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

v.

Division: CV-F

AUSTWOOD ENTERPRISES, INC.,
a Florida corporation f/k/a HOLMES
LUMBER COMPANY; AMERICAN
AND FOREIGN INSURANCE COMPANY, a
Delaware insurance company; LIBERTY
MUTUAL INSURANCE COMPANY, a
Massachusetts insurance company;
AMERISURE INSURANCE COMPANY,
a Michigan insurance company; CRUM &
FORSTER INDEMNITY COMPANY,
a Delaware insurance company and
MID-CONTINENT CASUALTY COMPANY,
an Ohio insurance company
Defendants.
_____/

PLAINTIFF'S MOTION FOR SUMMARY DECLARATORY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY DECLARATORY JUDGMENT AS TO AMERISURE'S DUTY TO DEFEND AND DUTY TO INDEMNIFY JOHNSON-GRAHAM MALONE, INC. FOR DAMAGES WHICH OCCURRED "IN FACT" DURING THE AMERISURE POLICY PERIOD(S)

COMES NOW, Plaintiff, JOHNSON-GRAHAM-MALONE, INC. ("JGM"), by and through its undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.510, hereby moves this Honorable Court for entry of a summary declaratory judgment, or alternatively, partial summary declaratory judgment, as to Defendant, AMERISURE INSURANCE COMPANY ("AMERISURE"), and its duty to defend JGM and duty to indemnify JGM for damages which occurred "in fact" during the AMERISURE policy

periods, and requests the Court reserve jurisdiction to determine damages and the award of attorneys' fees, and in support thereof, states as follows:

I. UNDISPUTED FACTS.

a. The Project – 54 Magnolia.

JGM was the general contractor for the construction of a garden style apartment located in Jacksonville, Florida, sometimes referred to as "Estates at Deerwood Park" and at other times "54 Magnolia". (the "Project"). A copy of the affidavit of Mr. Stephen W. Morrill is attached hereto as Exhibit "1". Using only subcontractors to execute the work, JGM constructed the Project in 1997 and 1998. Id.

b. The Underlying Action.

On April 26, 2007, the then-current owner of the Project filed suit against JGM alleging numerous construction defects, which constituted deviations from or violations of the applicable state building code and that the deviations were latent in nature ("Underlying Action"). See Exhibits "A" through "I" and Exhibit "1"[1]. The result of these defects was that various moisture barriers and sealing techniques were not properly used and accordingly the building was subject to severe water damage. See Exhibit "1". 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 Exhibits "G" through "I" and Exhibit "1". Notwithstanding when the Underlying Action complaint alleges the damages were found, the undisputed facts indicate that water intrusion based damages occurred from the time frame of the

[1] The Joint Compendium of Documents and Stipulation and the Exhibits thereto will be referred to as Exhibits "A" through "J" while the Exhibits attached hereto will be referred to numerically as Exhibits "1", "2" and "3".

completion of the Project until "discovered" in October of 2005, including the years 2002, 2003, 2004, and 2005, when AMERISURE insured JGM. A copy of the affidavit of Mr. Brett D. Newkirk, P.E. is attached hereto as Exhibit "2".

JGM issued demands to its insurance carriers that issued policies from 1997 through 2005, demanding that the carriers honor their duties to defend and their duties to indemnify. See Exhibit "1". One of the carriers during this time period was AMERISURE, which issued policies beginning January 1, 2002 and ending on January 1, 2005. See Exhibit "1" and Exhibits "A" – "F" and Exhibit "3".

c. Mediation & Settlement of the Underlying Action.

On October 14, 2008, in the Underlying Action, Judge Haldan E. Taylor entered an order setting a mediation date at the request of the plaintiff. See Exhibit "1". Demand was made upon all of the carriers, including AMERISURE, to attend and participate in the mediation but AMERISURE, having declined coverage, refused to participate. Id. All of JGM's other carriers also had declined coverage and none, including AMERIUSRE, honored their duty to defend. Id. However, one carrier did contribute to the settlement and, ultimately, all of the other carriers, except for AMERISURE, contributed to JGM's cost of settlement. Id. At no time in the Underlying Action was there any allegation by the plaintiff that the building had been damaged by "pollutants" or "fungi or bacteria." See Exhibits "G" through "I" and Exhibit "1".

The settlement entered into in the Underlying Action was a reasonable settlement made under supervision of a Court Ordered Mediator. See Exhibit "1". Under the settlement, the vast majority of the settlement amount was contributed by subcontractors and subcontractors' insurance companies, but in order to conclude the

settlement, JGM was forced to pay $50,000.00 of its own monies into the settlement pot, and also agreed to release the other insurance carriers from their respective costs of defense claims. Id.

d. The Damages to the Project.

A subsequent investigation revealed that there were certain deficiencies at the time of the original construction in 1997 and 1998 that were latent conditions not readily observable at the time the construction was completed. See Exhibit "2". These conditions included:

A. Balconies:

i. Base flashing not extended to slab edge at all locations.
ii. Base flashing contains open voids at corners and laps at most locations.
iii. Perimeter is not adequately integrated with metal components (t-bar, rip edge, base flashing, etc.) at most locations.

B. Weather resistive barrier:

i. Omitted in some locations.

ii. Tape/integration with windows not provided in isolated locations.

C. Wall flashings:

i. Inadequate terminations/laps in most locations.
ii. Brick cap flashing does not lap over outside edge in all locations
iii. Diverter or "kick-out" flashings not installed or inadequately functioning at the roof rake in many locations.
iv. Omitted head flashing and weeps at brick window openings.
v. Reverse shingled with weather resistive barrier in many locations.

D. Framing:
i. Untreated oriented strand board extended to contact

concrete and less than 6 inch clearance to grade where sided.

E. Brick:

i. The spacing exceeds code required maximums at most locations.

ii. Coping is not provided at the horizontal brick cells in all locations.

See Exhibit "2".

As a result of the construction deficiencies noted above, water intruded into the building at each significant rain event after the time the building was completed in 1997 and 1998. Id. During the period from January 1, 2002 to January 1, 2005, actual physical damage to the property occurred. Id. This damage was capable of being identified during the time period from January 1, 2002 through January 1, 2005 but only if the latent conditions were exposed. Id. If the latent condition had been exposed in that time period, the damage would have been easily identified. Id.

The severe conditions that were exposed at the time of remediation in 2006 and 2007 reflect a progressive, long-standing condition. Id. The property suffered physical damage essentially continuously from the time of original construction. Id.

e. The Instant Case.

Following the settlement of the Underlying Action, the instant suit was filed on or about April 10, 2009 against various subcontractors, subcontractors' insurance companies and three of JGM's carriers, including AMERISURE. See Exhibit "1". All Defendants have settled, except for AMERISURE. Id. 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, the portion of the mediated settlement

amount paid by JGM in the Underlying Action and its attorneys' fees and court costs in this action.[2]

f. The CGL Policies.

AMERISURE issued four CGL policies to JGM (hereinafter collectively referred to as "AMERISURE's CGLs"). See Exhibits "A" – "C" and Exhibit "3". One policy was in effect for one year between January 1, 2002 and January 1, 2004. Id. For the time frame of January 1, 2004 through January 1, 2005, AMERISURE issued two policies, one under policy number GL2017328 with the named insured listed and "JOHNSON-GRAHAM-MALONE INC" and the other under policy number GL2022789 with the named insured listed as "JOHNSON-GRAHAM-MALONE, INC". See Exhibit "C" and Exhibit "3". Except as noted, the pertinent language is identical as each provides:

> SECTION 1 – COVERAGES...
>
> PROPERTY DAMAGE LIABILITY
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance applies . ...
>
> b. This insurance applies to . . . "property damage" only if: . . .
>
> 2. the . . . "property damage" occurs during the policy period . ...
>
> ...
> 2. Exclusions
> This insurance does not apply to:
>
> ...
>
> **l. Damage to your work**
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

[2] The majority of JGM's remaining damage are its defense costs in the Underlying Action.

SECTION V - DEFINITIONS

...

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

...

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

See Exhibits "A" – "C" and Exhibit "3". AMERISURE's CGLs provide various exclusions and definitions, which are set out below in the argument.

g. <u>The Umbrella Policies.</u>

Amerisure also issued three umbrella policies to JGM (hereinafter collectively referred to as "AMERISURE's UMBRELLAS"). See Exhibits "D" – "F". Each umbrella policy was in effect for one year between January 1, 2002 and January 1, 2005. <u>Id.</u> Each policy provided coverage for:

A. COVERAGES

1. Insuring Agreement

a. We will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as damages which exceed the limit of "underlying liability insurance" or the "self-insured retention" because of:

(1) "Bodily injury",

(2) "Property damage", or

(3) "Personal and advertising injury"

Caused by an "occurrence" to which this insurance applies.

b. This insurance applies to "bodily injury", "property damage", and "personal and advertising injury" only if:

(1) The "bodily injury", "property damage", or "personal and advertising injury" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury", "property damage", or "personal and advertising injury" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. Of Section **B. WHO IS AN INSURED** and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury", "property damage", or "personal and advertising injury" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury", "property damage", or "personal and advertising injury" occurred, then any continuation, change or resumption of such "bodily injury", "property damage" or "personal and advertising injury" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury", "property damage" or "personal and advertising injury" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** Of **B. WHO IS AN INSURED** or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury", "property damage", or "personal and advertising injury" after the end of the policy period.

2. Exclusions
l. Damage to your work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

...

E. DEFINITIONS

...

13. "Occurrence" means:
a. For "bodily injury" and "property damage", and accident, including continuous or repeated exposure to substantially the same general harmful conditions resulting in "bodily injury" or "property damage", or

b. For "personal and advertising injury", an offense included in the definition of "personal and advertising injury".

...

19. "Property damage" means:
a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be

deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Id.

II. SUMMARY OF ARGUMENT.

JGM is entitled to summary judgment as to the duty to defend. The complaints filed in the Underlying Action gave rise to at least potential liability under AMERISURE's CGLs. This mere possibility of liability under AMERISURE'S CGLs is all that is necessary to trigger the duty to defend. Relative to the types of damages being claimed in this case, the Florida Supreme Court's decisions in U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007) and Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008) make clear that potential coverage was available to the contractor in this case for errors occasioned by JGM's subcontractors. Relative to any exclusions which are deemed to apply in this case, the facts, as pled in complaints in the Underlying Action, do not bring the entirety of the complaints, within any of the exclusions and thus, none of the exclusions defeat the duty to defend.

Relative to the timing of the loss, the complaints at least gives rise to the potential that damages occurred, in fact, or manifested themselves during one or more of the policy periods of AMERISURE. See Trizec Props., Inc. v. Biltmore Constr. Co., Inc., 767 F. 2d 810 (11th Cir. 1985). The fact that the Underlying Action has some indication of when damages were first observed by the underlying claimants does not eliminate the duty to defend even if it is assumed the so-called "manifestation" trigger of coverage applies to AMERISURE's CGLs. Assuming, arguendo, that AMERISURE's

CGLs in question did not require a defense obligation, the broad coverage language found in AMERISURE's UMBRELLAS required AMERISURE to drop down and defend JGM pursuant to such umbrella policies.

Relative to the duty to indemnify, the undisputed facts of the case show that some of the damage actually occurred, in fact – meaning took place as contrasted with being found during the policy periods of AMERISURE's CGLs. Any such damage occurring, in fact, during AMERISURE's policy period is covered pursuant to the language in both AMERISURE's CGLs and AMERISURE's UMBRELLAS. This unambiguous language does not evaluate coverage based on when it is found, either by the insured or by the claimant, but instead affords coverage based on **when the damage actually happened**. This reading of AMERISURE's CGLs is the only one consistent with the plain language, drafting history, the vast majority rule across the United States, and common sense. 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 of insurance; thus, such cases should be disregarded by this Court. The actual facts in this case show that the exclusions relied upon by AMERISURE are not applicable to the loss. For these reasons, JGM in entitled to summary judgment against AMERISURE.

III. DISCUSSION AND ANALYSIS.

a. Summary Judgment Pursuant To Fla. R. Civ. P. 1.150.

JGM is entitled to summary judgment because there are no genuine issues of material fact. Fla.R.Civ.P. 1.510. Partial summary judgment is appropriate under the

rule where there are no material disputed facts. Southern American Fire Insurance Company v. I.B.H. Liquor Corp., 242 So.2d 731 (Fla. 3d DCA 1971). Pursuant to Rule 1.510(d) Fla.R.Civ.P., this Honorable Court should make a finding of what material facts exist without controversy.

b. Interpretation of Insurance Policies Under Florida Law – Generally.

An insurance policy is a contract of adhesion; accordingly, Florida follows the *in contra perforatum* rules of construction against the drafter. In the interpretation of insurance policies, it is axiomatic that a policy is construed against its drafter. Westmoreland v. Lumbermens Mutual Casualty Co., 704 So.2d 176, 179 (Fla. 4th DCA 1997); Hudson v. Prudential Prop. And Cas. Ins. Co., 450 So.2d 565, 568 (Fla. 2d DCA 1984); National Merchandise Co. v. United Services Auto. Assoc., 400 So.2d 526, 532 (Fla. 1st DCA 1981). Specifically, provisions of an insurance policy which define insuring or coverage clauses are construed in the broadest possible manner to effect the greatest extent of coverage. Id. at 179. In contrast to insuring clauses, however, exclusionary clauses are **always** narrowly construed against the insurer. Demshar v. AAACon Auto Transport, Inc., 337 So.2d 963, 965 (Fla. 1976); Westmoreland, 704 So.2d 176 and Smith v. General Accident Ins. Co. of Amer., 641 So.2d 123 (Fla. 4th DCA 1994). Exclusionary clauses are typically read strictly and in a manner that affords the insured the broadest possible coverage. Indian Harbor Insurance Co. v. Williams, 998 So.2d 677, 678 (Fla. 4th DCA 2009). If coverage is to be excluded based upon the definition of coverage, or a policy exclusion, the policy should so state in clear, unmistakable language. Progressive Ins. Co. v. Estate of Wesley, 702 So.2d 513 (Fla. 2d DCA 1997). As observed in Westmoreland:

> [T]he current Florida rule is that strict construction is required of exclusionary clauses in insurance contracts, only in the sense that the insurer is required to make clear precisely what is excluded from coverage. If the insurer fails in the duty of clarity by drafting an exclusion that is capable of being fairly and reasonably read both for and against coverage, the exclusionary clause will be construed in favor of coverage.

Westmoreland, 704 So.2d at 179 quoting State Farm Fire & Cas. Co. v. Deni Assoc. of Fla. Inc., 678 So.2d 397, 401 (Fla. 4th DCA 1996), affirmed 711 So.2d 1135 (Fla. 1998).

Ambiguity exists whenever terms of the policy are subject to different reasonable interpretations, one of which provides coverage, and one of which does not or where more than one interpretation may be fairly given to a policy provision. Weldon v. All American Life Ins. Co., 605 So.2d 911, 915 (Fla. 2d DCA 1992); Blue Cross Blue Shield of Fla. v. Woodlief, 359 So.2d 883 (Fla. 1st DCA 1978); and Ellsworth v. Ins. Co. of N.A., 508 So.2d 395, 399 (Fla. 1st DCA 1987). To properly interpret a policy exclusion, the exclusion must be read in conjunction with other provisions of the policy, from the perspective of an ordinary person. See State Farm Fire and Cas. Co. v. CTC Devel't Corp., 720 So.2d 1072, 1074-5 (Fla. 1998); Mactown, Inc. v. Continental Ins. Co., 716 So.2d 289, 291 (Fla. 3d DCA 1991).

In keeping with the liberality of interpretation of insurance policies in favor of the insured, any and all ambiguities are interpreted liberally in favor of the insured and strictly against the insurer, the drafter. Prudential Prop. and Cas. Co. v. Swindell, 622 So.2d 467 (Fla. 1993); Westmoreland, 704 So.2d 176; and Hartnett v. So. Ins. Co., 181 So.2d 524, 528 (Fla. 1965). Terms must be liberally construed in favor of coverage so that where two interpretations are available – both for and against coverage – the interpretation allowing greater indemnity will **always** prevail. Weldon, 605 So.2d at 915; Braley v. American Home Assur. Co., 354 So.2d 904 (Fla. 2d DCA 1978), cert. denied,

359 So.2d 1210 (Fla. 1978); Union Amer. v. Clifford and Denis Assoc., 678 So.2d 397-401 (Fla. 4th DCA 1996).

When an insurer fails to define a term found in an exclusion or limitation, the insurer cannot insist upon a narrow, restrictive interpretation of the coverage and these terms must be liberally construed in favor of the insured. See Westmoreland, 704 So.2d 176, 180; National Merchandise Co., 400 So.2d 526, 530; CTC, 720 So.2d 1072, 1076; State Farm Mut. Ins. Co. v. Pridgen, 498 So.2d 1245, 1247 n.3 (Fla. 1986); Container Corp. of Amer. v. Maryland Cas. Co., 707 So.2d 733, 736 (Fla. 1998); Deni Assocs. Of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1139 (Fla. 1998); Berkshire Life Ins. Co. v. Adelberg, 698 So.2d 828, 830 (Fla. 1997); and State Comprehensive Health Assoc. v. Carmichael, 706 So.2d 319, 320 (Fla. 4th DCA 1997). When defining coverages and exclusions, an insurer must take care to ensure that provisions of its own policy do not give rise to ambiguity in the policy as it is improper for a policy to grant rights in one paragraph and then retract that very same right in another. See Tire Kingdom, Inc. v. First So. Ins. Co., 573 So.2d 885, 887 (Fla. 3d DCA 1990); Moore v. Connecticut General Life Ins. Co., 277 So.2d 839 (Fla. 3d DCA 1973), cert. denied, 291 So.2d 204 (Fla. 1974).

In Florida, the insured has the burden of proving that a claim is covered by the insurance policy. LeFarge Corp. v. Travelers Indemnity Co., 118 F.3d 1511 (11th Cir. 1997). Once the insured shows coverage, the insurer has the burden of proving an exclusion. Id. If there is an exception to an exclusion however, then the burden returns to the insured to prove the exception and show coverage. East Florida Hauling, Inc. v. Lexington Insurance Co., 913 So.2d 673 (Fla. 3d DCA 2005).

c. The Duty To Defend is Based Solely Upon the Allegations in the Claim for Relief Against JGM and is Interpreted Broadly.

The duty to defend is separate and apart from the duty to indemnify, and the insurer is required to defend the suit even if true facts later show there is no coverage. Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992); Klaesen Bros., Inc. v. Harbor Ins. Co., 410 So. 2d 611 (Fla. 4th DCA 1982); and BellSouth Telecomms., Inc. v. Church & Tower of Fla., Inc., 930 So. 2d 668 (Fla. 3d DCA 2006, review denied 950 So. 2d 1238 (Fla. 2007). Importantly, the duty to defend is much broader than the duty to indemnify, as it is based **solely** upon the allegations in the complaint against the insured and should be interpreted broadly. U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007); Auto Owners Ins. Co. v. Possi Window Co., 984 So. 2d 1241 (Fla. 2008); National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977); Liberty Mut. v. Lone Star Indust., 661 So. 2d 1218 (Fla. 3d DCA 1995); Aetna Ins. Co. v. Borrell-Bigby Electric Co., Inc., 541 So. 2d 139 (Fla. 2d DCA 1989); Biltmore Constr. v. Owners Ins. Co., 842 So. 2d 947 (Fla. 2d DCA 2003); C.A. Fielland v. Fid. & Cas. Co. of NY, 297 So. 2d 122 (Fla. 2d DCA 1974); and Evanston Ins. Co. v. Royal Am. Constr. Co., 2007 U.S. Dist. LEXIS 88893 (N.D. Fla. 2007).

If the complaint alleges facts which are partially within and partially outside of coverage of the policy, the insurer is obligated to defend the entire lawsuit. Tropical Park, Inc. v. United States Fid. & Guar. Co., 357 So. 2d 253, 256 (Fla. 3d DCA 1978); Grissom, 610 So. 2d at 1307. So long as the complaint alleges facts which create potential coverage under the policy, the insurer must defend. See Tropical Park, 357 So. 2d at 256; McCreary v. Florida Residential, 758 So. 2d 692 (Fla. 4th DCA 1999)(emphasis added). An insurer must defend if the allegations in the complaint

could bring the allegations of the complaint within coverage under the subject policy; this is true even if the allegations in the complaint "at least marginally and by reasonable implication" can be construed to invoke a duty to defend. Klaesen Bros., 410 So. 2d 611, 613; Grissom, 610 So. 2d at 1307; State Farm Mut. Auto. Ins. Co. v. Universal Atlas Cement Co., 406 So. 2d 1184 (Fla. 1st DCA 1981), rev. denied, 413 So. 2d 877 (Fla. 1982); Pentecost v. Lawyers Title Ins. Corp., 704 So. 2d 1103 (Fla. 1st DCA 1997); Borrell-Bigby, 541 So. 2d 139; McCreary, 758 So. 2d 692; Jones v. Florida Insurance Guaranty Asso., 908 So. 2d 435 (Fla. 2005); Church & Tower, 930 So. 2d 668; Nationwide Mut. Fire Ins. Co. v. Beville, 825 So. 2d 999 (Fla. 4th DCA 2002); Aguero v. First American Ins. Co., 927 So. 2d 894 (Fla. 3d DCA 2005); and Fla. Ins. Guaranty Assoc., Inc. v. All The Way with Bill Vernay, Inc., 864 So. 2d 1126 (Fla. 2d DCA 2003).

It has also been said that the court must not only look to the facts alleged in the complaint but their implications as well as determining whether the complaint may represent a covered occurrence. See Grissom, 610 So. 2d at 1307, fn. 5; Continental Cas. Co. v. Fla. Power and Light, 222 So. 2d 58, 59 (Fla. 3d DCA 1968), cert. denied, 229 So. 2d 867 (Fla. 1969); and Beville, 825 So. 2d 999. In fact, Florida courts have held that it is reversible error for a trial judge to even consider testimony from a declaratory judgment action in determining the duty to defend, because the allegations of the complaint solely control this particular duty under the insured's policy. State Farm Fire & Cas. Co. v. Edgecumbe, 471 So. 2d 209, 210 (Fla. 1st DCA 1985); Tropical Park 357 So. 2d 253; Lenox Liquors, 358 So. 2d 533; and Universal Atlas Cement Co., 406 So. 2d 1184. All doubts as to whether the duty to defend exists must be resolved in favor of the insured and against the insurer. Jones v. Fla. Ins. Guaranty Assoc., 908

So. 2d 435; Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810 (Fla. 1st DCA 1985); Fla. Ins. Guaranty Assoc. v. Giordano, 485 So. 2d 453 (Fla. 3d DCA 1986); and Grissom, 610 So. 2d at 1307.

This admittedly liberal rule of broadly interpreting the complaint and its implications in favor of the duty to defend can best be understood by understanding the corollary to this rule which disallows an insured from claiming indemnity where no duty to defend exists. See Fun Spree Vacations, Inc. v. The Orion Ins. Co., 659 So. 2d 419 (Fla. 3d DCA 1995); Caduceus Self Ins. Fund, Inc. v. So. Fla. Emergency Physicians, 436 So. 2d 1034 (Fla. 3d DCA 1983). With this rule in mind, it is clear that the duty to defend must be broadly interpreted. If under the actual facts of a given case, coverage should be available, a narrow restrictive interpretation of the complaint against the insured would result in the insured being cheated out of both the duty to defend and the duty to indemnify. Florida does not, as many jurisdictions do, allow for considerations of matters outside of the pleadings against the insured to augment whether or not a duty to defend exists. To disallow a broad interpretation of the complaint against the insurer would essentially foreclose both defense and indemnity in circumstances where they may, in fact, be warranted under the actual facts.

In order to avoid its duty to defend on the basis of an exclusionary clause, an insurer must establish that the allegations of the complaint fall "solely and entirely" within the exclusion which is used as the basis to avoid the duty of defense. Lime Tree Village Community Club Assoc., Inc. v. State Farm Gen. Ins. Co., 980 F.2d 1402, 1405-07 (11th Cir. 1993); Baron Oil Company, 470 So. 2d 810.

d. The Duty to Defend is Broad in Construction Cases, Both as to Evaluation of the Scope of Damages and as to The Evaluation of the Timing of the Loss.

Relative to the duty to defend, claims for defense in construction defects have always been quite broad in Florida. In Biltmore Constr., a contractor was sued for alleged construction defects which led to water intrusion. The Second District Court of Appeals recognized that repair or replacement of the faulty construction, itself, may well not be covered. Biltmore Constr. Co., 842 So. 2d 947. Notwithstanding this, the court found a duty to defend as the allegations, interpreted broadly, gave rise to the possibility of a covered claim. Id. In doing so, the court cited to the Grissom decision and noted that a duty to defend was required because of the existence of doubt as to the scope of the claim. Id.

Similarly, in Trizec, the Eleventh Circuit refused to parsimoniously evaluate the timing of the loss relative to the availability of the duty to defend. Trizec, 767 F. 2d 810. In Trizec, the underlying complaint appeared to allege a date in which the damages became known or "manifested." Id. The trial court granted summary judgment, finding that the "manifestation date" controlled the trigger of coverage. The Trizec court reversed, noting that the true trigger was the injury in fact. Id; see Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 754 n. 13 (11th Cir 1998) citing Trizec, 767 F.2d 810 (noting that Florida courts have rejected the "manifestation trigger of coverage" approach in favor of an approach under which coverage is triggered by property damage alone taking place during the policy period).

e. Availability of Construction Defect Coverage Under CGL Policies in Florida.

Quite recently, the scope of coverage available to general contractors under their occurrence-based CGL policies, has been broadened. Under both U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007) and Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008), physical damage to tangible property arising out of the work of subcontractors represents a covered loss under the general contractors' CGL policies.[3] Under J.S.U.B. and Pozzi, construction defects constitute an accident and occurrence within the meaning of the CGL policy. To the extent that actual physical damage arises out of the subcontractor's work, such damages constitute "property damage" within the meaning of the CGL policy. Where, as is the case in the instant case, the damage is occasioned after operations of the insured are complete, the "your work" exclusion – which controls after operations are complete – applies to exclude coverage for the work of the general contractor, however, the subcontractor exception to the "your work" exclusion restores coverage arising out of the work of JGM'S subcontractors. The undisputed facts of the instant case show that JGM performed all of its operations through subcontractors. The water damage occasioned by the failure of the subcontractors' work in the instant case clearly constitutes and "occurrence" and "property damage" as those terms are understood in J.S.U.B. and Pozzi. Similarly, the "your work" exclusion would have applied to eliminate coverage but for the existence of the subcontractor exception which restored coverage to the general contractor.

It should be noted that the last two (2) state supreme courts to rule on the issue

[3] The same analysis applies to the umbrella policies in the instant case to the extent that said policies used identical definitions of "occurrence" and "property damage," and have a similar exclusionary regime including the subcontractor exception to the "your work"/"completed operations" exclusion.

have found in favor of coverage under circumstances such as those in dispute in the instant case. See Travelers Indemnity Company v. Moore & Associates, 216 S.W. 3d 302 (Tenn. 2007) and Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007). The Lamar court held "... that allegations of unintended construction defects may constitute an 'accident' or 'occurrence' under the CGL policy and that allegations of damage to or loss of use of the home itself may also constitute 'property damage' sufficient to trigger the duty to defend under a CGL policy." This case is no different and the scope of the complained damages clearly extends beyond the work itself. Thus, the duty to defend in this case is and was not dependent on the outcome of J.S.U.B., and the duty existed regardless of the Florida Supreme Court's decision.

f. The Trigger of Coverage in Occurrence Based Policies – Generally.

AMERISURE's CGLs cover "property damage [that] occurs during the policy period," when the damage is caused by an "occurrence." See Exhibits "A" – "C" and Exhibit "3". "Occurrence is defined by the AMERISURE's CGLs as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Id. This type of policy is referred to as an "occurrence policy." Arad v. Caduceus Self Ins. Fund, Inc., 585 So. 2d 1000 (Fla. 4th DCA 1991).AMERISURE's CGLs, like all standard CGL policies, does not explicitly refer to a "trigger of coverage".

Trigger is simply "a label for the event or events that under the terms of the insurance policy determines whether a policy must respond to a claim in a given set of circumstances." Robert D. Fram, End Game: Trigger of Coverage in the Third Decade of CGL Latent Injury Litigation, 454 PRACTICING L. INST. 9 (1993). In most circumstances, the event causing damage occurs simultaneously with the resulting

harm. The issue is more complex where the damage occurs (or, as here, is reasonably alleged to have occurred), but is not discovered until a later time. Courts in different jurisdictions have reached disparate conclusions under comparable facts and identical policy language. In continuing damage or delayed discovery cases, courts have adopted no fewer than five trigger theories. Dow Chems. Co. v. Assoc. Indem. Corp., 724 F. Supp. 474, 478-79 (E.D. Mich. 1989).

First is the **continuous trigger** approach, which holds that all policies on the risk from the initial exposure through manifestation are triggered. See e.g., Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.D.C. 1981).

Second is the **exposure** theory, which presumes that damage occurs when exposure to the causative agent or event takes place and not when the symptoms of the exposure become evidence. See e.g., Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980).

Third is the **actual injury or injury-in-fact** theory, which focuses on when the injury or damage actually occurred.[4] See e.g., Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co., 267 S.W. 3d 20 (Tex. 2008); Am. Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984).

Fourth is the **manifestation** theory, which holds that policies are triggered when the damage becomes "manifest," or is discovered. Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982).

Last, there is a **double-trigger** theory, which holds that there are two triggers,

[4] This trigger is sometimes referred to as the "actual damage" or "damage-in-fact" trigger, through the more common phrase uses the term "injury," regardless of whether the context is property damage or bodily injury. Accordingly, this Motion, which concerns trigger in the property damage context, will use the phrase "actual injury/injury-in-fact."

exposure and manifestation, regardless of whether damage continues between those two events. See e.g., Zurich Ins. Co. v. Raymark Indus., Inc., 514 N.E. 2d 150 (Ill. 1987).

As Dow Chemicals counsels, however, "trigger rulings are most appropriately derived by reference to the operative policy language, as opposed to the judicial gloss placed upon similar language in ostensibly analogous cases." Dow Chemicals 724 F. Supp. at 479. As demonstrated below, Florida law and the language 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.

g. Plain Meaning Analysis and Florida's Rules of Contract Construction Support an Actual Injury/Injury-In-Fact Trigger.

As discussed in *supra*, under Florida law, courts must construe insurance policies according to the plain meaning of the policy language. Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000); see also, Fla. Stat. § 627.419(1) ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefore or any rider or endorsement thereto."). If the policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding it, the policy is considered ambiguous. Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003). Because the carrier drafts the policy, ambiguous coverage provisions are construed strictly against the carrier and liberally in favor of the insured. Deni Assocs., 711 So. 2d at 1138.

Florida rules of insurance policy interpretation do "not allow courts to rewrite contracts, *add meaning that is not present*, or otherwise reach results contrary to the intentions of the parties." Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979) (emphasis added). If a policy is silent on an issue, a court may not "add to or read in language not contained on the face of the policy." Meister v. Utica Mut. Ins. Co., 573 So. 2d 128, 130 (Fla. 4th DCA 1991).

AMERISURE's CGLs being occurrence based polices cover "property damage" if the damage occurs "during the policy period" and is caused by an occurrence, "including continuous or repeated exposure" to conditions. The focus is on the damage as the signal event – the only event under the language of the CGL – that must "occur [] during the policy period" in order to be covered.[5] It 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. Most recently, Florida's Middle District interpreted a CGL policy in support of the proposition that damage must occur during the policy period even if it is not discovered until after the policy expires by holding that that a plaintiff's expert's affidavit could provide support showing that even though damage had not yet been discovered, that damage was occurring during the policy period. Mid-Continent Casualty Co. v. Frank Casserino Construction Inc., 2010 W.L. 2431900 (M.D. Fla. June 16, 2010).

The Florida Supreme Court's decision in Koikos applies for multiple reasons. Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003). First, Koikos emphasizes the import of adhering to policy language in interpreting an insurance contract. Id. at 266;

[5] "Occur" (as opposed to "occurrence") is not defined by the CGL, so must be given its plain and ordinary meaning; i.e., to happen or take place. See Auto-Owners, 756 So. 2d at 34.

see also, Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So. 2d 528 (Fla. 2005) (refusing to "read into the text [of the insurance policy] a requirement that is simply not there ... We cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way")(citations omitted).

Second, Koikos establishes that the "continuous or repeated exposure to conditions" language in an occurrence policy (also present in AMERSURE's CGLs) was intended to broaden coverage. See Koikos, 849 So. 2d at 266. Last, the Koikos court found the focus of that language to be "ongoing and slowly developing *injuries*"; not some unarticulated awareness (as in a claims-made policy) that such injuries had taken place. Id. (emphasis added). In short, there is no language in AMERSURE's CGLs requiring (or even suggesting) that the damage must "manifest" or be "discovered" during the policy period. Adding terms or meaning to an insurance policy not found in the plain text of the policy is contrary to Florida law.

h. Applying a Manifestation Trigger Eviscerates the Coverage for Which JGM Paid Premiums.

JGM paid premiums to AMERISURE in accordance with the greater value of an occurrence policy. See Id. at 271 (concluding that "the 'continuous or repeated exposure' language does not restrict the definition of 'occurrence' but rather expands it by including ongoing and slowly developing injuries"). Accepting a manifestation trigger of coverage eviscerates the contract (and coverage) bargained for, and transforms AMERISURE's CGLs into less expensive "claims made" policies where the date of discovery is the triggering event.[6] See Trizec, 767 F. 2d 810 (observing that Liberty

[6] In National Union Fire Ins. Co. of Pittsburgh v. Baker and McKenzie, 997 F.2d 305, 306 (7th Cir. 1993), Judge Posner distinguished "claims made" policies from occurrence policies; "[b]ecause of the indefinite

Mutual, in seeking to apply a manifestation trigger, was "attempting to change the present policy into a 'claims made' policy, however, clearly focuses on the date that damage is sustained and not the date it 'manifests' itself.")[7]; see also, Towns v. N. Sec. Ins. Co., 964 A.2d 1150, 1164 (Vt. 2008) (collecting cases for the proposition that to adopt a manifestation trigger "would in effect transform the typically more expensive occurrence-based policy into a cheaper claims-made policy, a form of coverage specifically designed to limit the insurer's risk by restricting coverage to claims made during the policy period *'without regard to the timing of the damage or injury'*") (citations omitted; emphasis in original).[8] A claims made policy is less expensive because, absent tail coverage, the carrier's risk ends when the policy does. An occurrence policy, on the other hand, covers damage or injury occurring during the policy period, regardless of when it is discovered.

The Florida Supreme Court has emphasized that occurrence policies are those "in which the coverage is effective [...] regardless of the date of discovery or the date the claim is made or asserted." Gulf Ins. Co. v. Dolan, Fertig & Curtis, 433 So. 2d 512, 514 (Fla. 1983). "A claims-made policy, on the other hand, is one wherein the coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurer within the policy term. ... The essence, then, of a claims-made policy is notice to the carrier within the policy period." Id. (citing 7A Appleman, INS. LAW &

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future liability to which an occurrence policy exposes the insurance company, these companies now offer (also or instead) 'claims made' policies, which limit coverage to claims made during the policy period. The coverage is less, but so, therefore, is the cost." See also, Fremont Indem. Co. v. Gierhart, 560 So. 2d 1223, 1225 (Fla. 2d DCA 1990) ("the essence of a claims-made policy is notice to the carrier within the policy period").

[7] The Trizec case is discussed *supra*.

[8] The majority of courts nationwide have rejected the manifestation trigger in favor of a trigger that responds to when damage actually occurs, as required by the language of a CGL policy.

PRACTICE, 312 (Berdal ed. 1979)). A manifestation trigger, therefore, inappropriately funnels all losses into a single policy period, regardless of how many years the policyholder has paid premiums or when damage actually occurred.

Had AMERISURE intended to limit coverage to property damage that is "discovered" during the policy period (and charged a corresponding lesser premium), "it could have drafted clear policy language to accomplish that result." Koikos, 849 So. 2d at 271. It declined that opportunity. Accordingly, any damage actually occurring – taking place – during the policy period triggers the AMERISURE's CGLs. If the damage began during a prior policy period or continued into another CGL policy period containing the same coverage grant, those CGL policies would be triggered as well.

i. The Drafters of CGL Policies Rejected the Manifestation Trigger.

An actual injury/injury-in-fact trigger, which can be continuous, is consistent not only with Florida's interpretative principles, but also with the drafting history of CGL policies. Prior to 1966, CGL policies covered liability "caused by accident." American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983) (finding coverage triggered by injury-in-fact, rejecting manifestation and exposure theories). This created uncertainty because it appeared that such policies would cover only sudden but identifiable events, leaving open the question of whether the policies were intended to cover liabilities for injuries resulting from gradual processes. Id.; see also, Koikos, 849 So. 2d at 267 (discussing history of policy form).

The insurance industry created a task force to respond to the uncertainty. The task force substituted the "occurrence approach for the accident approach." American Home Prods. Corp., 565 F. Supp. at 1501. The 1966 version of the insurance industry's

policy form accordingly defines "occurrence" as injury or damage not only caused by an accident, but also by "injurious exposure over an extended period." Id. This language, however, left open the question of when coverage would actually be triggered, but the task force refused to include such language in the policy. Id. (citing the deposition of Richard Schmalz, member of the Joint Drafting Committee, which ultimately approved the 1966 form policy).

Documents and testimony in the In re: Asbestos Insurance Coverage Cases, 904 P.2d 370 (Cal. 1995) reveal that "over a period of decades, drafting committees of the National Bureau of Casualty Underwriters ("NBCU"), Mutual Insurance Rating Bureau ("MIRB"), and ISO [Insurance Services Office] repeatedly considered and rejected an amendment to the standard CGL policies explicitly prescribing manifestation or discovery as the only trigger of coverage for both property damage and bodily injury." John G. Buchanan, III, Richard D. Shore & Steven F. Benz, The Trigger of Coverage Under CGL Policies, 477 PRACTICING L. INS. 145, 159 n. 3 (Sept. 30, 1993).

The manifestation trigger was criticized on numerous grounds, including that there was no agreement "on the question of 'to whom must the injury be manifest?'" Ronald R. Robinson, "The Best of Intentions;" Drafting the 1966 Occurrence and 1973 Pollution Exclusion Policy Language, 4 ENVTL. CLAIMS J. 367, 375 (1992). Moreover, no one could agree on a definition of 'manifestation', creating the possibility of inconsistent results. Id. The manifestation trigger would also unfairly "permit a carrier to cancel following the first notice of injury and leave the insured without coverage for other injuries emerging from the same exposure," and ... in many cases injuries sufficiently serious to trigger coverage could occur prior to any form of manifestation."

American Home Prods. Corp., 565 F. Supp. at 1501. "These problems [among others] led the bureaus to reject altogether the use of manifest deemer language." Robinson, "The Best of Intentions," at 375.

The drafters also rejected the exposure approach, electing to "adopt instead the CGL's coverage of any injury [or damage] that results during the policy period, irrespective of when the 'contact with the means of injury' – the exposure – took place." American Home Prods., 565 F. Supp. at 1501. Thus, under the plain terms of the CGL policy form eventually adopted and at issue here, an actual injury/injury-in-fact trigger is operative, and where damage continues through multiple policy periods, so does coverage. Id. at 1503 citing Elliot, The New Comprehensive Gen. Liability Policy, in Liability Ins. Disputes 12-5 (S. Schreiber ed. 1968) (noting that the drafters recognized that "long exposure could involve 'cumulative injuries' in which 'more than one policy afford[s] coverage,' and 'each policy will afford coverage to the bodily injury of property damage which occurs during the policy period'").

j. Florida Law Supports an Actual Injury/Injury-In-Fact Trigger Which Can Apply Continuously to Successive Policies When Damage Continues to Happen.

Florida law has long held that, under an occurrence-based CGL policy, where damage and the causative event do not occur simultaneously, it is the damage that must occur, or be fairly alleged to occur, during the policy period, in order for coverage to exist and not the happening of the event or act that caused the damage. The applicable line of cases begins in 1964 with New Amsterdam Casualty Co. v. Addison, 169 So. 2d 877 (Fla. 2d DCA 1964), in which the Second District Court of Appeal held, as a matter of first impression in Florida, that "[t]he time of the occurrence of an

accident, within the meaning of a policy of liability, is generally deemed to be the time when the complaining party actually was damaged and not when the wrongful act was committed." Id. at 886.

Relying on New Amsterdam Casualty Co. v. Addison, the First District Court of Appeal in 1978 similarly held that occurrence-based liability coverage is triggered "when the complaining party is damaged," regardless of when the causative act occurred. Hertz Corp. v. Pugh, 354 So. 2d 966, 969 (Fla. 1st DCA 1978). A year later, the same court held in Travelers Insurance Co. v. C.J. Gayfer's & Co., 366 So. 2d 1199 (Fla. 1st DCA 1979) that "the phrase 'caused by an occurrence' informs the insured that an identifiable event other than the causative negligence must take place during the policy period. The term 'occurrence' is commonly understood to mean the event in which negligence manifests itself in property damage or bodily injury, and it is used in that sense [in the policy]." Id. at 1202.

In Trizec, the Eleventh Circuit relied in part on this line of cases to hold that under Florida law and the language of an occurrence-based policy, damage that continues, or is fairly alleged to continue, through multiple policy periods can trigger coverage under each successive policy. Trizec, 767 F. 2d 810. The court specifically rejected manifestation as a trigger of coverage and noted that other Florida courts had rejected the exposure trigger. Id. at 813 (emphasis added).

Under facts similar to those here, Trizec involved a carrier's duty to defend its policyholder against a claim alleging property damage caused by negligent construction of a roof deck. The construction took place from 1971 to 1975, the carrier was on the risk from 1972 to 1976, and the damage was discovered in 1979. The carrier (like

AMERISURE) claimed it did not have a duty to defend, arguing "the occurrence of the damage can only trigger coverage where it is discovered or has 'manifested' itself." Id.

The court disagreed: "the language of the policy itself belies Liberty's assertions," adding:

> The potential for coverage is triggered when an "occurrence" results in "property damage." There is no requirement that the damages "manifest" themselves during the policy period. Rather, it is the damage itself which must occur during the policy period for coverage to be effective. Here, the actual date that the damage occurred is not expressly alleged, but the language of the complaint, at least marginally and by reasonable implication, could be construed to allege that the damage (cracking and leaking of roof deck with resultant rusting) may have begun to occur immediately after installation, 1971 to 1975, and continued gradually thereafter over a period of time . . . . Because the complaint alleges facts which fairly bring the cause within the coverage of the insurance contract, there is a potential for coverage and [the carrier] owes [the policyholder] a duty to defend the main action.

Id. at 813 (internal citation omitted); see also, Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 754 n. 13 (11th Cir 1998) ("[c]ourts applying Georgia, Florida, and Alabama law . . . have rejected the 'manifestation trigger of coverage' approach in favor of an approach under which coverage is triggered by property damage alone taking place during the policy period" citing Trizec).

Similarly, in CSX Transp. v. Admiral Ins. Co., 1996 U.S. Dist. LEXIS 17125 (M.D. Fla. 1996), the Middle District of Florida rejected the manifestation trigger in favor of a continuing injury-in-fact trigger. In CSX, the insured railroad company, CSX, was sued by various public and private parties for contamination at various sites either owned or used by CSX "over a period of many years." Id. at *1. CSX brought a declaratory suit against its numerous and successive insurers seeking defense and indemnity. Id. Almost all parties stipulated to an injury-in-fact trigger, although one carrier argued that

"the date on which damage was discovered is the applicable trigger of coverage, i.e., the manifestation theory." Id. at *5, n.2. The court summarily dismissed the manifestation trigger: "this position is contrary to the language of the policies and the weight of authority, and it is rejected." Id.

The CSX court noted that "there is substantial authority suggesting that the multiple or continuous trigger theory is the choice that would be applied in most jurisdictions in the circumstances of this case [one being Florida], and that "as a practical matter, the two theories [injury-in-fact and continuous trigger] appear to be functionally equivalent." Id. at *5. The court thus applied a continuing injury-in-fact trigger for each policy period during which damage occurred, holding that the damages should be allocated to the various policies in proportion to time on the risk. The court noted that in so doing, it adopted the "majority rule." Id. at *8 citing Keene v. Ins. Co. of N. Am., 667 F.2d 1034 (D.D.C. 1981).

k. Cases Supporting the So-Called Manifestation Trigger are Internally Inconsistent, Contrary to the Policies, and Contrary to Florida Law.

Following CSX, the Middle District of Florida uniquely took an odd turn with regard to trigger of coverage decisions, in the case of Auto Owners Insurance Co. v. Travelers Casualty & Surety Co., 227 F. Supp. 2d 1248 (M.D. Fla. 2002) in support of the position that the appropriate trigger of coverage is manifestation. In Auto Owners, the court was called upon to decide whether a policy covered property damage caused by a leaking pipe, where the leak was discovered after the applicable policy expired but the damage occurred during the policy period. Id.

The court started out in the right direction, finding that in Florida "the potential for coverage is triggered when an 'occurrence' results in 'property damage.' There is no requirement that the damages be 'manifest' during the policy period. Rather, it is the damage itself which must occur during the policy period for coverage to be effective." Id. at 1265-66 citing Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F. 2d 810, 813 (11th Cir. Fla. 1985).

Two paragraphs later, however, the court, without explanation or solace in logic and in contravention to Trizec, states, "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" and thus "the 'trigger' for coverage for the CGL policies is when the damage occurs and if damage is continuously occurring, the 'trigger' is the time the damage 'manifests' itself or is discovered." Id. at 1266. The court then held that the trigger of coverage (and the occurrence) was the date the leaking pipe was discovered, even though the damage caused by the leaking pipe "undisputedly occurred" before it was discovered. Id. at 1268.

The Auto Owners court's internally inconsistent position resulted from its reliance on an Alabama case: American Motorists Insurance Co. v. Southern Security Life Insurance Co., 80 F. Supp. 2d 1280, 1284 (M.D. Ala. 2000), which in turn relies on Travelers Ins. Co. v. C.J. Gayfer's & Co., 366 So. 2d 1199. Auto Owners, 227 F. Supp. 2d at 1266. In Gayfer's, the court held that a claim against a plumbing contractor was not covered where a plumber's allegedly negligent work on a drainage system took place during the policy period but the system failed and water damage to the plaintiff's store occurred after the policy period. Gayfer's, 366 So. 2d at 1200. The Gayfer's court

stated that an "occurrence" under the policy "is commonly understood to mean the event in which negligence manifests itself in property damage or bodily injury." Id. at 1202. Although the court used the term "manifest", it applied the actual injury/injury-in-fact trigger: the date the water damage actually occurred. See Id.

Thus, this Court should decline to consider Auto-Owners; it not only contravenes Florida law, but is internally inconsistent. The other cases are similarly flawed and none undertake a thorough analysis of the language of the operative AMERISURE CGLs.[9] This Court now has the opportunity to reaffirm Florida law, including principles of policy interpretation and the language of the occurrence based AMERISURE CGLs at issue.

I. A Continuous Actual Injury/Injury-In-Fact Trigger Has Been Accepted by the Majority of Jurisdictions.

The continuous actual injury/injury-in-fact trigger, founded upon policy language requiring damage during the policy period, has long had an application in the property damage context. In Gruol Construction Co. v. Insurance Co. of North America, 524 P.2d 427 (Wash. Ct. App. 1974), a building owner sued a construction company, claiming that negligent actions taken during construction caused dry rot. Id. at 429. The construction company's three successive carriers refused to defend it, so the construction company brought suit against them. Id. The trial court found that the injury was a continuous process and thus held all three carriers jointly and severally liable. Id. The appellate court affirmed, noting that "in a dispute between an insured who has

[9] Harris Specialty Chems., Inc. v. United States Fire Ins. Co., 2000 U.S. Dist. LEXIS 22596 (M.D. Fla. July 7, 2000) (misstating Trizec; inapplicable because it involved no actual damage to another's property); Assurance Co. of Am. v. Lucas Waterproofing Co., Inc., 581 F. Supp. 2d 1201 (S.D. Fla. 2008) (referencing manifestation but applying an actual injury/injury-in-fact trigger of coverage); North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1289-90 (S.D. Fla. 2006) (supporting actual injury/injury-in-fact theory, as court held prisoners' incarceration, not exoneration, was trigger date).

sustained damages of a continuing nature, and the carriers providing coverage, the burden of apportionment is on the carriers." Id. at 637-38.

Since Gruol, courts in the majority of states have, in accordance with policy language, adopted a trigger of coverage that holds that a CGL policy is triggered if property damage takes place, or is alleged to have taken place, during the policy period, and that the continuous trigger applies where property damage progresses or is alleged to progress through multiple policy periods. See e.g., Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 486 S.E.2d 89, 91 (S.C. 1997) (holding, in general contractor's action seeking coverage under subcontractor's policy, that coverage under CGL policy "is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage"); Arrow Exterminators, Inc. v. Zurich Am. Ins. Co., 136 F. Supp. 2d 1340, 1349 (N.D. Ga. 2001) (concluding, in termite damage case, that the "appropriate trigger is a continuous one" where policy does not specify that occurrence requires discovery or manifestation, and declining to "rewrite an occurrence policy into a claims-made policy which in essence is what Zurich is requesting"); Am. Employer's Ins. Co. v. Pinkard Constr. Co., 806 P. d 954, 955-56 (Colo. Ct. App. 1990) (holding that because corrosion of roof installed by policyholder was progressive and policy language dictates that "property damage triggers coverage when actual damages are sustained," each policy issued during period that damage occurred was triggered); Sentinel Ins. Co. v. First Ins. Co. of Haw., 875 P.2d 894, 915-17 (Haw. 1994) (holding, in construction defect case, injury-in-fact trigger is mandated by plain language of policy, and where the damage continues over multiple policy periods, continuous trigger applies).

A more recent case considering this issue in depth, under facts similar to those in this case, is Don's Building Supply, Inc. v. OneBeacon Insurance Co., 267 S.W. 3d 20 (Tex. 2008). Don's Building Supply ("Don's") sold and distributed "a synthetic stucco product known as Exterior Insulation and Finish System (EIFS)." Id. at 22. The siding was installed on homes from December 1993 to December 1996, during which time Don's was insured under CGL policies that were later assigned to OneBeacon. Id.

Various homeowners sued Don's alleging that the EIFS was defective and that it caused wood rot and other damage to their homes. Id. at 22. They also alleged that the damage began within six months of installation, but was hidden and therefore not discoverable until after the OneBeacon policy ended. Id. OneBeacon filed a declaratory judgment action asking the court to determine it had no duty to defend Don's, and the trial court agreed "that the duty [to defend] does not arise until the damage becomes identifiable." Id. at 23. Don's appealed, and the Fifth Circuit certified the following question:

> When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for the purpose of an occurrence-based commercial general liability policy?

Id. The Texas Supreme Court analyzed the policy language, "considered the[ ] provisions together reading them for their plain meaning, [and held] that property damage under this policy occurred when actual physical damage to the property occurred." Id. at 24.

In so holding, the court reviewed, at length, law from other jurisdictions, and rejected the manifestation trigger because:

> [t]he policy before us simply makes no provision for it. The policy in straightforward wording provides coverage if the property damage "occurs during the policy period," and further provides that property damage means "[p]hysical injury to tangible property." Whatever practical advantages a manifestation rule would offer to the insured or the insurer, the controlling policy language does not provide that the insurer's duty is triggered only when the injury manifests itself during the policy term, or that coverage is limited to claims where the damage was discovered or discoverable during the policy period.

Id. at 28-29. The court noted that the policy "links coverage to damage, not damage detection. Id. Engrafting a manifestation rule to limit coverage – by conditioning coverage on the observations of a third party claimant – would blur the distinction between this occurrence-based policy and a claims-made policy." Id. Likewise, the court rejected the exposure trigger as inconsistent with the policy language. Id. at 29.

The court held that because the pleadings in the underlying lawsuit alleged property damage during the OneBeacon policy period, OneBeacon owed Don's a duty to defend: "this duty is not diminished because property damage was undiscoverable or not readily apparent or 'manifest,' until after the policy period ended. . . . [T]he parties could have conditioned coverage on identifiability, but the contract imposes no such limitation." Id. at 31-32. And although the court did not reach the issue of whether a continuous trigger would apply under the particular circumstances of the case and thus "express[ed] no opinion on these questions," it followed its refusal to opine with a long list of cases and treatises applying and/or adopting the continuous actual-injury trigger in cases where damage continues through successive policy periods. Id. at 32, n.45 (citations omitted).

Cases nationwide properly reject the manifestation trigger because it seeks to add an unwritten requirement into CGL occurrence policies contrary to the plain

language of those policies covering "property damage" that occurs during the policy period. The policies instead dictate that an actual injury/injury-in-fact trigger applies, and that if the damage continues taking place through successive policies, then those policies are triggered as well.

m. AMERISURE's Affirmative Defense Present No Barrier to Summary Judgment in Favor of JGM.

The parties agree and do not dispute that there has been an "occurrence" which caused "property damage" within the meaning of AMERSIURE's CGLs. However, AMERISURE has raised a number of affirmative defenses that suggests that it disputes the nature of that "property damage" and when it occurred.

1. AMERISURE Misconstrues the Policy Language.

The affirmative defense set forth in paragraph 44 of AMERSIURE's answer asserts that there was no "occurrence" resulting in "property damage" within AMERISURE's CGLs effective January 1, 2003 through January 1, 2005. However as discussed *supra*, AMERISURE's CGLs being occurrence based polices cover "property damage" if the damage occurs "during the policy period" and is caused by an occurrence, "including continuous or repeated exposure" to conditions. The focus is on the damage as the signal event – the only event under the language of the CGL – that must "occur [] during the policy period" in order to be covered. The key date is when the damage happened; not when someone happens upon it. As such, AMERISURE misconstrues the policy language in this affirmative defense.

2. The Pollution Exclusion Has No Application.

The affirmative defense set forth in paragraph 45 of AMERSIURE's answer asserts that there is no liability insurance coverage "to the extent that the Plaintiff [JGM] seeks to recover monies paid to Property Reserve, Inc. for damages resulting from 'pollutants.'" As set forth *supra*, the principal category of damages sought against AMERISURE relates to its failure to defend. In this affirmative defense, AMERISURE did not cite any clauses from AMERISURE CGLs but it is assumed that AMERISURE must be relying upon the so-called pollution exclusion which reads:

> 2. Exclusions...f. Pollution
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharged dispersal seepage, migration, release or escape of "pollutants"

The term "pollutants" is defined in the policy as:

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and wastes. Wastes includes materials to be recycled, reconditioned or reclaimed.

There are no allegations in the complaint in the Underlying Action of any damage caused by "pollutants." The principal source of damage is rain water, which is not a pollutant. See e.g., State Farm Fire & Gas Co. v. M.L.T. Construction Co., 849 So.2d 762 (La. App 2003). Thus, the "pollution" exclusion has no application. Furthermore, the Underlying Action did not involve any personal injuries. A typical pollution exclusion case is one in which a person claims personal injury due to inhaling vapors. Technical Coating Applicators, Inc. v. U.S. Fidelity and Guaranty Co., 157 F. 3d 843 (11th Cir. Fla.

1998)(fumes from roofing products); Philadelphia Indemnity Insurance Co. v. Yachtman's Inn Condo Association, Inc., 595 F. Supp. 2d. 1319 (S.D. Fla. 2009)(sewage, feces and battery acid); Deni Assoc., 711 So. 2d 1135 (ammonia spilled from blueprint machine and insecticide Ethion 4 Miscible sprayed on bystanders were "pollutants"). No Court has found ordinary rain water to be a pollutant. As such, the pollution exclusion is inapplicable to this case.

3. The Subcontractor Exception to the "Your Work" Exclusion.

The affirmative defense set forth in paragraph 47 of AMERSIURE's answer asserts that AMERISURE's CGLs "[do] not apply if the damaged work or work out of which the damage arises was performed on your behalf by a subcontractor." As discussed at length *supra*, this point of law was clearly resolved by the Florida Supreme Court in Pozzi Window Co., 984 So. 2d 1241 and J.S.U.B., Inc., 979 So.2d 871. Clearly, faulty workmanship by a subcontractor that is neither intended nor expected from the standpoint of the contractor can constitute an "occurrence." Id. Indeed, the Florida Supreme Court determined that the insurance industry had intentionally marketed such a product for the protection of general contractors from unexpected occurrences. See Id. As set forth in the affidavit of Mr. Morrill, all worked performed at the Project was performed by subcontractors; JGM did not self-perform any work at the Project. See Exhibit "1". Accordingly, on these facts, as a matter of law, the exclusion for damage to "your work" does not apply to the conditions set out in this case.

4. The Mold and Fungi Exclusion Has No Application.

The affirmative defense set forth in paragraph 46 of AMERSIURE's answer asserts the Mold and Fungi Exclusion as contained in only the 2004-2005 AMERISURE

CGL. As set out in the affidavits supporting this Motion, this is not a case concerning the cost of cleanup of mold or mildew. See Exhibits "1" and "2". The affidavit of Brett D. Newkirk establishes that the repair items sought by the owner in the underlying lawsuit involved building repairs and replacement of damaged wood but there was no mold remediation claim in the Underlying Action.[10] See Exhibit "2". In the Underlying Action, the allegations of the property owner went far beyond damage to wood and included an entire host of subcontractors' errors. See Exhibit "G", "H" and "I". As such, AMERISURE breached its duty to defend given the broad scope of the owner's allegations in the various iterations of the complaint in the Underlying Action. Id. Accordingly, AMERISURE has not and cannot establish that the allegations in the complaint in the Underlying Action fall "solely and entirely" within the exclusion, and as such AMERISURE cannot use the exclusion as a basis to avoid its duty of defend. See Lime Tree, 980 F. 2d at 1405-07; Baron Oil Company, 470 So. 2d 810.

5. The "Other Insurance" Clause Has No Application.

The affirmative defense set forth in paragraph 48 of AMERSIURE's answer asserts the "other insurance" clause which provides in part: "If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all the other insurers." As set forth in the attached affidavit of Mr. Morrill, not one carrier provided a defense to JGM at anytime in the Underlying Action. See Exhibit "1". As such, AMERISURE was under a duty to do so whether or not other policies existed. Adding insult to injury, the broad coverage language found in AMERISURE's

[10] There was no personal injury claim made by any tenant. The essence of the Underlying Action was a claim by the landlord that the Project was damaged as a result of improper subcontractor workmanship. It was never framed in any way as a mold or mildew claim.

UMBRELLAS required AMERISURE to drop down and defend JGM pursuant to such umbrella policies. See Exhibits "D", "E" and "F". Accordingly, in breach of AMERISURE's CGLs and AMERISURE's UMBRELLAS, AMERSIURE failed and refused to provide a defense to JGM.

6. The "Voluntary Payment" Clause Has No Application.

The affirmative defense set forth in paragraph 49 of AMERSIURE's answer asserts the "voluntary payment" clause. The attached affidavit of Mr. Morrill establishes that AMERISURE refused to provide a defense to the Underlying Action. See Exhibit "1". It is well established that an insured is free to enter into a reasonable settlement when its carrier has wrongfully refused to provide it with a defense. First American Title Insurance Co. v. National Union Fire Insurance Co., 695 So. 2d 475 (Fla. 3rd DCA 1977)(where a carrier denies a claim and refuses to defend, the insured can take whatever steps are necessary to protect itself from a claim). A carrier which denies coverage does so at its own risk. This has been held to be true even where such denial is on a mistaken but honest belief that coverage did not exist. Thomas v. Western World Ins. Co., 343 So. 2d 1298, 1302 (Fla. 2d DCA 1977); see also, Ernie Haire Ford, Inc. v. Universal Underwriters Ins. Co., 331 Fed. Appx. 640, 647 (11th Cir. Fla. 2009); Gallagher v. Dupont, 918 So. 2d 342, 347 (Fla. 5th DCA 2005); St. Paul Fire & Marine Ins. Co. v. Thomas, 273 So. 2d 117, 121 n.7 (Fla. 4th DCA 1973).

On the undisputed facts, AMERISURE declined a defense and accordingly, this clause has no application. See American Reliance Insurance Co. v. Perez, 712 So.2d 1211 (Fla. 3rd DCA. 1998) and First American, 695 So. 2d 475.

IV. CONCLUSION.

The allegations, as pled in the complaints in the Underlying Action, fall clearly within the coverage grant of the subject AMERISURE CGLs and do not establish that the claims fall "solely and entirely" within any policy exclusion. As such, there was the potential for coverage and AMERISURE owed a duty to defend JGM in the Underlying Action. In failing to provide said defense, AMERISURE breached that duty. The undisputed material facts of the case show that at least some of the covered damages in the Underlying Action actually happened (occurred) during the policy periods of AMERISURE's CGLs. Because there are no material facts in dispute that AMERISURE breached its duty to defend and its duty to indemnify JGM for damages which occurred "in fact" during the AMERISURE policy periods, JGM is entitled to Summary Judgment or in the alternative, Partial Summary Judgment in its favor, with the Court reserving on the issue of damages and attorneys' fees. All of the affirmative defenses of AMERISURE are not applicable to the undisputed facts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished via E-mail and regular U.S. Mail to Counsel for AMERISURE: ANDREW F. RUSSO, ESQUIRE, Rywant, Alvarez, Jones, Russo & Guyton, P.A., Suite 500, Perry Paint & Glass Building, 109 Brush Street 7406, Tampa, FL 33602, arusso@rywantalvarez.com, DONALD ELDER, ESQUIRE and ABRAHAM SANDOVAL, ESQUIRE, Tressler LLP, 233 South Wacker Drive, 22nd Floor, Chicago, IL 60606, delder@tresslerllp.com and asandoval@tresslerllp.com on this 19th day November, 2010.

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