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CASE LAW UPDATE

Dear Ladies and Gentlemen:

This month we would like to share with you some recent opinions from the Unites States District Courts for the Middle and Southern Districts of Florida and the Florida District Courts of Appeal. We have highlighted specific cases that may be of interest to you.

In *Axis Surplus Ins. Co v. Contravest,* the U.S. District Court for the Middle District of Florida stated in dicta that the injury-in-fact trigger of coverage, not the manifestation trigger of coverage, applies with regard to when an "occurrence" under a Commercial General Liability ("CGL") policy took place when determining whether an insurance carrier has a duty to defend its insured. Note that **this is contrary to a substantial number of federal court decisions interpreting Florida law.**

In *James River Ins. Co v. Fortress Sys., LLC,* the U.S. District Court for the Southern District of Florida held that, under Nebraska law, the Absolute Auto, Aircraft, and Watercraft Exclusion contained in a CGL policy excluded coverage for damages caused by excessive heat during transportation.

In *Clarke v. State Farm,* the Florida Fourth District Court of Appeal held that a claim against an insured arising out of the transmission of the Herpes Simplex Virus was excluded from coverage under a homeowner's insurance policy.

In *Julio Lunas v. Cooperativa de Seguros Multiples de Puerto Rico*, the Florida Second District Court of Appeal held that a settlement agreement was not reached where a settlement offer was acceptable by performance and the accepting insurance carrier failed to comply with the specific terms of the offer.

I. ***Axis Surplus Ins. Co v. Contravest Construction Co., Contravest Inc., and The Crest at Waterford Lakes Condo. Ass'n.*, 2012 U.S. Dist. LEXIS 77489 (M.D. Fla. June 5, 2012).**

FACTS AND PROCEDURAL HISTORY

This is a declaratory judgment action regarding whether Axis Surplus Insurance Company ("Axis") has a duty to defend or indemnify its insureds, Contravest Construction Company and Contravest, Inc. ("Contravest"), with regard to an underlying suit brought against

Contravest by The Crest at Waterford Lakes Condominium Association, Inc. ("the Association"). In response to Axis' complaint, Contravest filed a Counterclaim against Axis seeking a declaration regarding Axis' (and several other insurance carriers') obligations to defend and indemnify Contravest with regard to the underlying suit.

In the underlying suit, the Association alleged that Contravest engaged in the "negligent construction and development of the individual dwelling units and common areas of The Crest at Waterford Lakes Condominium community" (the "Subject Property"). Due to that negligence, the Subject Property allegedly sustained severe damage, including damage caused by water intrusion. The Association alleged that the Association's members only became aware of the defects through the retention of construction experts, which was prompted by complaints from unit owners. Those experts inspected the premises and provided reports disclosing property damage, the earliest of which was dated August 26, 2008.

Axis issued four CGL policies to the Covenant, effective from July 21, 2003 through July 21, 2007, with each lasting one year, and was providing a defense to Contravest in the underlying suit under a reservation of rights. In its declaratory judgment action, Axis filed a motion for summary judgment arguing that it did not have a duty to defend. Cotravest filed a cross-motion for summary judgment arguing that Axis did have a duty to defend, as did the Association. The primary issue in each party's motion for summary judgment was whether the alleged property damage occurred during the policy period of at least one of the Axis policies.

DISTRICT COURT DECISION

In order to trigger coverage under Axis' policy, "property damage" must have "occurred" during the policy period.[1] Axis asserted that damage "occurs" when it is discovered and that the allegations of the Underlying Complaint indicated that the damage was not discovered until 2008, after the latest Axis policy had expired. Contravest asserted that damage "occurs" when it is discoverable and that, based on the allegations of the Underlying Complaint, the damages may have been discoverable during the Axis policy periods. Note that both Axis and Contravest argued in favor of a variation of the "manifestation" trigger of coverage. The Association, meanwhile, argued that Florida follows the "injury-in-fact" theory, under which damage "occurs" at the moment that there is actual damage and the date of discovery is irrelevant.

The Florida Supreme Court and Florida appellate courts have not yet ruled on this issue, and there is disagreement among the federal courts as to which theory applies. That disagreement, according to the Court, stems from different interpretations of two cases—*Trizec Properties*[2], and *Gayfer's*[3].

In *Gayfer's*, the underlying suit alleged that the insured negligently installed a roof drainage system during the policy period, and then after the policy period expired a joint in the drainage system failed and discharged water into the building.[4] There was no discussion about

[1] The parties do not dispute that the alleged damages constitute "property damage" under the terms of the policy.
[2] *Trizec Properties, Inc. v. Biltmore Construction Co.*, 767 F.2d 810 (11th Cir. 1985).
[3] *Travelers Insurance Co. v. C. J. Gayfer's & Co.*, 366 So. 2d 1199, 1200 (Fla. 1st DCA 1979).
[4] *Id.*

when the damage occurred—it was undisputed that it occurred after the policy period expired. Rather, the issue in *Gayfer's* was whether the fact that the negligent act that caused the damage occurred during the policy period was enough to trigger coverage or if the actual damage had to have occurred during the policy period.[5] The court ruled that it was not enough—that 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 *Gayfer's*.[6]

In a subsequent case in the U.S. District Court for the Middle District of Florida, the court interpreted the sentence in *Gayfer's* mentioning the word "manifests" to mean that Florida courts follow the manifestation trigger theory.[7] A number of subsequent cases followed that court's lead in utilizing the manifestation trigger theory without separately analyzing *Gayfer's*.[8]

The Court reasoned that those prior decisions misinterpreted the initial holding in *Gayfer's* because the issue of when damage "occurs" in order to trigger coverage was not before the court in that case. In support of its reasoning, the Court cited a Texas Supreme Court decision, which stated that cases cited in support of the manifestation trigger, including *Gayfer's*, did not relate to triggers of coverage, but held only that the time of the initial negligence that subsequently led to property damage was not an occurrence. Note that the Court's citation to a Texas Supreme Court's decision is surprising and questionable considering that it was making a determination regarding Florida law as it relates to issues regarding which there is prior Florida law.

The Court then analyzed *Trizec,* which was a duty to defend case; not a trigger of coverage case. In *Trizec*, the 11th Circuit Court of Appeal held that an insurance carrier did have a duty to defend its insured where the damages may have occurred during the policy period. The court in *Trizec* stated that "the damage itself . . . must occur during the policy period for coverage to be effective" and that "[t]here is no requirement that the damages 'manifest' themselves during the policy period" in order to trigger coverage.[9]

Since the language in the CGL policy at issue was similar to the language at issue in *Trizec*, this Court applied the injury-in-fact trigger and held that Axis had a duty to defend Contravest. Note that the portion of the Court's decision regarding triggers of coverage is dicta because, as the Court states, Axis would have a duty to defend Contravest regardless of whether the manifestation or injury-in-fact triggers of coverage applied. Note also that even though this case stands for the proposition that the injury-in-fact trigger applies in Florida, the overwhelming majority of federal case law regarding this issue supports the application of the manifestation trigger.

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[5] *Id.* at 1201-02.
[6] *Id.* at 1202.
[7] *Auto Owners Insurance Co. v. Travelers Casualty & Surety Co.*, 227 F. Supp. 2d 1248 (M.D. Fla. 2002).
[8] *See Mid-Continent Cas. Co. v. Siena Home Corp.*, No. 5:08-CV-385-Oc-10GJK, 2011 U.S. Dist. LEXIS 79132, 2011 WL 2784200, at *3 (M.D. Fla. July 8, 2011); *Mid-Continent Cas. Co. v. Frank Casserino Constr.*, 721 F. Supp. 2d 1209, 1216 (M.D. Fla. 2010); *Essex Builders Grp., Inc. v. Amerisure Ins. Co.*, 485 F. Supp. 2d 1302, 1309 (M.D. Fla. 2006).
[9] *Id.* at 813.

II. *James Rives Ins. Co. v. Fortress Sys., LLC*, 2012 U.S. Dist LEXIS 175215 (S.D. Fla. Dec. 11, 2012).

FACTS AND PROCEDURAL HISTORY

This is a declaratory judgment action regarding whether James River Insurance Company ("James River") has an obligation to defend or indemnify its insured, Fortress Systems, LLC ("FSI"), in an underlying lawsuit filed against it by Bodywell Nutrition LLC ("Bodywell") ("the Underlying Action"). In the Underlying Action, Bodywell, a sports nutrition and dietary supplement company, sued FSI, a dietary supplement manufacturer. Bodywell had retained FSI to manufacture a powder-form drink called First Order. After FSI manufactured First Order, Bodywell and FSI agreed that FSI would arrange for shipping the product to Bodywell's facilities. According to both Bodywell and FSI, FSI manufactured First Order without defect. However, the shipping companies to whom FSI subcontracted used vehicles without proper cooling systems. As a result, the First Order powder clumped together and became insoluble. Bodywell then filed suit against FSI.

During the relevant time period, FSI had in effect a CGL policy issued by James River with a policy limit of $5,000,000 (the "Subject Policy"). James River denied coverage for damages arising out of the above referenced circumstances under the Subject Policy.

After James River denied coverage, Bodywell and FSI entered into a consent agreement in the Underlying Action, which provided, among other things, that: (1) the parties would file a stipulation of settlement and joint motion requesting that the Court enter a final judgment in Bodywell's favor in the amount of $10,450,000; (2) Bodywell would dismiss with prejudice its remaining claims against FSI; and (3) FSI would assign its right to pursue its claims under the Subject Policy to Bodywell. The Court entered a Final Judgment in accordance with the parties' stipulation.

Around the same time, James River filed its declaratory action against FSI and Bodywell, asserting five claims. Count I sought a declaration that FSI's damages were not covered under the insurance policy. Counts II and III sought to establish that the damages fell within several exclusions to coverage. Count IV alleged that FSI was not covered because it breached the cooperation clause of the policy. Count V asked the Court to find, in the alternative, that coverage was limited by certain amendments to the policy. Bodywell and FSI counterclaimed, alleging that James River had a duty to defend FSI in the underlying suit and a duty to indemnify FSI for its settlement with Bodywell. James River and Bodywell and FSI moved for summary judgment.

DISTRICT COURT DECISION

Note that Nebraska law was applied in the interpretation of the James River policy.[10]

[10] *See Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 805, 696 N.W.2d 453 (Neb. 2005); *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 575-76, 675 N.W.2d 665 (Neb. 2004); *Pogge v. American Family Mut. Ins. Co.*, 272 Neb. 554, 563, 723 N.W.2d 334 (Neb. 2006).

The parties stipulated that FSI produced First Order for Bodywell, and the product was damaged while in transit aboard FSI's shippers' vehicles. In light of those stipulated facts, the Court found the Absolute Auto, Aircraft, and Watercraft Exclusion of the Subject Policy to be dispositive.

The Absolute Auto, Aircraft and Watercraft Exclusion ("Absolute Auto Exclusion") bars coverage for "'property damage' arising out of the . . . use of any 'auto.'" James River argued that the Absolute Auto Exclusion applied to exclude FSI's damages because the clumping occurred as a result of the shippers' failure to use temperature controls in their vehicles. Bodywell and FSI countered that the damage did not arise out of the use of the shippers' vehicles, but rather out of the heat in the vehicles.

The Court found that Bodywell and FSI's argument "may be true in the same limited sense that a driver's injury is caused by a collision with the steering wheel." It was obvious, however, that in both cases the damage arose out of the "(mis)use of an auto." Nebraska courts have found that, in order for an injury to "arise out of" the use of an auto, there must be "some causal relationship between the injury and the use of the vehicle,"[11] and that standard was easily met in this case. The court found a clear causal connection between the use of the shippers' vehicles and the subsequent property damage. Therefore, the damage arose out of the use of an auto, and was excluded from coverage under the Subject Policy.

III. *John B. Clarke v. State Farm Florida Insurance*, 2012 Fla. App. LEXIS 18961 (Fla. 4th DCA 2012).

FACTS AND PROCEDURAL HISTORY

This matter arose out of a claim asserted against John B. Clarke by a woman (the "plaintiff") alleging that she contracted from him the Herpes Simplex Virus ("HSV"). The plaintiff's complaint alleged the following: within two months of meeting Mr. Clarke, the plaintiff moved into his home, where she and her mother discovered medications and hygiene products that caused her to question Mr. Clarke's sexual health. Mr. Clarke, anticipating the plaintiff's concerns, preemptively visited a urologist and took a variety of STD tests, knowing that he would test negative for HSV because he had not had an active outbreak within the prior three months. When the plaintiff confronted Mr. Clarke regarding his sexual health, he presented her with his test results, which indicated that he had tested negative for HSV. Comforted by the test results, the plaintiff had sexual intercourse with Mr. Clarke. Shortly thereafter, the plaintiff experienced severe genital discomfort and later tested positive for HSV. She had no prior history of carrying or suffering from HSV before dating Mr. Clarke.

At all times relevant to the plaintiff's claims, Mr. Clarke had in effect a homeowner's insurance policy issued by State Farm Florida Insurance ("State Farm"). Mr. Clarke made a claim with State Farm, which agreed to provide him with a defense under a reservation of rights. According to the terms of the State Farm policy, it specifically did not include coverage for:

[11] *Farmers Union Coop. Ins. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436, 439 (Neb. 1997).

(a) any of the following which are communicable: disease, bacteria, parasite, virus, or other organism, any of which are transmitted by any insured to any other person.

(b) the exposure to any such disease, bacteria, parasite, virus, or other organism by any insured to any other person; or

(c) emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury unless it arises out of actual physical injury to some person.

State Farm filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify Mr. Clarke. State Farm then moved for summary judgment, which the trial court granted. Mr. Clarke appealed.

APPELLATE COURT DECISION

The Court affirmed the trial court's summary judgment order. The Court held that in its policy, State Farm agreed to defend and indemnify Mr. Clarke for claims brought against him "for damages because of bodily injury." However, excluded from the definition of "bodily injury" were communicable diseases "transmitted by any insured to any other person." The plaintiff's causes of action were based on the fact that she "was exposed to a high risk HSV virus, and that she contracted the herpes virus from the Defendant" as a result of his actions. Since the plaintiff's complaint failed to allege "bodily injury" covered under the State Farm policy, the trial court correctly concluded that State Farm did not owe a duty of defense or indemnification

The Court rejected Mr. Clarke's argument in favor of a narrow and strained interpretation of the policy's exclusions to "bodily injury" that included communication of HSV but not the resulting physical injuries caused by the disease - the symptoms "arising out of" HSV. Mr. Clarke pointed to several policy provisions where State Farm specifically used the phrase "arising out of" to exclude coverage for damages, and contended that it was therefore significant that the policy did not exclude damages "arising out of" communicable diseases.

The Court noted that Florida courts strictly construe exclusionary provisions "only in the sense that the insurer is required to make clear precisely what is excluded from coverage."[12] Where an insurance carrier has defined a term used in a policy in clear, simple, non-technical language, strict construction does not mean that judges are empowered to give the defined term a different meaning deemed more socially responsible or desirable to the insured.[13] A "disease" necessarily includes its symptoms.

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[12] *State Farm Fire & Cas. Ins. Co. v. Deni Assocs. of Fla., Inc.*, 678 So. 2d 397, 401 (Fla. 4th DCA 1996), *affirmed*, 711 So. 2d 1135 (Fla. 1998).

[13] *Id.*

The Court found the two cases upon which Mr. Clarke relied, both out of the state of New York, to be distinguishable.[14] In one of those cases, the court held that where the defendant transmitted HIV to the plaintiff, an insurance company did not have a duty to defend or indemnify its insured because the policy denied coverage "for bodily injury arising out of the transmission of a 'communicable disease' by [the] insured."[15] In the other case, an insured exposed the plaintiff to contaminated soil, "set[ting] the stage for possible disease transmission by such means as direct contact."[16] The court held that the insurance company did not have a duty to defend or indemnify the insured because the policy denied coverage for "bodily injury... arising out of the transmission of or alleged transmission of any communicable disease."[17] The cases cited by Mr. Clarke demonstrated only that an insurer may deny coverage where a policy expressly denies coverage for bodily injury "arising out of" the transmission of communicable diseases. Neither case concluded that the phrase, "arising out of," contains the magic words necessary to exclude coverage for the transmission of a communicable disease, and the fact that a provision in an insurance policy might have been drafted differently "does not necessarily mean that the provision is otherwise inconsistent, uncertain or ambiguous."[18]

IV. *Julio Lunas v. Cooperativa de Seguros Multiples de Puerto Rico*, 100 S. 3d 239 (Fla. 2nd DCA 2012).

FACTS AND PROCEDURAL HISTORY

This claim arose out of a sinkhole that caused damage to the residence of Julio Lunas. Mr. Lunas' insurance carrier admitted that the damages caused by the sinkhole were covered under its policy. On September 10, 2010, Mr. Lunas, through his counsel, sent correspondence to his insurance carrier demanding it tender its policy limits within seven days.[19] On October 7, 2010, the insurance carrier responded with correspondence to Mr. Lunas and his counsel enclosing reports regarding the cost to repair the subject residence and a release to sign as a condition for receiving the enclosed $115,861 settlement check. That check was apparently not accepted. On October 28, 2010, counsel for Mr. Lunas' insurance carrier sent correspondence to Mr. Lunas' counsel memorializing a telephone conversation in which Mr. Lunas' counsel offered to settle the claim for the policy limits of $115,861, contingent upon a "check split." That correspondence set forth the insurance carrier's understanding that Mr. Lunas demanded that an $85,000 check be made out to him and the mortgagee (Wachovia), and that a $30,861 check be made out to Mr. Lunas, his counsel, and the public adjuster.

On November 12, 2010, by overnight mail, the insurance carrier's counsel sent to Mr. Lunas' counsel one check in the amount of $115,861, payable to Mr. Lunas, the mortgagee (Bank of America), the public adjuster, and Mr. Lunas' counsel.

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[14] *Plaza v. General Assurance Co.*, 244 A.D.2d 238, 664 N.Y.S.2d 444 (N.Y. App. Div. 1997), and *Alexis v. Southwood Ltd. P'ship*, 792 So. 2d 100 (La. Ct. App. 2001).
[15] 664 N.Y.S.2d at 444.
[16] 792 So. 2d at 102.
[17] *Id.*
[18] *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986).

[19] Interestingly, the amount of the policy limits was not mentioned in Mr. Lunas' letter.

During the above outlined exchange, Mr. Lunas' breach of contract action remained pending. The action ended when the trial court concluded that the above identified exchanges resulted in an enforceable settlement agreement, particularly since the offer to settle Mr. Lunas' claim contained an impossibility - excluding from the insurance proceeds the lienholder/mortgagee, which would deprive the mortgagee of its right to insurance proceeds and be contrary to public policy.

APPELLATE COURT DECISION

Settlement agreements are governed by contract law.[20] A settlement agreement forms only when one party makes an offer and the other party accepts. There "must be a meeting of the minds as to the essential settlement terms in order for settlement agreements to be enforceable."[21] The general rule is that "an acceptance of an offer must be unconditional and identical with the terms of the offer."[22] Courts must use an objective test to determine whether an enforceable contract was made.[23] "'The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.'"[24]

In this case, the insurance carrier advanced two theories as to how an enforceable contract came into being, neither of which the Court agreed with. First, it asserted that it met the terms offered in the letter of September 10, 2010, which set forth two conditions for settlement: (1) a settlement check for "policy benefits" and (2) to be received within seven days "from receipt of this letter." The insurance carrier met neither condition, as the amount of "policy benefits" was not agreed to. Second, the insurance carrier argued that it met the conditions identified in the October 28, 2010 correspondence issued by its counsel. However, the insurance carrier did not meet the conditions of that correspondence either, as it sent one check, not two, and the mortgagee on the check was different that the one listed in the correspondence. Thus, there was no meeting of the minds and no settlement was entered into.[25]

We hope you find the above cases helpful and insightful. Should you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned at your earliest convenience.

Very truly yours,

JOHN BOND ATKINSON
JOSEPH V. MANZO

[20] *Schlosser v. Perez*, 832 So. 2d 179, 182 (Fla. 2d DCA 2002) (citing *Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985)).
[21] *Id.*
[22] *Id.* (citing *Giovo v. McDonald*, 791 So. 2d 38, 40 (Fla. 2d DCA 2001)).
[23] *Robbie*, 469 So. 2d at 1385.
[24] *Hanson v. Maxfield*, 23 So. 3d 736, 739 (Fla. 1st DCA 2009) (quoting *Robbie*, 469 So. 2d at 1385).
[25] *See Gonzalez v. Claywell*, 24 So. 3d 1260, 1261 (Fla. 1st DCA 2009).