IN THE CIRCUIT COURT IN AND FOR THE 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

AMERISURE INSURANCE COMPANY,
a Michigan insurance company,

Defendant.
_____/

PLAINTIFF'S REPLY IN OPPOSITION TO AMERISURE'S RESPONSE TO, AND IN SUPPORT OF 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 hereby serves this Honorable Court with its Reply in Opposition to Amerisure's Response to and in Support of Plaintiff's Motion for 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 in support thereof, states as follows:

I. SUMMARY OF REPLY ARGUMENT

In failing to recognize that allegations pled in the complaints filed in the Underlying Action gave rise to at least potential coverage and/or a mere possibility of liability and/or that the complaint "at least marginally and by reasonable implication" alleged losses within

coverage under the subject policy, AMERISURE breached the policy by failing to defend JGM, and as such, JGM is entitled summary judgment as to the duty to defend.

JGM purchased an occurrence-based CGL policy that pays for damage that occurs, meaning "actually happens", during the policy period. When the loss, such as the loss in the instant case, is progressive in nature, each CGL policy in effect when damage actually happens, is triggered. The unambiguous language of the policy requires nothing more or less than this result. The "manifestation" trigger proffered by AMERISURE finds not one iota of support in the actual policy language. AMERISURE's proposed "manifestation" trigger is a clever attempt to truncate and limit coverage availability for progressive losses. Carriers primarily advance this trigger theory based on the claim that it is easier to discern when the damage was found, as opposed to when it actually happened. Even, assuming arguendo, "manifestation" was "easier" to discern, this cannot trump the plain policy language, which is the polestar for construing insurance policies.

Given the divergent case law across the country, most of which favors JGM, the best that could be said relating to AMERISURE's "manifestation" position is that the policy is ambiguous. Such ambiguity must, of course, be interpreted in favor of the insured in a manner that maximizes coverage. The adoption of an "injury-in-fact" trigger accomplishes this result. To the extent that the Court finds the trigger issue is ambiguous, this Court can take solace in the fact that an "injury-in-fact" trigger would align Florida with the overwhelming majority of other jurisdictions that have considered the matter, is consistent with the drafting history of the policy, and is representative of the view espoused by most treatises and commentators who have addressed the subject.

II. AMERISURE HAD THE DUTY TO DEFEND REGARDLESS OF WHICH "TRIGGER OF COVERAGE" APPLIES.

a. The Duty to Defend Based on Potential Coverage and/or Possible Liability - Generally.

JGM is entitled to summary judgment as to the duty to defend. A carrier 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). When reviewing the complaints filed in the Underlying Action, they gave rise to at least **potential** coverage under AMERISURE's CGLs. This mere **possibility** of liability under AMERISURE's CGLs is all that is necessary to trigger the duty to defend.

If the complaint alleges facts which are partially within and partially outside of coverage under 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). 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 at 613 (emphasis added); 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); Aetna Ins. Co. v. Borrell-Bigby Electric Co., 541 So. 2d 139 (Fla. 2d DCA 1989); 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 in determining whether the complaint may represent a covered occurrence. See Grissom, 610 So. 2d at 1307, fn. 5 (holding that duty to defend was required because of the existence of doubt as to the scope of the claim); 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.

b. AMERISURE Breached its Duty to Defend Because the Underlying Action's Complaints, Both Expressly and Impliedly, Gave Rise to At Least Potential Coverage and/or Possible Liability for Construction Defect Related Damages.

The Florida Supreme Court's decisions in J.S.U.B. and Pozzi Window make clear that potential coverage was available to the JGM for errors occasioned by JGM's subcontractors. 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; construction defects constitute an accident and occurrence within the meaning of the CGL policy.) AMERISURE, in failing to recognize that the construction defect and damage allegations pled in the complaints filed in the

Underlying Action gave rise to at least **potential** coverage and/or a mere **possibility** of liability and/or that the complaint **"at least marginally and by reasonable implication"** alleged losses within coverage under the subject policy, breached the policy by failing to defend JGM.

c. The Discovery of the Construction Defects Claimed in the Underlying Case Gave Rise to At Least Potential Coverage and/or Possible Liability.

Relative to the timing of the loss, the complaints in the Underlying Action at least give rise to the **potential** that construction defect damages actually occurred/happened/took place prior to being observed in October 2005 but within at least one of AMERISURE's CGLs which provided coverage from January 1, 2002 consecutively through January 1, 2005. See Trizec Props., Inc. v. Biltmore Constr. Co., Inc., 767 F. 2d 810 (11th Cir. 1985); Exhibits "G", "H" and "I". Regardless of when property damage was first observed, the date the damages were observed does not eliminate the duty to defend even if it is assumed that the so-called "manifestation" trigger of coverage applies to AMERISURE's CGLs. AMERISURE, in failing to recognize that the construction defect damages gave rise to the **potential** that the damages actually occurred/happened/took place during the policy period, breached the policy by failing to defend JGM.

III. Occurrence-Based CGL Policies in Effect When Property Damage Takes Place are "Triggered" Regardless of Whether That Property Damage has Manifested or is Even Discoverable.

a. Bedrock Principles of Florida Law Require That Policy Construction Start and End With the Policy's Plain Language, and Thus Require the Application of the "Injury-In-Fact" Trigger.

The AMERISURE CGLs afford coverage based on **when the damage actually happened**. The "injury-in-fact" trigger is the only one consistent with the policy's plain

language. Florida law is clear, insurance policies, like other contracts, are interpreted in accordance with their plain ordinary meaning. See Garcia v. Federal Ins. Co., 969 So. 2d 288, 292 (Fla. 2007); Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000); see also, Fla. Stat. § 627.419(1). 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, not its manifestation or discoverability.[1] It is immaterial whether property damage was latent or patent, had manifested or was hidden, or was discovered or even discoverable during that policy period.

There is absolutely no language in AMERSURE's CGLs requiring (or even suggesting) that the property damage must be "patent," "manifest", "discovered", "capable of detection", or the like, during the policy period. 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). Florida courts simply disallow judicial rewriting of policies of insurance, particularly to suit the needs of carriers. See Flaxman v. Government Employees Ins. Co., 933 So. 2d 597 (Fla. 4th DCA 2008). Whatever practical advantages a manifestation rule would offer

[1] "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.

to the insured or to the carrier, the controlling policy language **does not** provide that the carrier'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. Instead of endorsing its own policies as the carrier has drafted them, AMERIURE is attempting to have the judiciary engraft an *ex post facto* endorsement of the "manifestation" trigger concept into its policies.

Carriers, as the drafters of the form policy, are in total control of the insuring process and are well able to specify different trigger rules by contracts as they wish. See Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3D (2007 Supp.) § 102:22 ("The parties may, of course, make their intent explicit in the contract of insurance by stating that coverage will be triggered by the occurrence of the harm producing event, by initial manifestation of damages, or by requiring that both occur within the policy period."). AMERISURE, having failed to draft their CGLs to include a manifestation trigger, is stuck with their policies as written. Neither AMERSIURE nor this Court are permitted to add meaning and words to the CGLs.

b. Ambiguity Exists When Policy Terms are Subject to Different Interpretations.

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); 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). 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 v. Lumbermens Mut. Cas. Co., 704 So. 2d 176 (Fla. 4th DCA 1997); 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).

Of course, JGM has argued that the policy is unambiguous and this is because JGM maintains that the plain meaning and language of the policy is clear, as discussed *supra*. However, because there are two differing interpretations as to the "trigger of coverage" being espoused, one by AMERISURE and one by JGM, at a minimum, the AMERISURE CGLs should be considered ambiguous.

c. Ambiguity in Interpretation of the Policy Form Exists Based on Divergent Case Law Nationwide.

Florida recognizes that "proof of the pudding" of ambiguity is appropriately found where the reasoned judgment of numerous courts come to opposite or differing conclusions from a study of essentially the same policy language. Security Insurance Company of Hartford v. Investors Diversified Limited, 407 So. 2d 314 (Fla. 4th DCA 1981). Admittedly, some of the cases cited by AMERISURE hold that a manifestation trigger applies to progressive construction defect claims. Given the conflicting holdings of courts around the country, there can be no doubt that there is a massive, nationwide dispute with numerous state and federal courts reaching different views as to coverage under the same CGL policy forms. However, the majority of cases, including the more recent and better

reasoned cases, trend towards JGM's position. If this divergence of holdings does not prove ambiguity, nothing can. Florida courts simply disallow judicial rewriting of policies of insurance, particularly to suit the needs of carriers, thus there is no doubt this is reason that the "manifestation" trigger has fared so poorly in the last decade. In a liability insurance context, Rhode Island is the only state in the last ten years whose Supreme Court has adopted the "manifestation" trigger. See Textron, Inc. v. Aetna Cas. & Sur. Co., 723 A.2d 1138 (R.I. 1999) and CPC International, Inc. v. Northbrook Excess & Surplus Ins. Co., 668 A.2d 647, 649-50 (R.I. 1995).

This Honorable Court should not be swayed by the limited number of authorities purporting to construe CGL policies as imposing a "manifestation" trigger, because an error, no matter how often it is repeated, still remains an error. AMERISURE would have this Court continue to perpetrate these errors rather than correctly apply Florida's rules of construction to the AMERISURE CGLs which would lead the Court to only one result – that coverage is available during each and every policy when damage actually happened. In the face of ambiguity, it is absolutely straightforward that the policy must be interpreted in a manner most favorable to the insured, and the "injury-in-fact" trigger accomplishes this goal. Because of the divergent nationwide treatment of "trigger", the AMERISURE CGLs should be considered ambiguous and a review of the drafting history is relevant, pertinent and required.

d. Ambiguity Allows for Review of the Drafting History – Which Clearly Intends to Provide for a Continuous "Injury-In-Fact" Trigger and Explicitly Rejects Manifestation and Other Triggers.

JGM re-incorporates the arguments as to the drafting history as set forth in its Motion for Summary Judgment and will not repeat them herein. In the Florida Supreme

Court decision in J.S.U.B., the court recognized that the ISO's drafting history was a relevant point of analysis regarding the meaning of the standard form CGL policy. J.S.U.B., 979 So. 2d at 879-80, 894. Relative to the trigger issue, the drafting intention of the policy is clear; the drafters intended an "injury-in-fact" based trigger of coverage allowing coverage during each policy period where damage actually took place in a progressive loss setting. Given that "injury-in-fact" was the intended outcome, it is not surprising that it is the only one consistent with the policy language. Since it is clear that the ISO intended for the "injury-in-fact" trigger to apply in this coverage situation, AMERISURE is asking this Court to leave Florida's CGL insureds in the anomalous position of paying for a premium rating which built in the cost of an "injury-in-fact" trigger which AMERISURE is asking to be taken away; under no analysis can this be the law of Florida.

e. Adoption of "Injury-In-Fact" Trigger Would Align Florida With the Overwhelming Majority of Other Jurisdictions.

The vast majority of jurisdictions that have decided the trigger issue, particularly in a progressive construction defect setting, have held that the injury-in-fact trigger is applicable, and that all policies in effect when damage actually occurs are triggered. Similarly, insurance policy commentators agree that the injury and trigger coverage is both the majority rule and only trigger "consistent" with the policy language.[2]

Since Gruol Construction Co. v. Insurance Co. of North America, 524 P.2d 427 (Wash. Ct. App. 1974), courts in the majority of states have, in accordance with policy

[2] 2 Jeffrey W. Stempel, Stempel on Insurance Contracts § 14.09[B] (3d ed. 2007 Supp.); Couch on Insurance 3D § 102:22; 2 Allan D. Windt, Insurance Claims & Disputes § 11.4 (4th ed. 2007 Supp.); Peter J. Kalis, et al., Policyholder's Guide to the Law of Insurance Coverage § 2.02[C][4], at 2-17 (2007); 4 David L. Leitner, Raegan W. Simpson & John M. Bjorkman, Law & Practice of Insurance Coverage Litigation § 44:26 (2007 Supp.); R. Steven Rawls and Rebecca C. Appelbaum, Coverage Trigger: Getting It Right for the Right Reason (International Risk Management Institute October 2008).

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); Arrow Exterminators, Inc. v. Zurich Am. Ins. Co., 136 F. Supp. 2d 1340, 1349 (N.D. Ga. 2001); Am. Employer's Ins. Co. v. Pinkard Constr. Co., 806 P. d 954, 955-56 (Colo. Ct. App. 1990); Sentinel Ins. Co. v. First Ins. Co. of Haw., 875 P.2d 894, 915-17 (Haw. 1994). 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.

Of particular note, as discussed in JGM's Motion for Summary Judgment, is the Texas case of Don's Building Supply, Inc. v. OneBeacon Ins. Co., 267 S.W. 3d 20 (Tex. 2008) where the Texas Supreme Court has aligned itself with those jurisdictions recognizing an "injury-in-fact" trigger as being required under a CGL. In so doing, the Texas Supreme Court thoroughly addressed and rebuffed every argument of those carriers supporting a "manifestation" trigger. The Texas Supreme Court's rebuttal to the carrier's efficiency-based arguments regarding the "manifestation" trigger is particularly telling, as the Court noted:

> Pinpointing the moment of injury retrospectively is sometimes difficult, but we cannot exalt ease of proof or administrative convenience over faithfulness to the policy language; our confined task is to review the contract, not revise it. **Our prevailing concern is not one of policy but of law, and we must**

> **honor the parties' chosen language--covering third-party claims if damage to the claimant's property occurred during the policy period. The policy asks when damage happened, not whether it was manifest, patent, visible, apparent, obvious, perceptible, discovered, discoverable, capable of detection, or anything similar. Occurred means when damage occurred, not when discovery occurred.** In this case, property damage occurred when the home in question suffered wood rot or some other form of physical damage.

Don's Building Supply, 267 S.W. 3d at 29 (emphasis added); see also Byrne, Ltd. v. Trinity Universal Ins. Co., 2008 Tex. App. LEXIS 9041(Tex. App. Dallas 5th Dist. 2008); Union Ins. Co. v. Don's Building Supply, 266 S.W. 3d 592 (Tex. App. Dallas 5th Dist. 2008); and OneBeacon Ins. Co. v. Don's Building Supply, 553 F. 3d 901 (5th Cir. 2008). 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.

f. Cases Adopting the So-Called "Manifestation" Trigger May Actually be "Injury-In-Fact" Holdings.

In particular, the Texas Supreme Court identified "trigger confusion" in cases that had adopted the so-called "manifestation" trigger by recognizing that many of the holdings were, in actuality, "injury-in-fact" trigger holdings inartfully using the term "manifest." As Don's Building Supply notes:

> ...decisions sometimes cited as following the manifestation rule, and which indeed use a form of the word "manifest" in their analysis, do not actually follow the manifestation rule as opposed to the actual-injury rule, because they were not concerned with *latent* damage where these two rules diverge. Instead, these cases merely hold that the time of injury or damage, as opposed to the time of the alleged negligent conduct that caused the injury, is the triggering event under the policy. **These cases, when carefully reviewed, may actually be more aligned with the actual-injury rule than**

with the manifestation rule, and appear to use a form of the verb "manifests" merely as a synonym for "results in" or "leads to," rather than drawing a distinction between the actual occurrence of damage and the later discovery or obviousness of damage.

Id. at 27 (emphasis added). The recent federal district court cases purporting to interpret Florida law may have fallen victim to this: Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248 (M.D. Fla. 2002); Essex Builders Group, Inc. v. Amerisure Ins. Co., 485 F. Supp. 2d 1302 (M.D. Fla. 2006); Harris Spec. Chems., Inc. v. U.S. Fire Ins. Co., 2000 U.S. Dist. LEXIS 22596 (M.D. Fla. 2000); Assurance Co. of Am. v. Lucas Waterproofing Co., Inc., 581 F. Supp. 2d 1201 (S.D. Fla. 2008); and North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1289-90 (S.D. Fla. 2006). Ironically, all of these cases claim allegiance to the holding in Trizec. There can be no doubt that Trizec is an "injury-in-fact" trigger case which explicitly rejects "manifestation" trigger. The Eleventh Circuit reaffirmed this view in Boardman Petrolum, Inc. v. Federated Mut. Ins. Co., 135 F. 3d 750, fn. 13 (11th Cir. 1998).

g. Florida Cases Supporting "Manifestation Trigger" are Internally Inconsistent, Contrary to the Policies, and Contrary to Florida Law.

After Trizec and CSX, the Middle District of Florida, in the case of Auto Owners Insurance Co. v. Travelers Casualty & Surety Co., 227 F. Supp. 2d 1248 (M.D. Fla. 2002), took a turn in support of the "manifestation" trigger. As detailed in JGM's Motion for Summary Judgment, those arguments are incorporated herein and all will not be repeated, except to again emphasize the internal inconsistencies in Auto Owners and Casserino Constr.

The Auto Owners court cited Trizec stating, "the potential for coverage is triggered when an 'occurrence' results in 'property damage'", "there was no requirement that the

damages be 'manifest' during the policy period", and "it is the damage itself which must occur during the policy period for coverage to be effective." Auto Owners, 227 F. Supp. 2d at 1265-66, citing Trizec, 767 F. 2d at 813. Two paragraphs later, without explanation and in contravention to Trizec, the court stated "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. Such internal inconsistencies are also present in the Middle District's recent decision in Mid-Continent Cas. Co. v. Frank Casserino Constr., 721 F. Supp. 2d 1209 (M.D. Fla. 2010).

Casserino Constr. involved the construction of two buildings completed in 1998. Mid-Continent Cas. Co. v. Frank Casserino Constr., 721 F. Supp. 2d 1209 (M.D. Fla. 2010). Water intrusion damages were not discovered until at least 2004. Id. Experts testified via affidavits that the "latent defects...would have been discernable about the time the first measurable rains after construction was concluded in 1998." Id. The latent water intrusion defects were not readily discernable during the period of the relevant CGL policies and could have only been discovered by removal of things like roofing or siding. Id. The Middle District held:

> For there to be coverage under a CGL policy, **there must be a covered loss that occurs within the policy period**. Although an "occurrence" need not necessarily take place during the policy period, **"property damage" must occur during the policy period**. *Auto Owners Ins. Co. v. Travelers Cas. & Surety Co.*, 227 F. Supp. 2d 1248, 1265 (M.D. Fla. 2006); *see also Trizec Properties, Inc. v. Biltmore Constr. Co.*, 767 F.2d 810, 813 (11th Cir. 1985) ("[I]t is the damage itself which must occur during the policy period for coverage to be effective").

Id. Later in the opinion, however, the Court then stated:

> 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.

Id. In careful review of the opinion, the Middle District is equating the term "occur" with the term "manifest". See Id. Clearly, the Middle District understood that it was not the performance of the negligent construction that triggered coverage, but that the timing of the "property damage" was significant. See Id. However, in one sentence the Court says that coverage is triggered when "property damage" "occurred", then in another sentence concludes that coverage is triggered when the "property damage" "manifests" itself. See Id.

Most recently, in the case of Amerisure Ins. Co. v. Albanese Popkin the Oaks Dev. Group, L.P., 2010 U.S. Dist. LEXIS 125918 (S.D. Fla. Nov. 30, 2010), the Southern District made the distinction that in Trizec, "[b]ecause the complaint in the underlying case was construed to have alleged that the damage occurred during the policy period, the question of when the damage manifested itself was irrelevant to the analysis," but recognized Trizec's holding that with an occurrence policy, "the critical inquiry is when did the insured sustain actual damage." Id. Despite this, in purposely ignoring any continuously occurring damage, the Southern District found that "[m]anifestation of the damage [was] relevant...because it establishe[d] that...**actual damage** [was sustained] before the policy became effective." Id. This holding further demonstrates inconsistencies in Florida as the Court concluded that **actual damage was sustained when those actual damages were manifest or seen or viewed or discovered** and completely ignores any time frame between when the damages began or ended. At some point in time the damage began to happen/occur/exist/take place. At some point in time, prior to repair, those damages were

discovered/seen/observed/viewed/manifest. And there is some point in time that the damages were finally repaired – meaning – the damage ended. The Southern District has seemingly decided this case in a vacuum where time does not exist.

These glaring internal inconsistencies and its contravention of Florida law necessitate that Auto Owners, along with those cases which rely on and follow Auto Owners[3], be disregarded. This Court now has the opportunity to set the record straight by reaffirming Florida law, including principles of policy interpretation, and the language of the occurrence based AMERISURE CGLs at issue. To suggest, as AMERISURE has, that the issue of trigger in Florida is 'settled' or 'clearly adopted' shows deficient comprehension of the relevant case law and such suggestions misguide this Court. See AMERISURE Response, p. 4 and 7.

IV. AMERISURE's Affirmative Defenses Present No Barrier to Summary Judgment in Favor of JGM.

While AMERISURE contends that the sole issue before the Court is that of "trigger", AMERISURE has pled several affirmative defenses. In so pleading, they have given rise for JGM to address each of them in JGM's Motion for Summary Judgment. JGM will not repeat all of its arguments, but incorporates them herein. However, JGM will briefly address the affirmative defense raised as to "other insurance". JGM will address all the issues concerning AMERISURE's Motion to Strike Affidavits in a separate filing entitled Plaintiff's Response in Opposition to AMERISURE's Motion to Strike Affidavits, but to the

[3] Harris Specialty Chems., Inc. v. United States Fire Ins. Co., 2000 U.S. Dist. LEXIS 22596 (M.D. Fla. July 7, 2000); Assurance Co. of Am. v. Lucas Waterproofing Co., Inc., 581 F. Supp. 2d 1201 (S.D. Fla. 2008); North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1289-90 (S.D. Fla. 2006), Amerisure Ins. Co. v. Albanese Popkin the Oaks Dev. Group, L.P., 2010 U.S. Dist. LEXIS 125918 (S.D. Fla. Nov. 30, 2010).

extent necessary and allowable, JGM will not repeat those arguments here but incorporates them into this Reply.

a. <u>AMERISURE'S CGLs are not Excess Policies, but Merely Contain an "Other Insurance" Clause, Requiring it to Pay its Pro Rata Share of Any Losses.</u>

The affirmative defense set forth in paragraph 48 of AMERISURE's Answer asserts the "other insurance" clause, which provides in full:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our 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; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

Contrary to AMERISURE's assertion, it is absolutely false that if this Court elects to find "manifestation" as the trigger, coverage will be unavailable to JGM because the AMERISURE CGLs would only apply in an excess capacity. AMERISURE's position that its CLGs are excess policies defies the facts of this case, the plain language of the AMERISURE CGLs, and every principle of Florida insurance law addressing the issue. AMERISURE's CGLs are not excess policy of insurance, but are primary level CGL policies. In fact, excess policies issued by AMERISURE exist above AMERISURE's

CGLs. See Exhibits "D", "E" and "F". The "other insurance" provision, as a matter of Florida law, makes AMERISURE liable for its pro rata share of both defense and indemnity related to the subject loss. Any attempt by AMERISURE to claim its policy is "excess" over any other primary insurance policies that exist is nothing less than an attempt to mislead this Court.

A true excess or umbrella policy requires a primary policy as a condition of coverage. Towne Realty, Inc. v. Safeco Ins. Co., 854 F.2d 1264 (11th Cir. 1988) (applying Florida law); Rouse v. Greyhound Rent-A-Car, Inc., 506 F.2d 410, 415 (5th Cir. 1975) (applying Florida law); 15 Couch on Insurance §219:24, §220:32 (3d ed. 1999); see also, Cosmopolitan Mut. Ins. Co. v. Continental Casualty Co., 28 N.J. 554, 147 A.2d 529 (1959) (holding that there can be no excess insurance in the absence of primary insurance); 1 Holmes' Appleman on Insurance 2D § 2.16 (1996) (noting that a primary policy of insurance starts at "the first dollar loss" in excess of the insured's deductible or self-retention, while excess coverage requires an underlying primary policy that is required to be maintained "as set forth in a schedule of insurance set forth in the excess policy").

To the extent that any of JGM's other primary CGL carriers also had "other insurance provisions", Florida law is clear: when two primary insurance policies contain "other insurance" clauses, the clauses are deemed mutually repugnant, and both carriers shall share the loss on a pro rata basis in accordance with their policy limits. Galen Health Care v. American Casualty Co., 913 F. Supp. 1525 (M.D. Fla. 1996); see also Travelers Ins. Co. v. Lexington, 478 So. 2d 362, 365 (Fla. 5th DCA 1985), review denied, 488 So. 2d 69 (Fla. 1986); Rouse, 506 F. 2d 410; and Motor Vehicle Casualty Co. v. Atlantic Nat'l Ins. Co., 374 F. 2d 601, 603 (5th Cir. 1967). Accordingly, if "other insurance" clauses are present in other carriers' policies, those and AMERISURE's CGLs cancel each other out,

making them each liable for their pro rata share of the loss. See Miami Battery Mfg. Co. v. Boston Old Colony Ins. Co., 1999 U.S. Dist. LEXIS 23357 (M.D. Fla. 1999)(Florida insurance carriers who breach the duty to defend are jointly and severally liable for all defense costs incurred on behalf of its insured party). But again, JGM expended its own monies in defense; **not one carrier provided a defense to JGM at anytime in the Underlying Action.** See Exhibit "1". This Court should soundly reject AMERISURE's misleading position that it is an excess carrier. Accordingly, in breach of AMERISURE's CGLs and AMERISURE's UMBRELLAS, AMERISURE failed and refused to provide a defense to JGM.

V. CONCLUSION.

The "injury-in-fact" trigger is the only trigger consistent with the AMERISURE CGLs' plain language. When a covered loss is progressive in nature, each CGL policy in effect when damage actually happens/occurs/takes place is triggered. The unambiguous language of AMERISURE's CGLs requires nothing more or less. In so finding, far from "breaking from the ranks" or "advocating a seismic shift in Florida insurance law", this Court would instead end the continued perpetration of insurance interpretation errors by upholding and accurately applying Florida's rules of construction to the AMERISURE CGLs, thereby finding the only correct result – that coverage is available during each and every policy when damage actually happened.

More specifically, the Court should deny AMERISURE summary judgment and grant JGM summary judgment by finding that the AMERISURE CGLS are (1) occurrence-based general liability policies which are "triggered" whenever "property damage" takes place/happens/occurs during the policy period, regardless of when it was manifested or discoverable; and (2) that each and every AMERISURE CGL in effect during times when

"property damage" actually happened/occurred/took place are "triggered", thus AMERISURE breached its duty to defend and its duty to indemnify JGM for damages which occurred "in fact" during the AMERISURE policy periods.

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., Perry Paint & Glass Building, 109 Brush Street 7406, # 500, Tampa, FL 33602, arusso@rywantalvarez.com, DONALD ELDER, ESQUIRE and ABRAHAM SANDOVAL, ESQUIRE, Tressler LLP, 233 South Wacker Dr., 22nd Floor, Chicago, IL 60606, delder@tresslerllp.com and asandoval@tresslerllp.com on this 18th day of January, 2011.

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