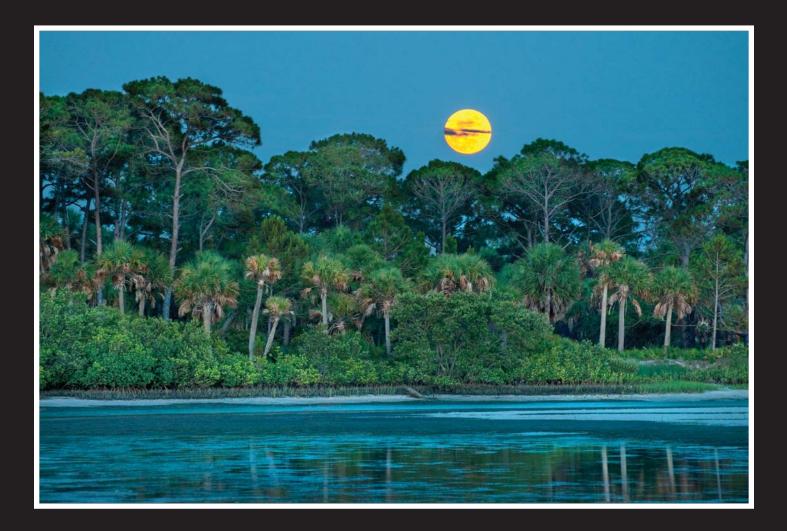
## LAWYER

THE HILLSBOROUGH COUNTY BAR ASSOCIATION TAMPA, FLORIDA | SUMMER 2015 | VOL. 25, NO. 6





## **ELEVENTH CIRCUIT IS QUICK ON THE TRIGGER** Construction Law Section

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



he 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-infact" 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

or discoverable."

applied the injury-in-fact theory

when the damage happens, not

when the damage is discovered

and held: "Property damage occurs

Another pertinent issue in the

case was whether certain damages

or damages to the defective property

itself (uncovered). The lower court

application of exterior brick coating

brick[,] that the use of inadequate

adhesive and an inadequate base

property damage to the tile[, and]

that the incorrect construction of a balcony, which allowed water to

seep into the ceilings and walls of

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

The Eleventh Circuit held that

for the damaged brick and tile, the:

[or tile] installation and the

issue turns on whether the brick

tear" damages).

the garage leading to wood rot,

caused property damage to the

in the installation of tile caused

determined that "the incorrect

caused property damage to the

were resulting damages (covered)

"Property damage occurs when the damage happens, not when the damage is discovered or discoverable."

application of the brick coating [or tile adhesive] were done by a single sub-contractor. If it was done by a single subcontractor, 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.

Author: Emily Morrell -Hill Ward Henderson

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