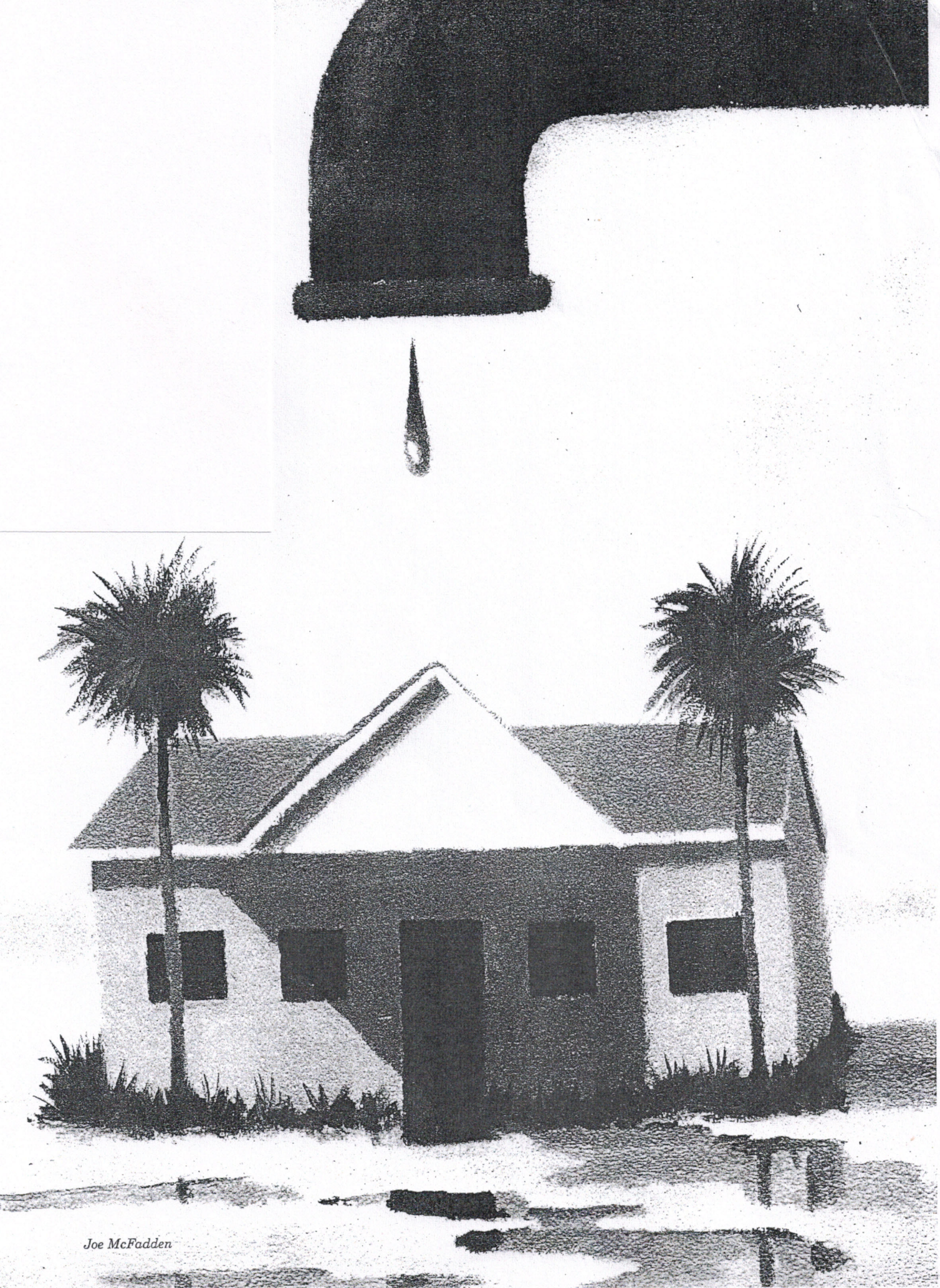


Joe McFadden

The Manifestation Rule in Florida: Has Death Knelled?

by Kevin Kelly

The passion for truth is silenced by answers which have the weight of undisputed authority — Paul Tillich, 1886-1965.

An invasive weed of sorts — the so-called manifestation rule — has taken root over the last decade in the swamp known as Florida insurance law. This rule has been successfully advocated by some insurers to deny liability insurance claims. The focus here is the propriety of using this rule to deny coverage for claims against contractors when hidden, construction-related damages amass over an extended duration. Courts applying the rule have erred. The manifestation rule — restricting liability coverage solely to the insurance policy in effect when hidden damage is discovered — is inimical to the premise of Florida law that insurance policies be given their plain meaning. This article reviews how this unlikeliest of legal doctrines took root in Florida and what its future might hold.

Liability claims are commonly made by contractors when sued for faulty construction. In Florida, the most common, though not exclusive, scenario for such claims is when construction defects cause water leaks. Often, seemingly minor, hidden defects in the skins or "envelopes" of buildings cause equally hidden and slowly progressing water intrusion and resulting rot. Buildings in Florida leak. There are few truer axioms.

Much is at stake. Billions of dollars in property damage can be expected from the next spate of tropical storms to hit Florida.[1] For building owners and their contractors, the risk can be existential. The cost of repairing buildings damaged by water intrusion can rival, or even exceed, the original cost of construction.[2]

Will Florida construction contractors be adequately insured against their prospective liabilities? For many, unfortunately, the answer is no. That is, if the implied manifestation rule is not sooner rooted out. Contractors and their customers, Florida's business property owners, and homeowners are all invested in the answer. Insurers, too, are well aware of the economic risks they face when the next significant hurricane hits.[3] Thus, there is no surprise that Florida courts are familiar terrain to liability insurers and their insured contractors, both keenly interested in divining the line between covered claims for construction-related damage and claims excluded from coverage.

Liability Insurance for Construction-related Damage

Commercial general liability (CGL) insurance protects businesses from myriad risks of claims arising out of business operations, maybe most recognizably the slip-and-fall personal injury claim.[4] Books have been written on the multiple risks covered by CGL policies. Ours is a narrower focus.

Contractors rely on CGL policies to insure against their liability to building owners for property damage caused by faulty work. Since building owners will likely bear at least some of the cost of faulty construction if their contractors have no CGL insurance, they typically require such insurance of their contractors.

Since water intrusion damage can be a particularly costly result of latent construction defects,[5] when a leak is discovered in a building less than 10 years old, alert owners naturally look to their builder (or designer) for a remedy.[6] The cost to fix the leak itself is typically modest. In contrast, fixing other parts of the building, damaged as a consequence of the moisture, is where the significant expense lies.[7] When this occurs, the fortunate contractor

has an insurer that acknowledges insured "physical injury" is not limited by a manifestation requirement.

The Plain Language

Deciphering the complex, standard CGL policy can test the patience of a monastic scribe. Many a veteran attorney and jurist have been lost in its labyrinths. Confusion can abound, and this opens opportunities for at least nominally intelligent advocates of the insurer and the insured to attribute opposite meanings to the very same words. The result is often the aptly characterized "policy-interpretation linguistic gymnastics."[8] Such confusion is all the more likely when one of the parties benefits from sowing that confusion.

In welcome contrast, the CGL language at the center of the dispute over the manifestation rule is actually quite plain and mostly standardized.[9] CGL policies insure against liability for "property damage." In turn, covered "property damage" in a CGL policy is "physical injury to tangible property" caused by an "occurrence" during the policy period.[10] That's it. Despite this plain language and despite the absence of any form of the word "manifestation" in the standard CGL policy, somehow, by implication, the manifestation rule sprouted.[11] Some courts, based on flawed logic, have narrowed and complicated the otherwise plain meaning of the word "injury."

The Manifestation Rule

The manifestation rule protects insurers at the expense of their insureds. Under this rule, if accreting damage occurred to a building, but wasn't discovered during an insurer's policy period, that insurer's coverage is not triggered. When the damage occurs, in fact, is rendered irrelevant under the manifestation rule.

Where adopted, the manifestation rule is used primarily to isolate a single applicable CGL policy from among many consecutive CGL policies effective during the years hidden damage occurs. The rule dictates that the policy in effect when the injury is discovered, and that policy alone, covers the resulting claims. The contractor loses the benefit of the additional CGL insurance it purchased for years damage occurred but was undiscovered. Under this rule, "damage," defined in the standard CGL policy as simply "physical injury," is instead implied to mean the more limited "discovered physical injury."

CGL policies are typically one year in length, and often have limits of $1 million per occurrence. Under the manifestation rule, if damage, for example, occurring in each of the six years after construction, is first discovered in year six, coverage is only triggered for the $1 million of coverage under the year-six policy. The contractor's insurers for years one through five are off the hook. In contrast, if "physical injury" means injury-in-fact, as its plain meaning would suggest, each of the year-one through year-six policies are triggered, equating to $6 million in coverage. For a contractor, the difference between $1 million and $6 million in coverage can be the difference between economic survival and bankruptcy.

Florida Is a Hostile Place for an Implied Manifestation Rule

Oddly, all litmus tests indicate Florida soil is inhospitable to a manifestation rule. Long-standing, basic precepts of Florida insurance law and contract construction make this an unlikely place for a court to imply a restrictive condition in a policy.

Standing alone, a manifestation rule doesn't seem particularly harsh. The rule doesn't bristle with inherent inequities. Alone, it doesn't violate basic notions of fairness. Here lies the problem. Insurance policies are contracts, and the manifestation rule is contrary to the wording of the standard CGL contract.

The first widely accepted rule of contract construction, anathema to the manifestation rule, is that parties are free to contract and courts applying Florida law are not to disturb those agreements.[12] Construing the word "injury" as discovered injury changes a fundamental basis of the parties' bargain.

Second, Florida law gives effect to the plain language of insuring agreements, where possible, in lieu of strained definitions.[13] The word "injury" cannot mean "discovered injury" without violating the plain language rule.

Third, if a court could reasonably find an ambiguity in the word "injury," *e.g.*, whether it means injury or discovered injury, such an ambiguity should be construed strictly against the insurer and liberally in favor of the insured.[14]

Fourth, if an ambiguity exists in a contract, it should also be construed strictly against the drafter of the contract. For insurance contracts, that is the insurer.[15]

Fifth, in case the aforesaid rules weren't sufficient to guide a court, an insurance contract, where possible, should be construed "in the broadest possible manner to effect coverage."[16]

In light of these basic rules of contract construction and insurance law, the opinions of some courts that Florida has adopted the manifestation rule are an enigma. Making those opinions still more enigmatic are three additional factors: the conscious exclusion by the insurance industry of manifestation language in the standard CGL policy, the CGL's nature as an "occurrence" policy, and the ease with which insurers could use an alternative explicit manifestation endorsement.

The Insurance Industry Rejected a Manifestation Requirement

Prior to 1966, the predecessor of the standard CGL policy covered "accidents," leading to confusion over whether only "sudden, unexpected, but identifiable events" were covered.[17] Courts were left in doubt whether "accident" also encompassed slowly progressing damages.[18]

In 1966, the insurance industry formed a task force that significantly remodeled the CGL policy. The word "accident," lest it be too restrictive, was substituted in the CGL policy with the word "occurrence."[19] "Occurrence" was further defined not only as an "accident," but also "injurious exposure over an extended period."[20] Thus, the insurance industry quite deliberately expanded coverage to include gradual damages, such as those caused by hidden water leaks.

With this extension of coverage to injuries resulting from long exposure, "the difficulty of determining time of injury was certain to be even greater under the CGL than it had been under predecessor policies."[21] The insurance industry knew this.[22] Yet, upon expanding the scope of the insuring agreement, the insurance industry purposefully chose not to add a discovery restriction to CGL coverage.[23] "The insurance industry task force recognized this problem from the very outset of its labors, just as courts had recognized by then that an injury could occur in scientific fact long before it became manifest."[24]

The task force "refused to accept language that would have incorporated into the CGL policy either the manifestation or the exposure theory."[25] In light of this rejection of explicit manifestation language, the odds of any court implying a manifestation rule would seem that much more remote.[26]

A Manifestation Requirement Changes the Nature of a CGL Policy

CGL policies are, by their very nature, "occurrence" policies.[27] Yet, inferring a discovery limitation in the policy effectively changes its nature to its less expensive cousin, the claims-made policy. In fact, a key to distinguishing a claims-made policy from an occurrence policy is the very absence from an occurrence policy of a discovery or manifestation requirement.[28]

Occurrence policies are more expensive than claims-made policies because of the indefinite period of time for which there may be coverage.[29] To impose a manifestation requirement "would in effect transform the typically more expensive occurrence-based policy into a cheaper claims-made policy."[30] The claims-made policy is "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.'*"[31]

The federal 11th Circuit in *Trizec Prop., Inc. v. Biltmore Constr. Co.*, 767 F. 2d 810, 813 (11th Cir. 1985), applying Florida law, frowned on such a nature-changing interpretation, noting: "In essence, [the insurer] is attempting to change the present [CGL] policy into a 'claims made' policy where the date of discovery of the damage is relevant. The language of the policy, however, clearly focuses on the date that damage is sustained and not the date it 'manifests' itself."[32]

Trizec was a good read of Florida law and should have served as guidance to federal district courts applying Florida law. Consistent with *Trizec*, the Florida Supreme Court, distinguishing between claims-made policies and occurrence policies, concluded coverage exists under an occurrence policy "regardless of the date of discovery...."[33]

Why Imply a Manifestation Requirement When Explicit Works?

Some insurers have resorted to an optional endorsement (*i.e.*, an insurance contract amendment) in which an explicit "manifestation" requirement can be added.[34] This endorsement, modifying standard CGL language, called the "'known and continuing loss endorsement,' provides coverage only for damage which first 'manifests' during the policy term."[35] The existence of this explicit endorsement further belies the suggestion that insurers need Florida courts to imply a manifestation rule.

The Florida Supreme Court has not spoken directly to the conclusion of some courts that Florida has adopted a manifestation trigger-of-coverage rule. However, Florida's adoption of

the aforesaid general rules of insurance law and contract construction does not bode well for insurers who continue to assert "injury" really means "discovered or manifested injury." Making this even less likely are 1) the choice of the insurance industry to omit a manifestation requirement in the standard CGL policy; 2) the error of commingling by some courts of claims-made insurance concepts with those of the purposes of the standard CGL occurrence policy; and 3) the expediency of some insurers in using an explicit manifestation endorsement. Florida has not accepted the manifestation rule as an element of its law.

The Manifestation Rule Takes Root in Federal Courts

So, you might ask, in light of all the seeming obstacles, where does this manifestation rule come from if the word "injury" in a CGL policy is so plain? In a word, Alabama.

The debate as to whether Florida law includes a manifestation trigger-of-coverage rule has focused on an otherwise innocuous Florida state appellate court decision from 1979, *Travelers v. Gayfers*, 366 So. 2d 1199 (Fla. 1st DCA 1979). The operative words in *Gayfers*, later to serve as the unlikely foundation of the purported manifestation rule in Florida, are: "The term 'occurrence' is commonly understood to mean the event in which negligence manifests itself in property damage...."[36] In this single sentence lies what some courts found to be the first and only expression by a Florida state court of Florida's supposed manifestation rule.

Notably, not a single published Florida state court opinion, other than arguably *Gayfers*, has concluded Florida law incorporates a manifestation rule. Not so, however, for some federal courts applying Florida law.[37] The seeds of the debate were first laid in 2000 by a federal district court in Alabama, in *Am. Motorists Ins. Co. v. S. Sec. Life Ins. Co.*, 80 F. Supp. 2d 1280 (M.D. Ala. 2000). The *American Motorists* case, applying Florida law, tersely misinterpreted the *Gayfers* case as espousing the manifestation rule.[38]

The debate fully sprouted, however, in 2002 in *Auto Owners Ins. Co. v. Travelers Cas. & Surety Co.*, 227 F. Supp. 2d 1248 (M.D. Fla. 2002). In *Auto Owners*, hidden damages, amassing over multiple years, were caused by defects on two different projects constructed by the same insured contractor. In one project, defects in underground piping caused acetone leaks and resulting soil contamination. In the other project, in the classic hidden leak scenario, the roofing and siding on a building were defectively constructed. In both projects, the alleged negligent construction occurred years before the damages became manifest.[39] Some of the contractor's CGL insurers denied coverage.

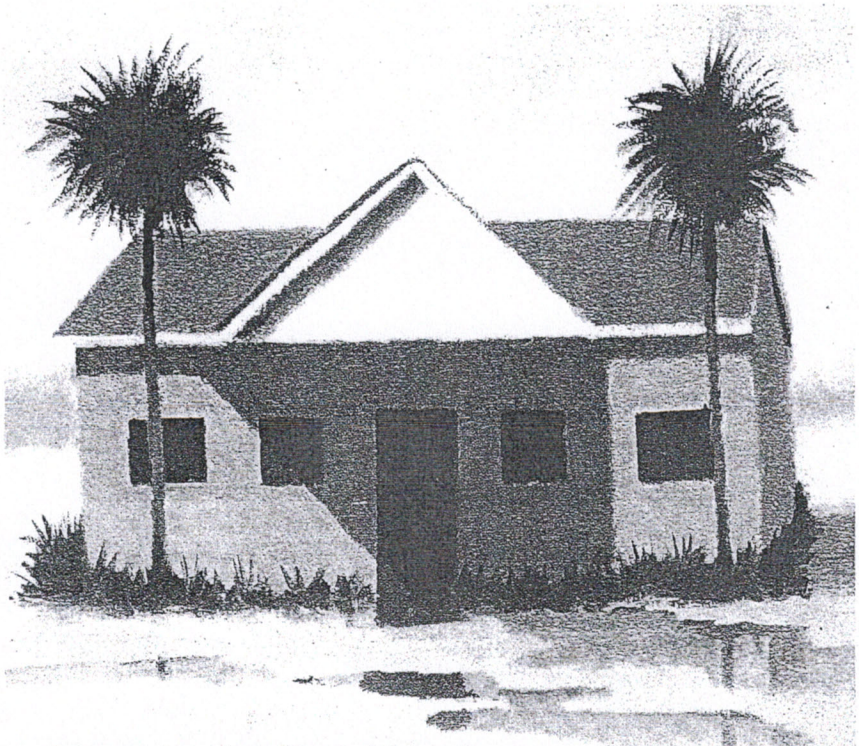
The *Auto Owners* court identified four alternative rules recognized by many courts, though not the Florida Supreme Court, to determine what triggers coverage[40] under a CGL policy: "(1) exposure; (2) manifestation;

(3) continuous trigger; and (4) injury in fact."[41] The court felt compelled to narrow down the many policies that might apply by identifying a single triggering event. The *Auto Owners* court explained:

> [First,] Under the exposure theory, property damage occurs upon installation of the defective product. [Second,] Under the manifestation theory, property damage occurs at the time damage manifests itself or is discovered. [Third,] The continuous trigger approach defines property damage as occurring continuously from time of installation *until the time of discovery.* And [Fourth,] injury-in-fact (which is also referred to as damage-in-fact), coverage is triggered when the property damage underlying the claim actually occurs.[42]

With no precedent from the Florida Supreme Court on the question of which trigger-of-coverage rule (if any) to apply, the *Auto Owners* court found enough in *Gayfers* to suggest Florida applied the manifestation rule. "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."[43] The *Auto Owners* court would have been better served to ask itself whether *any* trigger-of-coverage rule, per se, was needed to enforce the insurance contracts as written.[44]

Since substantial reliance has been placed on the *Auto Owners* case by subsequent courts discerning a Florida manifestation rule, its rationale begs scrutiny. Few courts have undertaken such scrutiny.[45] There are three primary reasons the *Auto Owners* court was misguided in discerning a manifestation trigger-of-coverage rule under Florida law.



"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."

First, the Florida state court *Gayfers* case was far from the model in which the *Auto Owners* court should have discerned a manifestation rule, if for no other reason than that the damages in *Gayfers* occurred near instantaneously and quite overtly. The *Gayfers* case involved a defectively installed plumbing connection. The latent defect did not cause leaking until a sudden, discrete, identifiable event, namely "a joint in the drainage system failed, discharging rain water into the store."[46] Logically, a manifestation rule would only serve to isolate what triggers coverage where the occurrence of the damage was measurably separated in time from the discovery thereof, such as with slowly accreting damage. Such a temporal separation did not exist in the *Gayfers* case, and thus, it was a poor candidate for Florida's bellwether adoption of a manifestation rule.

The second reason the *Auto Owners* court was misguided can be found in the contents of the two cases on which *Gayfers* itself is premised, and in which there were no expressions of a manifestation rule.[47] The first case *Gayfers* relied upon, *Prieto v. Reserve Ins. Co.*, 340 So. 2d 1282 (Fla. 3d DCA 1997), likewise involved a sudden, discrete damaging event, a building collapse, on a single identifiable date.[48] The *Prieto* court refused to find that coverage was triggered by the underlying negligent event alone, the defective construction, when there were not also resulting damages at that time. The *Prieto* court was not faced with the question of whether expanding, but undiscovered, damages caused by continuous, accreting water intrusion constituted injury. Nowhere does the *Prieto* court refer to "manifestation." The *Prieto* court did not adopt or apply a manifestation test.[49]

The other case on which the *Gayfers* court relied, *Addison*, also involved a sudden, discrete damaging event, on a single date.[50] A person was shocked in a pool due to faulty electrical work. The *Addison* court held: "The time of occurrence of an accident, within the meaning of a policy of liability, is generally deemed to be the time when the complaining party was *actually damaged,* not when the wrongful act was committed."[51] That accident, *i.e.,* damages, must merely occur during the policy term.[52] Nowhere does the *Addison* court refer to "manifestation."[53]

Thus, *Gayfers* cannot be fairly interpreted as approving the denial of coverage based on the fortuity to the insurers of delayed discovery, when damages actually occurred during their policy periods. Ironically, the

Gayfers court cited the widely recognized rule that where two interpretations of a policy may be fairly made, "the one allowing greater coverage will prevail."[54] The *Gayfers* decision is far too thin a reed on which to hang so heavy a burden on insureds as courts discerning an implied discovery restriction in the plain word "injury."[55]

The third flaw in the reasoning of *Auto Owners* was its dubious distinction of no less than 11th Circuit Court of Appeals precedence, the *Trizec* case.[56] *Trizec* involved claims arising from a leaking roof deck that rusted over time. The 11th Circuit, applying Florida law, held that whether the damage has been seen or manifested during a CGL policy period was not relevant to coverage.[57] "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."[58] From the perspective of federal district courts within the 11th Circuit, the adoption of the manifestation rule is all the more queer in light of the binding precedence of *Trizec*.

Based on the holding in *Auto Owners* in 2002, some CGL insurers began (or continued) denying coverage when damage, even though occurring in fact, did not manifest during their policy periods. The insurers cannot be faulted for relying on published case law.

The Manifestation Rule Spreads

Like a weed surviving a dose of Roundup™, the manifestation rule came out of the *Auto Owners* case not merely tolerant to poison, but prolific. In 2007, relying on its own precedence, *i.e.*, *Auto Owners*, the Middle District in the *Essex* case again opined that Florida had adopted the manifestation rule for assessing what triggers CGL coverage.[59]

In *Essex*, in the classic water intrusion fact pattern, an apartment complex suffered water leaks. The owner made claims against its contractor for damage. The contractor made a claim against its CGL insurers, some of which denied coverage. The Middle District repeated, "Under Florida law, the general rule is that 'the time of occurrence within the meaning of an 'occurrence' policy is the time at which the injury first manifests itself.'"[60] Importantly, though still cited authoritatively, the precedential value of the *Essex* opinion is at best suspect given it was a nonfinal order. In fact, the *Essex* court requested to be briefed on the trigger-of-coverage issue *after* the subject order was issued.[61]

In 2006, pronouncements of the manifestation rule spread south.[62] The U.S. District Court for the Southern District of Florida recognized the guidance of its northerly cousin in *Auto Owners*.[63] In 2008,[64] and again in 2010,[65] the Southern District recognized the manifestation rule had been adopted in Florida.

In 2010, the Middle District repeated its pronouncement of the manifestation rule. An "occurrence" under the

CGL is the date on which damage first becomes visible[66] or manifests itself. By 2011, the manifestation rule had so extensively cross-pollinated with local flora that it seemed intractably domesticated. In July 2011, the Middle District pronounced a fait accompli: "This exposition of Florida law [the manifestation rule] has since been *uniformly followed*."[67] The Middle District repeated the manifestation rule as an element of Florida law in early 2012.[68] By mid-2012, only the brashest of lawyers could relish arguing to a federal judge that the manifestation rule was an invasive species foreign to Florida.

So prevalent are the federal district court cases discerning a manifestation rule in Florida law[69] that the misconception has been captured in a learned commentary on the law, which, after all, is dependent on courts' opinions.[70]

In the meantime, Florida state courts were faring fine without a manifestation rule. In a lone Florida state court case, *Pennsylvania Lumbermens Mut. Ins. Co. v. Ind. Lumbermens Mut. Ins. Co.*, 43 So. 3d 182 (Fla. 4th DCA 2010), the judge was confronted by one party advocating the manifestation rule and the other party advocating the injury-in-fact rule. The judge was not much impressed with the need for any choice. The judge, endorsing neither rule, simply held, "When the water intrusion occurred is not relevant because coverage is triggered by the resulting damage to the property caused by the water."[71] For those insistent that a court apply one of the trigger-of-coverage rules, the injury-in-fact rule would be the label to attribute to the *Penn. Lumbermens* court.

A Course Correction by the Middle District

Importantly, just when advocating against the "uniformly followed" manifestation rule in certain courts seemed a futile tilt against the windmill, the Middle District pulled a surprise. In mid-2012, the Middle District in *Axis Surplus Ins. Co. v. Contravest Constr. Co.*, 2012 WL 2048303 (M.D. Fla. June 5, 2012), an unreported opinion, scrutinized its prior decision in *Auto Owners*. In doing so, the Middle District entirely reversed course.[72] The *Axis* court didn't just timidly recede from the manifestation rule; it directly repudiated the rule as an element of Florida law. The Middle District, at least in *Axis*, found and corrected its error. Unequivocally.

The *Axis* court recognized that federal courts discerning a manifestation rule in Florida law had misinterpreted the source case, *Gayfers,* on which their entire premise relied.[73] The *Axis* court noted "subsequent cases have continued to follow their lead [*e.g., Auto Owners* and *Essex*] without separately analyzing *Gayfers*."[74] The *Axis* court elucidated why the use of the word "manifest" in *Gayfers* was a matter of linguistic expediency tied to case-specific facts for which even a universally adopted manifestation rule would serve no purpose. "[T]he issue of when damage 'occurs' in order to trigger coverage was not before the *Gayfers'* court — only the issue of whether a negligent act alone is sufficient to trigger damages."[75] Bingo! In that one sentence, the Middle District laid bare a decade of ever-spreading but flawed logic erroneously concluding *Gayfer's* endorsed the manifestation rule.

Though the Middle District in *Axis* has taken the first whack at the manifestation rule as an element of Florida law, it appears the Southern District is still cultivating the weed. In 2012, three weeks after the *Axis* decision, the Southern District cited *Arnett v. Mid-Continent Cas. Co.*, 2010 WL 2821981 (M.D. Fla. July 16, 2010) (preceding *Axis*), as authority for Florida's adoption of the manifestation rule.[76] This is unfortunate given that the source of the Southern District's finding of the manifestation rule under Florida law is the Middle District line of cases.[77] If the root of the error lies in the Middle District, can the manifestation rule survive anywhere in Florida for long with that root removed?

The *Axis* decision may serve as a start in the process of grubbing from the hard ground of precedence the erroneous notion that Florida law incorporates the manifestation rule. Whether *Axis* is followed by consensus in future Middle District cases remains to be seen. Even if all the *Axis* case did was spark a debate where little had existed, it will serve as progress. Recognizing a foreign species is the first step in its eradication. However, sufficient chaff remains in reported opinions to tempt courts with the manifestation rule in the future. That would be unfortunate. "Perpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court."[78] The Middle District got it right in *Axis*.

Conclusion

Courts needn't comb for deep meaning in simple words. Jurists needn't suspend their common sense and wrestle with a choice over four trigger-of-coverage rules. Insurance contracts are complex enough without inviting complexity where none exists.

"Property damage," as defined in the standard CGL policy, is "physical injury to tangible property." No plain reading of the word "injury" could rationally lead to a conclusion that it really means less, *i.e.,* only discovered injury. Resorting to alternative interpretations serves no valid purpose. Upon proof that tangible property was physically injured during a policy period, coverage exists whether evidenced then or later by contemporaneous photographs, fact witnesses, inferences based on known circumstances, admissible expert testimony, or otherwise.

Insurers will not be unduly burdened with unforeseen financial risk if courts correct the error and reject the manifestation rule. After all, some insurers have selectively employed an express manifestation endorsement, and they can expand its use. The choice of a manifestation requirement will then lie where it has belonged all along: with the parties to the contract, not the courts. The insurer and insured can bargain for it or against it, and they can pay for it or not, without gambling on an uncertain court ruling. That some insurers have already deployed an optional express manifestation endorsement suggests any industry adjustment should be quick.

There is something ironic, indeed

tragic to the person whose claim is denied, in having an insurance company that drafted the policy divine implied conditions restricting coverage. This is especially so in light of the basic precept of Florida law that insuring agreements be ascribed their plain language.

To avoid this error, courts applying Florida law should recede from decisions finding the manifestation rule is an element of Florida law.❑

[1] Insurance Information Institute, *The 20th Anniversary of Hurricane Andrew: Impact Endures for Insurance Providers and Policyholders in Coastal States* (Aug. 2, 2012) ("A repeat of Hurricane Andrew on its 20-year anniversary would produce more than twice the losses of the 1992 storm, as much as $57 billion in insured losses...."); Insurance Information Institute, *Florida Hurricane Insurance: Fact File* (Oct. 2012) ("Given the growth in the number and value of insured property, a repeat of the hurricane that devastated Miami in 1926 would result in approximately $125 billion in insured damage today....").

[2] In 1997, a judgment of over $14 million was entered against the builder of the Martin County courthouse after the facility was evacuated and effectively reconstructed due to moisture intrusion and resulting property damage. *Centex-Rooney Const. Co. v. Martin County*, 706 So. 2d 20, 25 (Fla. 4th DCA 1997). The claims were premised on faulty construction and design.

[3] "As a result of unprecedented levels of catastrophic insured losses in recent years, and especially as a result of Hurricane Andrew, numerous insurers have determined that in order to protect their solvency, it is necessary for them to reduce their exposure to hurricane losses." FLA. STAT. §215.555(1)(b) (1993), Florida Hurricane Catastrophe Fund.

[4] *U.S. Fire Ins. Co. v. J.S.U.B.*, 979 So. 2d 871, 877 (Fla. 2007).

[5] A latent defect is one "not apparent by use of one's ordinary senses from a casual observation of the premises." *Brady v. State Paving Corp.*, 693 So. 2d 612, 614 (Fla. 4th DCA 1997).

[6] FLA. STAT. §95.11(3)(c) (2012). Florida's statute of repose for construction defect claims is 10 years.

[7] A construction defect, such as the omission of protective flashing above a window, may allow seemingly small amounts of water to intrude, but the significant cost will not be in sealing the gap. Rather, other things in the water's path, or where the water pooled or was absorbed, over an extended period of time, are likely to have suffered significant physical damage (*i.e.*, rot, mold, or oxidation in the roofing, sheathing, cladding, structural components, framing, drywall, or finishes).

[8] *J.S.U.B.*, 979 So. 2d at 892, Justice Lewis, concurring.

[9] The Insurance Services Office, a national insurance industry association, develops and publishes standard form insurance policies, including the standard form CGL policy, CG 00 01, almost exclusively used by general contractors, or substantially incorporated into their CGL policies. *See French v. Assurance Co. of Am.*, 448 F.3d 693, 698, 700-704 (4th Cir. 2006). For an exhaustive history of the evolution of the CGL policy, *see also J.S.U.B.*, 979 So. 2d at 877-880.

[10] *Id.* A construction error may be an insured occurrence under a CGL policy even if it goes unnoticed for an extended period of time. Moreover, nonsudden, hidden, resulting damages can be "property damage" as that term is used in a CGL policy. *J.S.U.B.*, 979 So. 2d at 883, 884, 891.

[11] Certainly, other provisions of the CGL policy affect coverage, *e.g.*, timely notice of the claim, but no other provisions serve as ostensible bases for adopting or applying a manifestation rule.

[12] *TIG Ins. Co. v. Smart School*, 401 F. Supp. 2d 1334, 1343 (S.D. Fla. 2005) (quoting *Quinerly v. Dundee Corp.*, 31 So. 2d 533, 534 (Fla. 1947)). ("Courts are powerless to rewrite contracts or interfere with the freedom of contracts or substitute their judgment for that of parties to the contract in order to relieve one of the parties from apparent hardships of an improvident bargain.").

[13] *J.S.U.B.*, 979 So. 2d at 883 (citations omitted) ("[W]e apply well-established principles of insurance contract interpretation, reading the policy... in accord with its plain language....").

[14] *State Farm v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998); and *J.S.U.B.*, 979 So. 2d at 877, 883 (citing *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)).

[15] Contra proferentum — ambiguities are to be construed against the drafter — is the most prominent rule of construction in insurance law. *Keenan Hopkins Schmidt & Stowell Contractors, Inc. v. Cont'l Cas. Co.*, 653 F. Supp. 2d 1255, 1262 (M.D. Fla. 2009), *quoting Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 179 (Fla. 4th DCA 1997); *Matter of Celotex Corp.*, 196 B.R. 973, 1003 (Bankr. M.D. Fla. 1996); and *J.S.U.B.*, 979 So. 2d at 877, 878.

[16] "Florida law is equally well-settled that insuring or coverage clauses are construed in the broadest possible manner to affect [sic] the greatest extent of coverage." *Keenan*, 653 F. Supp. 2d at 1262, *quoting Westmoreland*, 704 So. 2d at 176, 179.

[17] *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 565 F. Supp. 1485, 1501 (S.D.N.Y. 1983).

[18] *Id.* ("The courts were left in doubt as to whether, and to what extent, the standard policy was meant to cover liability for injuries that resulted from gradual processes, rather than from sudden events.").

[19] *Id.* ("The insurance industry responded to the uncertainty created by the 'accident' orientation of pre-1966 liability policies by establishing a task force to draft what eventually became the CGL.").

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See Trizec Prop., Inc. v. Biltmore Constr. Co.*, 767 F.2d 810, 813 (11th Cir. 1985).

[28] *Gulf Ins. Co. v. Dolan, Fertig & Curtis*, 433 So. 2d 512, 514 (Fla. 1983); *Fremont Indemnity Co. v. Gierhart*, 560 So. 2d 1223, 1225 (Fla. 2d DCA 1990).

[29] "Because of the indefinite 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, therefore, so is the cost. *National Union Fire Ins. Co. v. Baker & McKenzie*, 997 F.2d 305, 306 (7th Cir. 1993).

[30] *Towns v. Northern Sec. Ins. Co.*, 964 A.2d 1150, 1164 (Ver. 2008) (reciting cases holding in accord).

[31] *Id.*

[32] *Trizec*, 767 F.2d at 813.

[33] *Gulf Ins.*, 433 So. 2d at 514.

[34] *See Keenan*, 653 F. Supp. 2d at 1255, 1267-1270.

[35] *Id.* at 1267. The optional manifestation endorsement provides "[a]ll claims or suits for... 'property damage' that is continuous or progressively deteriorating and which 'manifest' during this policy period will be deemed to apply only to this policy period and no other policy period." *Id.* at 1268. The endorsement explicitly defines "manifested" as "discovered" damage: "'Manifest(ed)' means... [f]or 'property damage' when damage is first discovered by the person or organization who suffered such damage." *Id.*

[36] *Travelers v. Gayfers*, 366 So. 2d 1199, 1202 (Fla. 1st DCA 1979).

[37] Federal courts sitting in diversity jurisdiction apply the substantive law of the forum state, here, Florida. *Admiral Ins. Co. v. Feit Mgmt. Co.*, 321 F.3d 1326, 1328 (11th Cir. 2003).

[38] "Florida courts follow the general rule that the time of occurrence within the meaning of an indemnity policy is the time at which the plaintiff's injury first manifests." *Am. Motorists Ins. Co. v. S. Sec. Life Ins. Co.*, 80 F. Supp. 2d 1280, 1284 (M.D. Ala. 2000), *citing Gayfers* 366 So. 2d at 1202.

[39] *Id.* Articulating what an "occurrence" is in a CGL policy poses a tautological challenge. Much confusion attends the use of the words "occur" and "occurrence" in interpreting CGL policies, and naturally so. In the absence of a negligent act simultaneously causing overt property damage, there are really two occurrences necessary to trigger coverage, the cause and the later effect, which may be a continuing occurrence over many years. The underlying faulty construction (or negligent act) on the one hand, and the resulting damages on the other hand, both literally occurrences, may be measurably separated in time and in different policy periods. If so, the negligent act occurs first, and damages either occur continuously thereafter until discovered (*e.g.*, in the case of hidden, ac-

creting water intrusion) or the damages occur later in a sudden event (*e.g.,* a wall topples over). Both occurrences, whether appreciably separated in time, must occur for there to be a covered "occurrence" under a CGL policy. For example, a contractor's failure to properly install flashing over a window is a literal occurrence and might constitute the first of the two elements of an "occurrence" under a CGL policy. But that negligent act, that initial occurrence, alone does not mean coverage is triggered if there is no resulting property damage. The negligent contractor might enjoy the fortuity of no water intruding even though the flashing was defectively installed. Maybe the window is protected from blowing rain by an adjacent high-rise. In that case, the first occurrence alone, without the occurrence of resulting damage, does not amount to a contractual "occurrence" necessary to trigger coverage. Unless the standard CGL language changes, courts and attorneys will likely continue to confuse the uses of the word "occurrence" when discussing the negligent act, and the physical damages caused thereby.

[40] "There can be a fair amount of confusion over this subject [the four trigger rules], as it is not uncommon for courts to declare they are utilizing one particular trigger but conduct an analysis that suggests something different." 4 PHILIP L. BRUNER & PATRICK J. O'CONNOR, BRUNER & O'CONNOR CONSTRUCTION LAW §11:184 (June 2011).

[41] *Auto Owners,* 227 F. Supp. 2d at 1266, *citing In re Celotex Corp.,* 196 B.R. 973, 1000 n. 187 (Bkrtcy. M.D. Fla. 1996).

[42] *Id.* at 1266 (citations omitted, emphasis in original). The third and fourth rules, continuous injury and injury-in-fact, are essentially the same rule stated in different words. *See CSX Transp. v. Admiral Ins. Co.,* 1996 WL 33569825 (M.D. Fla. 1996) (noting the continuous trigger theory is the "functional equivalent" of the injury-in-fact trigger). For a court intent on hanging its hat on any rule, per se, continuous-trigger and injury-in-fact entail nothing more than applying the plain meaning of the term "physical injury."

[43] *Id.* at 1266, *citing American Motorists,* 80 F. Supp. 2d at 1284.

[44] It is beyond the scope of this article to address whether, or under what circumstances, a court may find a valid need to select a trigger-of-coverage rule under any circumstance. When CGL claims are made for damages resulting from construction defects, however, no valid purpose is served by any trigger-of-coverage rule, other than that compelling courts to apply the plain language of the policy.

[45] *See* recent exception in *Axis Surplus Ins. Co. v. Contravest Constr. Co.,* 2012 WL 2048303 (M.D. Fla. June 5, 2012).

[46] *Gayfers,* 366 So. 2d at 1200.

[47] *Id.* at 1202.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 1202; *New Amsterdam Cas. Co. v. Addison,* 169 So. 2d 877 (Fla. 2d DCA 1964).

[51] *Addison,* 169 So. 2d at 887 (emphasis added).

[52] *Id.*

[53] Even the adoption of a manifestation rule does not necessarily compel denial of coverage for claims for damages that were not discovered during the period of a given CGL policy. By selecting as the definition of manifest, "capable of being discovered," in lieu of the more restrictive definition, "discovered," hidden damages that were slowly accreting would fall within coverage. What is hidden is arguably discoverable, though not yet discovered. If a court found the need to infer a manifestation rule to limit the meaning of "physical injury to tangible property," is it not more congruent with insurance law to adopt the more expansive definition of manifest (discoverable, in lieu of discovered)? This begs other semantic questions. If manifest means "capable" of being seen, what does that mean? Is it manifest in Florida at noon that there is a full moon over China? The answer may depend on who is asking, who is answering, where those persons are, their immediate means of perception, and whether it's overcast in China. This invites the "linguistic gymnastics" frowned on by courts. This very debate, whether manifest means discoverable or discovered, was the focus of one recent Middle District opinion, *Mid-Continent Cas. Co. v. Siena Home Corp.,* 2011 WL 2784200 (M.D. Fla. July 8, 2011).

[54] *Gayfers,* 366 So. 2d at 1201.

[55] The *Auto Owners* court did not address the Middle District's unreported precedence of *CSX Transportation* in which it noted most jurisdictions apply the "multiple or continuous trigger theory," instead of a manifestation theory. *CSX Transp.,* 1996 WL 33569825.

[56] *Trizec,* 767 F.2d at 813 (applying Florida law).

[57] *Id.*

[58] *Id.* at 813. Though the duty to defend is broader than the duty to indemnify, this clear pronouncement of the 11th Circuit cannot be fairly or rationally read to hinge on a distinction between those two duties, for which coverage exists or not under the same policy. *See Axis,* 2012 WL 2048303 at *7, fn 11.

[59] *Essex Builders Group, Inc. v. Amerisure Ins. Co.,* 485 F. Supp. 2d 1302 (M.D. Fla. 2007).

[60] *Essex,* 458 F. Supp. 2d at 1310, *quoting Auto Owners.*

[61] The record in *Essex,* after the court rendered its opinion (thereafter published in F. Supp. 2d), exemplifies the danger of attributing a conclusive rule to a judge who opts not to base a final decision on that rule. The opinion in *Essex* was given in a nonfinal order. The *Essex* court, upon issuing its opinion order, had not even been fully briefed by both parties on the trigger-of-coverage issue. Immediately after the *Essex* opinion was rendered on December 13, 2006 (later to be published), the insurer sought leave to move for summary judgment. In response, the court, on December 14, 2006, the day after the subject opinion order, issued a second order directing that the insured contractor brief the court on the trigger-of-coverage issue. "Plaintiff shall serve and file a legal memorandum addressing the trigger of coverage issue and any evidentiary materials it wishes the [c]ourt to consider in connection with that issue." *Essex,* Case No. 6:04-cv-01838, Doc. 351 (Dec. 14, 2006.) In compliance with that second order, the contractor on Jan. 3, 2007 first briefed the court on the trigger-of-coverage issue and related case law, such as *Trizec. Essex,* Doc. 358 (Jan. 3, 2007). The judge never entered a judgment for that insurer against the contractor as those parties settled their dispute and stipulated to a dismissal before that issue was adjudicated. *Essex,* Doc. 369 (Jan. 31, 2007). These post-opinion events are not reported in Fed. Supp.

[62] *N. River Ins. Co. v. Broward County Sheriff's Office,* 428 F. Supp. 2d 1284, 1289 (S.D. Fla. 2006).

[63] *Id.*

[64] *Assurance Co. of Am. v. Lucas Waterproofing Co.,* 581 F. Supp. 2d 1201, 1207 (S.D. Fla. 2008).

[65] *Amerisure Mut. Ins. Co. v. Albanese Popkin,* 2010 WL 4942972 (S.D. Fla. Nov. 30, 2010).

[66] *Arnett v. Mid-Continent Cas. Co.,* 2010 WL 2821981 (M.D. Fla. July 16, 2010).

[67] *Mid-Continent v. Siena,* 2011 WL 2784200 at *3.

[68] *Amerisure Mut. Ins. Co. v. Summit Contractors, Inc.,* 2012 WL 716884 (M.D. Fla. Feb. 29, 2012).

[69] This is due in no small part to federal court diversity jurisdiction available to many insurers in coverage disputes. Moreover, once the first insurer got a foothold in federal court with the manifestation rule, no insurer that could avoid it would risk a contrary Florida state court ruling.

[70] THE FLORIDA BAR, FLORIDA CONSTRUCTION LAW AND PRACTICE Ch. 5 (6th ed. 2011).

[71] *Pennsylvania Lumbermens,* 43 So. 3d at 189.

[72] *Axis,* 2012 WL 2048303 at 7.

[73] *Id.* at *6, 7.

[74] *Id.* at *6.

[75] *Id.* at *7.

[76] *Scottsdale Ins. Co. v. CB Entm't,* 2012 WL 2412154 (S.D. Fla. June 26, 2012).

[77] *Id.* Whether the *Scottsdale* court had seen the decision in *Axis,* issued so soon before it, is unknown. In *Scottsdale,* however, both parties agreed, improvidently for one it seems, that Florida law includes the manifestation rule. *Id.* Since the parties agreed the manifestation rule applied, *Scottsdale* was not the best case for testing that court's adherence to the manifestation rule.

[78] *Smith v. Dept. of Ins.,* 507 So. 2d 1080, 1096 (Fla. 1987) (Ehrlich, J., concurring in part, dissenting in part).

***Kevin Kelly**, with GrayRobinson, P.A., in Orlando, graduated from Texas A&M University, College Station, Texas, and Capital Law School, Columbus, Ohio. Since 1990, after serving four years as a U.S. Air Force weapon-system procurement officer, he has concentrated in construction, design, commercial, defense contract, and business tort litigation and appeals.*