

Case Study: *Axis v. Contravest Construction*

--By Haley Maple, Marshall Dennehey Warner Coleman & Goggin PC

Law360, New York (September 19, 2012, 2:44 PM ET) -- In the construction litigation and insurance coverage contexts, a hotly contested issue often arises over when commercial general liability coverage is "triggered," giving rise to insurers' duty to defend and indemnify the insureds.



Although different theories on when coverage is triggered exist, the Florida Supreme Court has yet to answer the question as to which "trigger" theory applies in Florida. In June 2012, however, the United States District Court for the Middle District of Florida issued an opinion in *Axis Surplus Insurance Co. v. Contravest Construction Co., et. al.*, 2012 U.S. Dist. (M.D. Fla. June 5, 2012), which anticipates that the Florida Supreme Court will utilize the injury-in-fact trigger.

The controversy in *Axis* arose from an underlying litigation involving a condominium association's claims against Contravest (Axis's insured) for construction defects. In the underlying litigation, the association claimed the property suffered severe water intrusion and other defects that were not readily discoverable. The association claimed that, after unit owner complaints and observations of the property, the association retained construction experts who inspected the premises and issued reports in August and September of 2008, identifying property damage.

Axis moved for summary judgment, arguing that coverage pursuant to its commercial general liability policies was not triggered because the property damage was not discovered or manifested until 2008, after the expiration of the Axis policies. To wit, the Axis policies at issue provided:

- b. This insurance applies to "bodily injury" and "property damage" only if:
 - 1. The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"
 - 2. The "bodily injury" or "property damage" occurs during the policy period.

Axis, Contravest and the association asserted three different trigger theories based upon this policy language. Axis asserted that the condominium association's discovery of property damage in 2008, after the expiration of the Axis policies, failed to trigger coverage. Under Axis's trigger theory, "damage 'occurs' when it is discovered."

In contrast, Contravest asserted, "damage 'occurs' when it is discoverable," and, thus, based upon the allegations in the underlying litigation, damage could have been discoverable during the Axis policy periods.

The theories advocated by Axis and Contravest are different versions of the "manifestation" trigger theory. Under that theory, coverage is triggered when the damage is or could have been discovered. In contrast, the association argued that damage occurs "at the moment that there is actual damage and the date of discovery is irrelevant." The association-advocated theory is known as the "injury-in-fact" trigger theory.

Agreeing with the condominium association, the district court adopted the Eleventh Circuit's conclusion in *Trizec Properties Inc. v. Biltmore Construction Co.*, 767 F.2d 810, 813 (11th Cir. 1985), in which the court, in evaluating policy language similar to that in the Axis policy, determined that the "injury-in-fact" theory applied.

In *Trizec*, the policy stated that coverage was triggered as a result of "an occurrence during the policy period." Both parties in *Trizec* agreed that, under this policy language, the actual negligent act or omission failed to trigger coverage. Rather, the insurer in *Trizec* argued that coverage was triggered when the damage was discovered or manifested itself.

The Eleventh Circuit disagreed, finding that the use of the word "occurrence" in the policy at issue lacked any requirement that the damages manifest during the policy period. Instead, the Eleventh Circuit found that, pursuant to the policy at issue in *Trizec*, "[i]t is the damage itself which must occur during the policy period for coverage to be effective."

Because the Axis policy similarly stated that damage must occur during the policy period, the district court adopted the *Trizec* holding, finding that the property damage claimed by the association must have actually occurred during the policy period to trigger coverage.

In determining whether insurers owe a duty to defend, Florida courts look to the underlying complaint against the insured, and if the allegations therein assert claims against the insured that potentially fall within coverage, the insurer owes a duty to defend. *Axis Surplus Insurance Co.*, 2012 U.S. Dist., at *27-28 (citations omitted); see also *Trizec Properties*, 767 F.2d at 811.

Because the association's underlying complaint indicated that the damage occurred sometime after construction and sometime before the experts inspected the property in 2008, coverage was potentially triggered, and Axis owed a duty to defend.

Although the decision in *Axis* provides guidance and further support for the injury-in-fact trigger theory, the answer as to which trigger theory applies in Florida is not yet definitive for several reasons.

First, the Florida Supreme Court's interpretation of Florida law reigns over federal court interpretations of Florida law. Until the Florida Supreme Court issues a ruling on which trigger theory applies in Florida, the opinion in *Axis* will merely act as persuasive, not binding, authority in Florida state courts.

Second, the *Axis* opinion includes language that arguably limits its application to the particular policy at issue in that case, leaving open arguments that alternative trigger theories apply where the policy language differs from the language contained in the Axis policy.

Regardless, *Axis* is an important and persuasive decision. Pursuant to the decision, contractors who have been sued can argue that the moment when actual damage occurs, as opposed to when it is discovered, is the relevant date for determining coverage.

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