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# 11th Circuit Weighs in on Several CGL Policy Related Issues in *Carithers v. Mid-Continent Casualty Company*

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The Federal Eleventh Circuit Court of Appeals recently issued an opinion addressing a number of CGL Policy related issues, including the duty to defend, application of coverage triggers, and an analysis of covered damages. The underlying facts, issues, and defects were relatively routine. Mid-Continent had issued four CGL policies to a general contractor ("GC"); including products-completed operations coverage from 2005-2008. The Homeowners sued the GC for construction defects, alleging in the Complaint that the defects could not have been discovered until 2010. Mid-Continent refused to defend the GC, arguing the "manifestation" trigger applied, and that the property damage was not discovered until after its policies had expired. Summarized below are several interesting aspects of the Eleventh Circuit decision.

**Duty to Defend** - The Eleventh Circuit held that Mid-Continent had a duty to defend, essentially because Florida law is uncertain about whether a "manifestation" trigger or an "injury-in-fact" trigger should apply. Given this uncertainty, the Eleventh Circuit reasoned, Mid-Continent did not know whether there would be coverage for the underlying damages. This, coupled with Florida law requiring that doubts be resolved in the Insured's favor, led the court to conclude that Mid-Continent was obligated to provide a defense if either trigger would support coverage. This could have far ranging impacts on duty to defend analysis, especially in federal courts.

**Injury in Fact Trigger Applied** - Interestingly, the Eleventh Circuit went on to essentially apply an "injury-in-fact" trigger to find coverage under the Mid-Continent policies. In doing so, however, the Eleventh Circuit limited its holding to the facts of the case, and expressed no opinion on what trigger Florida law requires.

**"Faulty Workmanship" vs. "Property Damage"** - The Eleventh Circuit cited *JSUB* and *Pozzi Window* for the proposition that, as related to the work of subcontractors, there is a difference between a claim for the cost of repairing defective work (typically not property damage), and the cost of repairing damage caused by the defective work (typically covered property damage). The Court reaffirmed its ruling in *Auchter*, in which it held that the relevant criteria for distinguishing between defective work and damage caused by defective work essentially is the scope of the defaulting subcontractor's work on the project. The Court did note that its decision in *Auchter* represented a narrow interpretation of *Pozzi Window*.

**"Get To" Costs** - Some likely will argue that the opinion impacts whether insurers essentially are responsible for "get to" costs. The Eleventh Circuit opinion stated that damages to a defective balcony were not covered, but that damages to the underlying garage, caused by defects in the balcony, were covered. The Court reasoned that under Florida law the Homeowners had a right to recover "the costs of repairing damage caused by the defective work." Without much analysis or explanation, however, the Eleventh Circuit concluded that because the trial judge had ruled as a matter of "fact" that the costs of repairing the garage (covered property damages) "included" the costs to replace the defective balcony (not covered property damages), Mid-Continent was responsible for all repair costs, including the cost to repair the defective balcony work. Criteria for distinguishing between defective work and damage caused by defective work essentially is the scope of the defaulting subcontractor's work on the project. The Court did note that its decision in *Auchter* represented a narrow interpretation of *Pozzi Window*.