). Where there is no duty to defend, there is no duty to indemnify. *See Johnson Motion*, pg. 14; *see also Lime Tree Village Community Club Ass'n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405 (11th Cir. 1993); *see also Orlando Nightclub Enters. v. James River Ins. Co.*, No. 6:07-cv-1121, 2007 U.S. Dist. LEXIS 88320 at *28-29 (M.D. Fla. Nov. 30, 2007) (citing *Allstate Ins. Co. v. RJT Enters., Inc.*, 692 So. 2d 142, 144 (Fla. 1977); *see also Fun Spree Vacations, Inc. v. Orion Insurance Company*, 659 So.2d 419, 421 (Fla. 3d DCA 1995). An insured may not re-plead, ignore or alter through extraneous material the allegations of the underlying complaint in an attempt to trigger a defense obligation. *See Tropical Park v. United States Fid. & Guar. Co.*, 357 So. 2d 253, 256 (Fla. 3d DCA 1978) ("the duty of an insurance carrier to defend a claim falling within its insurance contract depends solely on the allegations in the complaint . . . ."); *see also Nat'l Union Fire Ins. Co. v. Lenox Liquors Inc.*, 358 So. 2d 533, 536 (Fla. 1977).

Here, Johnson seeks to trigger Amerisure's defense obligation and concomitantly recover defense costs. *See Johnson Motion*, pg. 5 ("This action continues against AMERISURE to recover the complete cost of defense of the Underlying Action based on AMERISURE's violation

of its duty to defend . . . ."). Therefore, the allegations of the underlying complaint solely determine whether the Amerisure policies are triggered.

B. Florida has Adopted the "Manifestation" Theory as the Event Which "Triggers" Coverage Under Liability Policies

1. A CGL policy is "triggered" when a loss manifests itself or is initially discovered

Amerisure's policies require that "bodily injury" and/or "property damage" be caused by an "occurrence." *See* Joint Compendium of Documents, Exhibits A-C. More importantly, the policies require that the "'bodily injury' or 'property damage' occur[] during the policy period." *Id.* To determine whether a loss "occurred during the policy period," Florida courts, analyzing identical policy language, follow the general rule that, in an alleged continuing injury context, "the time of occurrence within the meaning of an 'occurrence' policy is the time at which the injury first manifests itself." *Essex Builders Group Inc.*, 485 F.Supp.2d at 1310 (quoting *Auto Owners Insurance Company v. Travelers Casualty & Surety Company*, 227 F.Supp.2d 1248, 1266 (M.D. Fla. 2002)); *see also Albanese Popkin*, 2010 U.S. Dist. LEXIS 125918, *see also C.J. Gayfer's*, 366 So.2d at 1202 (holding that the time of the "occurrence" is defined at the point "in which the negligence manifests itself in property damage or bodily injury . . . ."); *see also Arnett v. Mid-Continent Cas. Co.*, No. 8:08-CV-2373, 2010 U.S. Dist. LEXIS 71666 at *19 (M.D. Fla. July 16, 2010) ("Under Florida law, the general rule is that the time of occurrence within the meaning of an 'occurrence' policy is the time at which the injury first manifests itself, that is, the date on which the damage first becomes visible."); *see also American Motorist Insurance Co. v. Southern Security Life Insurance Co.*, 80 F.Supp.2d 1280, 1284 (M.D. Ala. 2000) (applying Florida law) (citing *C.J. Gayfer's* and holding same); *see also Harris Specialty Chems., Inc. v. U.S. Fire Ins. Co.*,

No. 3:98-CV-351, 2000 U.S. Dist. LEXIS 22596 at *40-41 (M.D. Fla. July 7, 2000); *see also Mid-Continent Cas. Co. v. Frank Casserino Constr.*, No. 6:09-cv-1065, 2010 U.S. Dist. LEXIS 59636 (M.D. Fla. June 16, 2010) ("In Florida, however, coverage under a CGL policy is triggered when property damage manifests itself, not when the negligent act or omission giving rise to the damage occurs."); *see also North River Ins. Co. v. Broward County Sheriff's Office*, 428 F. Supp.2d 1284, 1289 (S.D. Fla. 2006). If the damage or injury manifests, *i.e.,* occurs outside of the term of a liability policy, the insurer faces no liability. *See North River Ins. Co.*, 428 F. Supp.2d at 1288-89; *Auto-Owners Ins. Co.*, 277 F.Supp.2d at 1266; *Essex Builders Group, Inc.*, 485 F.Supp.2d at 1302.

In complete disregard for Florida's settled law, Johnson claims that "[i]t is immaterial whether the damage occurs and becomes patent almost immediately, or occurs (or is alleged to occur) during one or more policy periods but is not discovered until a later date." *See Johnson Motion*, pg. 22. Johnson posits that "Florida law and the language [sic] AMERISURE's CGLs support the actual injury/injury-in-fact trigger, and if damage continues to occur through more than one policy period, all such policies are triggered." *See Johnson Motion*, pg. 21. However, Florida law has already rejected this argument.

Distilled to its essence, Johnson argues that one case, *Trizec Properties, Inc. v. Biltmore Constr. Co.*, 767 F.2d 810, 813 (11th Cir. 1985), establishes that the "injury in fact" trigger is the appropriate Florida trigger for purposes of placing a loss within a policy period. Although *Trizec* explained that when dealing with an occurrence policy, the critical inquiry is when the insured sustained actual damage, *see id.* at 812, Johnson fails to provide the Court with relevant context that factually distinguishes *Trizec's* applicability to the present case. In *Trizec*, and in

contrast to the present matter, the underlying complaint *did not* allege when the damage occurred. (emphasis added). Since the allegations failed to do so, the court determined that "the language of the underlying complaint at least marginally and by reasonable implication . . . could be construed to allege that the damage" occurred during the relevant policy period. *Id.* at 813. Although Johnson misrepresents that *Trizec* held that "[r]elative to the timing of the loss," a duty to defend is triggered when "the complaints at least gives [sic] rise to the potential that damages occurred, in fact, or manifested themselves" during the Amerisure policy periods, *see Johnson Motion*, pg. 9, the court, notably, did not determine that both "triggers" applied, but rather decided that it need not decide whether the "theory that damages manifest themselves or be discoverable before coverage is triggered" is a "correct or incorrect statement of law in general. *Id.* at 813 n. 6; *see also Albanese Popkin,* 2010 U.S. Dist. LEXIS 125918.

In contrast to *Trizec*, here, because the allegations in the underlying complaint clearly state when the alleged construction deficiencies first manifested, *Trizec's* precedential authority is inapplicable, which may explain why it stands apart from the unified Florida courts having addressed and adopted "manifestation" as Florida's true "trigger."

As recent as November 30, 2010, the Southern District of Florida reiterated that the "manifestation" theory controls in Florida, and not "actual injury." *Albanese Popkin*, 2010 U.S. Dist. LEXIS 125918. There, the insured argued similarly to that now being advanced by Johnson – that, under identical policy language, *Trizec's* "actual injury" trigger was the law in Florida and because "damage was continuous[,] . . . its first manifestation is not the crucial trigger." *Id.* at *14. The court, highlighting the overwhelming authority establishing the "manifestation" theory as Florida's CGL trigger, determined that *Trizec* di d not apply since the underlying

complaint "clearly alleged that the damage" occurred outside of the relevant policy period. *Id.* at *18. Significantly, the underlying claimants "admitted in their underlying complaint that they first noticed the damage prior to the policy period." *Id.* at *15. And similarly here, the underlying plaintiff Property Reserve, Inc., in all three iterations of its complaint, has steadfastly maintained that the damage first manifested itself outwardly in October 2005. *See* Joint Compendium of Documents, Exhibit G-I.

Johnson does not dispute the alleged damage's manifestation date. *See Johnson Motion*, pg. 2-3 ("In the Underlying Action, plaintiff further alleged that the defects were not discovered until approximately October 2005 because the damage was internal to the building."); *see also id.* at 4 (Johnson acknowledges damages were latent and had not yet been discovered at the construction's completion). Thus, as it is undisputed that the alleged loss first manifested outside the Amerisure policy periods, an application of Florida law warrants a finding as a matter of law that Amerisure's policies need not respond to this loss.[4]

[4] In its memorandum, Johnson cites to various Florida authority that does not concern the "trigger" issue and have no application to the present matter. *See U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007) (pertaining to events qualifying as an "occurrence" and "property damage" and not "trigger"); *see also Johnson Motion*, pg. 19 ("duty to defend in this case is and was not dependent on the outcome of *J.S.U.B.*"); *see also Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So.2d 1241 (Fla. 2008) (pertaining to events qualifying as an "occurrence" and "property damage" and not "trigger"); *see also Biltmore Constr. Co. v. Owners Ins. Co.*, 842 So. 2d 947 (Fla. 2d DCA 2003) (same); *see also Boardman Petroleum v. Federated Mut. Ins. Co.*, 135 F.3d 750, 753 (11th Cir. 1998) (court did not conduct a "trigger" analysis but overruled application of South Carolina choice-of-law principles in favor of Georgia's substantive law); *see also Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003) (concerning the definition of "occurrence" and not the "trigger" issue); *see also New Amsterdam Casualty Co. v. Addison*, 169 So. 2d 877 (Fla. 2d DCA 1964) (court did not analyze the "trigger" issue but addressed the products-completed operations exclusion and that the causative act that led to damage is not the appropriate event for an "occurrence"); *CSX Transp. v. Admiral Ins. Co.*, 1996 U.S. Dist. LEXIS 17125, at *19-20 (M.D. Fla. Nov. 6, 1996) (in discussing applicability of "trigger" under six different states' law, the parties *stipulated* as to the "injury in fact" trigger) (emphasis added).

2. Johnson's Reliance on Foreign Authority to Change Florida's Landscape as to "trigger" is unavailing

In advocating a seismic shift in Florida insurance law, Johnson claims, in essence, that Florida courts have repeatedly erred on the "trigger" issue, and that this Court should break ranks from its brethren courts and adopt "actual injury" as Florida's trigger. *See e.g. Johnson Motion*, pg. 21. To get there, Johnson disrespectfully charges those numerous and precedential courts with flawed, illogical analyses that transforms an "occurrence" policy into a "claims made" policy. *See Johnson Motion*, pg. 10 ("To the extent that federal trial court level case law exists suggesting that the so-called 'manifestation' trigger of coverage should apply, these cases are wrongly decided, poorly reasoned, inconsistent with Florida law, and most importantly, not consistent with the language of the policy . . . ."); *see also e.g., id.* at 30-31 ("the Middle District of Florida, [in *Auto-Owners*, 227 F.Supp.2d 1248, which applied the 'manifestation' trigger] uniquely took an odd turn with regard to the trigger of coverage decisions."). Effectively conceding Florida is a "manifestation" state, Johnson rejects Florida's established law and relies on other states' law in support of "actual injury" as the triggering event under a CGL policy. *See Gruol Construction Co. v. Ins. Co. of North America*, 524 P.2d 427 (Wash. Ct. App. 1974); *see also Joe Harden Builders v. Aetna Cas. & Sur.*, 486 S.E.2d 89 (S.C. 1997); *see also Arrow Exterminators, Inc. v. Zurich Am. Ins. Co., et al.*, 136 F. Supp.2d 1340 (N.D. Ga. 2001); *see also Am. Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954 (Col. Ct. App. 1990); *see also Sentinel Ins. v. First Ins. of Hawaii*, 875 P.2d 894 (Haw. 1994); *see also Don's Bldg. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008).

Johnson, however, fails to comprehend that this Court is bound by Florida law and a key distinction why Florida, unlike other states, has adopted the "manifestation" trigger is the inherent certainty for placing a loss. Indeed, certainty in loss placement, where obtainable, is necessary because "Florida courts do not recognize a right of contribution between insurers for defense costs . . . ." *Continental Cas. Co. v. United Pacific Ins. Co.*, 637 So. 2d 270, 275 (Fla. 5th DCA 1994); *see also Pa. Lumbermens Mut. Ins. Co. v. Ind. Lumbermens Mut. Ins. Co.*, 43 So. 3d 182 (Fla. 4th DCA 2010). Thus, unlike the majority of those foreign jurisdictions' authority relied upon by Johnson having adopted an "injury in fact" trigger, an insurer acknowledging its duty to defend in Florida may not seek reimbursement or contribution of defense costs from other potentially responsible insurers. *See In re: Consolidated Feature Realty Litigation*, 2008 U.S. Dist. LEXIS 5505 (E.D. Wash. January 25, 2008) (acknowledging right of contribution among insurers for defense costs); *see also Valley Ins. Co., et al. v. Wellington Cheswick, LLC, et al.*, No. C05-1886, 2007 U.S. Dist. LEXIS 38072 (W.D. Wash. May 24, 2007) (holding same); *St. Paul Fire & Marine Ins. Co. v. Valley Forge Ins. Co.*, No. 1:06-CV-2074, 2009 U.S. Dist. LEXIS 23663 (N.D. Ga. March23, 2009) (holding same); *see also Colonial Ins. Co. of California v. Am. Hardware Mut. Ins. Co.*, 969 P.2d 796 (Colo. Ct. App. 1998) (holding same); *see also Nautilus Ins. Co. v. Lexington Ins. Co., et al.*, No. 09-00537, 2010 U.S. Dist. LEXIS 120883 (D. Haw. November 15, 2010) (holding same).

In Florida, absent a right of reimbursement or contribution for defense costs, the "manifestation" trigger provides certainty as to which insurer must respond to a loss. This certainty is not only conducive, but necessary for definitively placing the loss, where applicable, for purposes of determining which insurer, on a continuum of insurers, is responsible to provide

policy benefits. To stray from a "manifestation" trigger would promote uncertainty, confusion and may foster an environment where insurers are reticent to afford benefits for fear of being responsible for a loss which should be shared, pro-rated or may ultimately be found to have occurred beyond their policy's borders. The manifestation "trigger", despite Johnson's suggestions, was not adopted haphazardly, but rather as a means to promote equity, harmony and predictability in Florida insurance law.

Ignoring the harmony between Florida's current trigger and contribution law, Johnson advocates breaking from established law based on its narrow interpretation of the policy language. Despite Johnson's claim that the policy language does not support the "manifestation" trigger, "property damage" and "occurrence" are "inextricably intertwined." *CPC Int'l v. Northbrook Excess & Surplus Ins. Co.*, 668 A.2d 647, 649 (R.I. 1995). Thus, "there can be no occurrence under [a] policy without property damage that becomes apparent during the policy period, and property loss and compensable damages cannot be assessed unless the property damage is discovered or manifests itself." *Id.* A plain reading of the Florida rulings clearly indicate "manifestation" is the favored and appropriate trigger.

3. The Drafting History of a CGL Policy Is A Red Herring

In an effort to confuse this Court and cloud the record, Johnson needlessly and incompletely traces the history behind the drafting of CGL policies. *See Johnson Motion*, pg. 25-27. Johnson does so, however, without asserting that the language in the Amerisure policies is ambiguous or even remotely unclear so as to even arguably delve into drafting history. In fact, Johnson expressly states that the language is unambiguous. *See Johnson Motion*, pg. 10 (In arguing that the insuring agreement supports the "injury in fact" trigger, Johnson states that

"[t]his unambiguous language does not evaluate coverage based on when it is found . . . ."). As a "corollary to Florida's plain-meaning rule," which directs Florida courts to initially look to the policy's plain meaning to determine coverage, *see Travelers Indem. Co. v. PCR Inc.*, 326 F.3d 1190, 1193 (11th Cir. 2003), "Florida courts do not look behind unambiguous policies in search of countervailing rationales." *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 412 F.3d 1224, 1230 (11th Cir. 2005) ("unless we conclude that the policy language is ambiguous, it would be inappropriate for us to consider the arguments pertaining to the drafting history" of the policy.). Thus, Johnson's recitation of CGL drafting history and commentary from various insurance publications is not only improper, but directly contradicts Florida law and its adoption of "manifestation" as its trigger. As such, it should be disregarded by this Court.

Florida law, whose application is undisputed, instructs that when determining the timing of a loss in a continuing injury context, the date the damage manifests itself or is initially discovered governs for purposes of identifying which CGL policy must respond. Thus, as the alleged construction deficiencies indisputably manifested outside of the Amerisure policy periods, this Court should award summary judgment in Amerisure's favor.

C. The Allegations Set Forth in the Underlying Lawsuit Allege Construction Deficiencies Manifesting Outside of the Amerisure Policy Periods

In defining whether an "occurrence" causing "property damage" took place during a policy period, this Court need only look to the underlying complaint to determine when damage first outwardly manifested. *See supra*. Here, Johnson acknowledges that the applicable Amerisure policies expired in on January 1, 2005. *See* Joint Compendium of Documents, Exhibit C. Moreover, unlike *Trizec's* unique circumstances, Johnson acknowledges that the underlying

complaint clearly alleges that the "construction defects did not begin to be discovered until approximately October 2005, when they *began to manifest themselves outwardly*." (emphasis added). *See* Joint Compendium of Documents, Exhibit I, ¶ 17. The Amerisure policies under which Johnson now seeks coverage expired on January 1, 2005 – ten (10) months prior to the manifestation of the alleged defects at 54 Magnolia. *Id.* Following Florida's strict adage of deciding an insurer's duty to defend exclusively on the complaint, *e.g., Higgins*, 894 So. 2d at 10, the allegations of the underlying complaint, in conjunction with Florida's adoption of the "manifestation" trigger, warrant summary judgment in favor of Amerisure insofar as the Amerisure policies are not "triggered" in connection with this alleged loss. *See Gayfer's*, 366 So. 2d at 1202; *see also Essex Builders Group, Inc.*, 485 F.Supp.2d 1302; *see also Albanese Popkin,* 2010 U.S. Dist. LEXIS 125918.

Rather than articulate what allegations in the underlying complaint establish Johnson's entitlement to coverage, let alone the potential for coverage under the policies, Johnson speciously asserts in the alternative that, in the event that this Court follow Florida's "manifestation trigger", "the broad language found in AMERISURE's UMBRELLAS require AMERISURE to drop down and defend [it] pursuant to such umbrella policies." *See Johnson Motion*, pg. 10. However, this assertion is not only spurious, but disregards the plain language of the policies, which Johnson professes adherence. Insofar as Amerisure's umbrella policies are written for the identical policy periods and "follow form" to the CGL policies issued to Johnson, "the same analysis applies to the commercial liability policies and the umbrella policies." *Albanese Popkin,* 2010 U.S. Dist. LEXIS 125918 at *19 (citing *Admiral Ins. Co. v. Rockwell*, 515 So.2d 246, 247 (Fla. Dist. Ct. App. 2d Dist. 1987). No damage manifested, let alone is alleged in

the underlying complaint to have manifested, that would place the loss within any Amerisure policy. Summary judgment, therefore, is properly awarded in Amerisure's favor.

II. THE AFFIRMATIVE DEFENSES ARE IRRELEVANT TO THE THRESHOLD "TRIGGER" ISSUE

Despite agreeing that the "disposition of the 'trigger' issue is a legal predicate finding that will resolve the actual controversy between the parties," *see* Agreed Order;[5] *see also* Joint Compendium of Documents, Johnson persists in misdirecting the Court's attention by addressing Amerisure's affirmative defenses. Johnson's efforts in this regard are a red herring and have no bearing on this Court's determination of the appropriate "trigger" mechanism and its application in the face of the undisputed facts.

Initially, Johnson, without support, claims that "[t]he parties agree and do not dispute that there has been an 'occurrence' which caused 'property damage' within the meaning of AMERISURE's CGLs." *See Johnson Motion*, pg. 36. However, Amerisure has made no such agreement and its previous declination of coverage, which reserved all other policy defenses, was based solely on the allegations of the underlying complaint, *i.e.*, the clear representation that the alleged loss first manifested after the Amerisure policies had expired. Thus, whether there has been an "occurrence" under the policy has never before been placed at issue before this Court, especially in light of the fact that the parties agree on the viability of the predicate, and dispositive, "trigger" issue now ripe for adjudication. Continuing with its impropriety,

[5] *See* Agreed Order ("The parties have met and conferred regarding: the remaining legal issue to be resolved in this proceeding; [and] the most expeditious and appropriate way to resolve this legal dispute . . . . Both parties agree that a disposition of the 'trigger' issue is a legal predicate finding that will resolve the actual controversy between the parties and will likely prove case-dispositive.").

Johnson offers self-serving affidavits to support its contention that an "occurrence" as defined by the policies and interpreted by Florida law, has indeed transpired – notably unsupported by the underlying allegations. Insofar as Johnson now seeks to alter or supplement the underlying complaint's allegations through extrinsic evidence, *see Tropical Park*, 357 So. 2d at 256 (insured may not re-plead, ignore or alter through extraneous material the allegations of the underlying complaint in an attempt to trigger a defense obligation since "the duty of an insurance carrier to defend a claim falling within its insurance contract depends solely on the allegations in the complaint . . . ."); *see also Nat'l Union Fire Ins. Co. v. Lenox Liquors Inc.*, 358 So. 2d 533, 536 (Fla. 1977), Amerisure has concomitantly moved to strike those immaterial, impertinent, and scandalous documents from the current proceeding. *See* Amerisure's Motion to Strike.

Next, resolution is needed on "trigger" to evaluate the application of Amerisure's "other insurance" provision. Again, determining the priority of other insurers' policies that fall on the continuum of policies tendered to by Johnson only becomes ripe if this Court re-evaluates Florida's stance on "trigger" and determines that "actual injury" is the appropriate trigger, which would then place multiple policies from multiple insurers at issue. Johnson acknowledges that it was insured by various insurers over the span of the construction of "54 Magnolia" project, *see Johnson Motion*, pg. 3; *see also Joint Compendium of Documents*, Exhibit J (Johnson's declaratory judgment complaint with attached exhibits to insurance policies from other various insurers), and the fact that Johnson has elected to settle with those other insurers is of no moment; those insurers' policies are still valid and collectable due to the insurers' solvency and ongoing operations. *See State Farm Mut. Auto., et al. v. Univ. Atlas Cement Co., et al.*, 406 So.2d 1184, 1186 (Fla. 1st DCA 1981) ("'[C]ollectible insurance' [refers] to an insurance

policy, the proceeds of which are collectible as distinguished from uncollectible due to the insurance company's insolvency.").

Notably, should this Court elect not to embrace the manifestation "trigger", Johnson's propensity to overreach will result in coverage being unavailable under the Amerisure policies by virtue of the fact that the policies apply, if at all, in an excess capacity. Indeed, because Johnson actively sought out and eventually availed itself to other valid and collectable insurance, *i.e.*, settlement, Amerisure's CGL policies, pursuant to the "other insurance" conditions[6], respond, if at all, on an excess basis. And, insofar as the $50,000 settlement amount does not exhaust the limits of any one of Johnson's other valid and collectible primary policy limits, the Amerisure policies are not implicated by this loss. *See Keenan Hopkins Schmidt and Stowell Contractors, Inc. v. Continental Cas. Co.*, 653 F. Supp. 2d 1255, 1263-65 (M.D. Fla. 2009) (other insurance, in the form of a second primary policy, existed that provides primary coverage for the same loss, "other insurance" provision in an insurer's policy converted the policy an excess policy, providing "'excess' coverage after exhaustion of the limits of the second policy." Thus, "[b]ecause the primary insurers' coverage limits were apparently not exhausted, [the insurer] has not legal duty to reimburse those insurers for the amounts they spent in defending and indemnifying [the insured] in the Underlying Case."); *see also Joint Compendium of Documents*, Exhibit J (Johnson's declaratory judgment complaint with attached exhibits to insurance policies from other various insurers); *see also e.g.* Joint Compendium of Documents, Exhibit A, Bates Stamped AM 0056 ("when [Amerisure's] insurance is excess over other

[6] *See e.g.* Joint Compendium of Documents, Exhibit A, Bates Stamped AM 0055-56.

insurance, [Amerisure] will pay only [its] share of the amount of the loss, if any, that exceeds the sum of: (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance . . . .").

Finally, Amerisure has not relied on the policies' Total Pollution Exclusion, "Your Work" Exclusion, or Mold and Fungi Exclusion, to deny coverage of Johnson's claim. Rather, the sole basis Amerisure has relied upon to deny Johnson's claim are the clear allegations of the underlying complaints placing the loss outside the Amerisure policy periods. As mentioned above, these exclusions are unripe and will only become ripe once Johnson, as the insured, is able to meet the threshold requirements of whether its claim qualifies under the insuring agreement. *LaFarge Corp.*, 118 F.3d at 1516 (the insured bears the burden of bringing its claim within the ambit of coverage). Only after that, as Johnson purports to understand, will Amerisure bear any burden of proving the applicability of its exclusions. *See Johnson Motion*, pg. 13 ("Once the insured shows coverage, the insurer has the burden of proving an exclusion."). To that end, the exclusions may become ripe for substantive adjudication if this Court strays from Florida's adoption of the "manifestation" trigger and now adopts the "injury in fact" trigger. Until that time, the discussion of these exclusions is unripe.

Accordingly, Johnson's attempt to stray from the prerequisite, dispositive "trigger" issue should not be countenanced by this Court. Insofar as Florida has adopted the "manifestation" trigger and repeatedly re-enforced its precedential value, summary judgment should be granted in Amerisure's favor.

WHEREFORE, Defendant, AMERISURE INSURANCE COMPANY, respectfully requests that this Honorable Court enter an order in its favor and against JOHNSON-GRAHAM-MALONE, INC.:

granting Amerisure's motion for summary judgment; awarding costs to Amerisure associated with bringing this motion; and for such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail to: Robert Buesing, Trenam Kemker, 101 E. Kennedy Boulevard, Suite 2700, Tampa, FL 33602 and Mark A. Boyle Sr. and Debbie S. Crockett of Boyle & Gentile PA, 2050 McGregor Blvd., Fort Myers, FL 33901 on this 13th day of December, 2010.

Donald E. Elder (admitted *pro hac vice*)
Email: delder@tresslerllp.com
Illinois State Bar No.: 6255889
Abraham Sandoval (admitted *pro hac vice*)
Email: asandoval@tresslerllp.com
Illinois State Bar No.: 6296504
Tressler LLP
233 S. Wacker Drive, 22nd Floor
Chicago, IL 60606
(312) 627-4000
Attorneys for Defendant, Amerisure Insurance Company

Co-Counsel:
Andrew F. Russo, Esq.
FBN 508594
Rywant, Alvarez, Jones, Russo & Guyton, P.A.
Suite 500, Perry Paint & Glass Building
109 Brush Street
Tampa, Florida 33602
(813) 229-7007 – Telephone
(813) 223-6544 – Facsimile
Email:arusso@rywantalvarez.com