Client Alert

May 2015

Eleventh Circuit Rejects Insurer's Application of "Manifestation Trigger" in Property Damage Case

In a case of significance to property owners and contractors, the Eleventh Circuit recently rejected an insurer's attempt to apply a manifestation trigger to a claim for damage to property, confirming instead that coverage for property damage is triggered when the damage actually occurs. In doing so, the court took a narrow view of what constitutes "property damage," requiring the insured to demonstrate the existence of damage to property other than the defective work to implicate coverage under the policy. *Carithers v. Mid-Continent Cas. Co.*, No. 14-11639, 2015 WL 1529038 (11th Cir. Apr. 7, 2015).

Background

After discovering defects in multiple areas of their home, the Carithers filed suit against their homebuilder. The homebuilder's insurance company, Mid-Continent, refused to defend the action on behalf of its insured. The Carithers and the builder entered a consent judgment in favor of the Carithers that assigned to the Carithers the homebuilder's right to collect the judgment amount from Mid-Continent. The Carithers then filed suit against Mid-Continent. The trial court granted summary judgment in favor of the homeowners concerning the insurer's duty to defend and, following a bench trial, entered judgment in favor of the homeowners on coverage. Mid-Continent appealed.

Analysis and Holding

On appeal, the Eleventh Circuit Court of Appeals first addressed Mid-Continent's duty to defend, which hinged on when coverage was implicated under the policy. The insurer argued that property damage occurs when it manifests itself, that is, when it is discoverable by reasonable inspection or when it is actually discovered. The Carithers, on the other hand, argued that property damage occurred in their home at the time the home actually was damaged. Although the damage occurred sometime earlier, the complaint in the underlying action alleged that the damage to the home could not have been discovered by reasonable inspection until 2010, by which time the Mid-Continent policy was no longer in effect.

The Eleventh Circuit held that Mid-Continent had a duty to defend because it was unclear whether there would be coverage for the damages sought by the Carithers. Since no Florida appellate court has decided which trigger applies to determining when property damage occurs, and since federal district courts in Florida are split on the issue, the court found that Mid-Continent would be required to "resolve this uncertainty in favor of the insured and offer a defense to [the homebuilder]."

The court went on to hold, in reliance on prior Eleventh Circuit precedent, that property damage occurs when the damage happens, not when the damage is discovered or discoverable. The court acknowledged that difficulty may arise where property damage is latent and not discovered until much later. In this case, however, the district court found as a matter of fact that the property damage occurred in 2005, while the Mid-Continent policy was in effect. The court expressed no opinion on what the trigger should be where it is difficult or impossible to determine when the property was damaged.

The court also addressed the specific property damage determinations at issue. Concerning the work of subcontractors, the court cited the distinction between a claim for the costs of repairing or removing

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defective work, which is not a claim for "property damage," and a claim for the costs of repairing damage caused by the defective work, which is a claim for "property damage." In this case, the district court determined, for example, that the negligent application of exterior brick coating caused property damage to the brick itself. Coverage for the brick thus turned on whether the brick installation and the application of the coating were done by a single sub-contractor. If a single subcontractor performed both tasks, then the damage to the bricks was part of the subcontractor's work, and this defective work caused no damage apart from the defective work itself. However, if the bricks were installed by one subcontractor, and a different subcontractor applied the brick coating, then the damage to the bricks caused by the negligent application of the brick coating was not part of the subcontractor's defective work, and constituted covered damage to property.

There was no evidence as to whether the coating was applied by the same or a different subcontractor. The court determined that proof that the damaged property was the work of a separate subcontractor is part of the insured's initial burden of bringing the loss within the terms of the policy and held that distinguishing defective work from the damage caused by defective work is necessary to establish "a loss apparently within the terms of the policy."

The court rejected the insurer's argument that the Carithers could not recover for any defective work, even where repairing that work is a necessary cost of repairing work for which there is coverage. The house's balcony was defectively constructed, which caused damage to the garage. Under Florida law, the defectively constructed balcony was not covered by the policy, but in order to repair the garage (which the parties agreed was covered property damage), the balcony had to be rebuilt. Since the district court determined that repairing the balcony was part of the cost of repairing the garage, which was defective work, the Carithers were entitled to those damages.

Implications

Carithers serves as a reminder that insurers may not avoid their broad duty to defend claims where there is a potential that covered property damage might exist. Only where it is conclusive that no covered damage exists will the insurer be excused from its defense obligations. Any doubts must be resolved in favor of the policyholder.

Carithers also reiterates the restrictive view taken by the Eleventh concerning when damage caused by defective work constitutes property damage. A comparison to the Southern District of Florida's recent decision in *Pavarani Construction Co. (SE) Inc. v. ACE American Insurance Company*, Case No. 14-cv-20524-KING (S.D.Fla., Feb. 25, 2015), illustrates that dichotomy. Under the Eleventh Circuit's narrow view, however, policyholders must be prepared to present evidence of multiple subcontractors performing work and, when warranted, litigate issues concerning the timing of property damage, to establish that defective work in fact caused damage to insured property.

Members of the firm's insurance coverage counseling and litigation team are ready to answer any questions you might have about this alert or assist with any insurance-related matters.

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