

# LAWYER

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## ELEVENTH CIRCUIT IS QUICK ON THE TRIGGER

Construction Law Section

Chairs: Erik Raines - Hill Ward Henderson; and Mark Smith - Carlton Fields Jordan Burt



The Eleventh Circuit recently reaffirmed the appropriate trigger for determining coverage under a Commercial General Liability (CGL) insurance policy and clarified the scope of covered property damage in a construction case. In *Carithers v. Mid-Continent Casualty Company*, Case No. 14-11639 (11th Cir. April 7, 2015), the plaintiffs filed suit against their homebuilder after discovering a number of defects in their home. After the homebuilder's CGL insurer refused to defend, the homeowners and homebuilder entered into a consent judgment, which assigned the homebuilder's right to collect the judgment amount from Mid-Continent. The homeowners filed suit to collect from Mid-Continent.

The complaint in the underlying action alleged that the defects could not have been discovered until 2010. Mid-Continent argued that because its policies only provided insurance through 2008, it was not liable for the damages (the "manifestation trigger"). The homeowners argued that property damage under a CGL policy occurs when the property is damaged

(the "injury-in-fact" trigger).

No Florida state court appellate decision has decided which trigger applies, and federal district courts in Florida have been split on the issue. In this case, the Eleventh Circuit applied the injury-in-fact theory and held: "Property damage occurs when the damage happens, not when the damage is discovered or discoverable."

Another pertinent issue in the case was whether certain damages were resulting damages (covered) or damages to the defective property itself (uncovered). The lower court determined that "the incorrect application of exterior brick coating caused property damage to the brick[,] that the use of inadequate adhesive and an inadequate base in the installation of tile caused property damage to the tile[, and] that the incorrect construction of a balcony, which allowed water to seep into the ceilings and walls of the garage leading to wood rot, caused property damage to the garage." The lower court included the cost of repairing the balcony itself, which had to be replaced in order to repair the property damage to the garage ("rip and tear" damages).

The Eleventh Circuit held that for the damaged brick and tile, the issue turns on whether the brick [or tile] installation and the

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application of the brick coating [or tile adhesive] were done by a single sub-contractor. If it was done by a single sub-contractor, then the damage to the bricks [or tile] was part of the sub-contractor's work, and this

defective work caused no damage apart from the defective work itself. However, if the bricks [or tiles] were installed by one sub-contractor, and a different sub-contractor applied the brick coating [or tile adhesive], then the damage to the bricks [or tile] caused by the negligent application of the brick coating [or tile adhesive] was not part of the sub-contractor's defective work, and constituted property damage.

The court also upheld the cost of repairing the balcony itself, reasoning that the homeowners had a right to "the costs of repairing damage caused by the defective work" and that repairing the balcony was part of the cost of repairing the defective garage.

*Carithers* is a significant opinion for Florida construction attorneys, as it clarifies these often-litigated CGL coverage issues.



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