# Insurance Matters!

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A Newsletter of the **Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of The Florida Bar

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**In This Issue**:



## "Rip and Tear" Coverage Appears To Be Here to Stay in Florida

By: Mark Boyle, Boyle Leonard, P.A., Fort Myers, FL

In 2007, the Florida Supreme court joined, what is now the clear majority of jurisdictions, in holding that a Commercial General Liability policy ("CGL") covers certain elements of defective construction claims. In U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007) and the companion case of Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008), the Florida Supreme Court held that the CGL policy pays damages for those portions of the work that resulted in physical damage to the property. Both the J.S.U.B. and the Pozzi decisions distinguished claims for mere misperformed work, which the Court held was not covered, as contrasted with physical damage which resulted from this performed work, which was potentially covered. Both decisions held that defective construction claims constituted an occurrence and property damage, further holding that such claims were restored to coverage by an operation of the subcontractor exception to the "your work" exclusion. Subsequent cases have reinforced the idea that under J.S.U.B. and Pozzi merely misperformed work, without accompanying physical damage, does not constitute a covered loss under a CGL. See Amerisure Mutual Insurance Co. v. Auchter Co., 673 F.3d 1294 (11th Cir. 2012).

None of these cases answered one of the most common problems in defective construction

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## Assignment of Insurance Rights in Florida

By: Robert H. Friedman, Friedman, P.A., Palm Beach, FL

There are several contexts in which policyholders may wish to assign insurance rights to third parties. In the third-party liability context, it is common for policyholder defendants to enter into a Coblentz agreement with claimants to assign insurance rights when an insurance company has disclaimed defense and indemnity obligations. Sometimes a policyholder with an insurance claim wishes to sell all or a part of the claim to a third-party investor in exchange for a current cash payment. In the life settlement context, a poli-

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cyholder with a life insurance policy may wish to sell the right to collect the death benefit. Companies engaging in mergers and acquisitions address assignment of insurance policies and rights to preserve coverage for long-tail claims.


In the first-party context, policyholders often assign insurance rights to contractors when an insurer refuses to pay for repair costs. It is also not uncommon for a party selling real estate that has suffered damage to assign rights to a pending insurance claim to the purchaser of the property.

Although insurance companies typically resist the assignment of insurance rights, courts in Florida have generally upheld the policyholder's right to assign policy benefits on a post-loss basis.

### Insurable Interest

A basic concept of insurance law is that the party claiming insurance benefits must have an insurable interest in the subject of the insurance. Insurance is a form of economic protection, and is not meant to be a wager. The concept of insurable interest prevents a person from insuring his neighbor's house or his neighbor's life.

Under Florida Stat. § 627.405, insurable interest is defined as "any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment." Insurable interest in property is measured by "the extent to which the insured might be damnified by loss, injury, or impairment thereof." Id.

Insurers have used the insurable interest concept to invalidate certain life insurance benefit assignments, if the insurer can prove that the agreement to assign was made prior to the inception of the life insurance contract. See Florida Stat. § 627.404(1) (requiring that a party purchasing life insurance must have an insurable interest in the person being insured at the time of inception of the policy). In the real estate context, an insurer recently invalidated a property insurance claim asserted by a property manager on the basis that the property manager did not own the damaged property and therefore could not recover insurance proceeds absent an assignment. See *Banta Properties, Inc. v. Arch Specialty Ins. Co*., No. 12-14186, 2014 WL 274478 (11th Cir. Jan. 24, 2014).

### The Anti-Assignment Clause

Most first-party property policies contain an anti-assignment clause, which states that the policy cannot be assigned without the insurer's written consent. Some insurers take the position that an assignment of insurance benefits violates the anti-assignment clause. Although some jurisdictions prohibit the assignment of any insurance benefits without the insurer's consent, Florida is in the

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majority of jurisdictions that allows assignment after a loss has occurred. See, e.g., *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 195 (Fla. 3d DCA 2012); *Erickson's Drying Systems, Inc. v. QBE Ins. Corp.*, No. 2:11-cv-581, 2012 WL 469746, at *2 (M.D. Fla. Feb. 13, 2012); *Accident Cleaners, Inc. v. Universal Ins. Co.*, Case No. 5D14-352 (Fla. 5th DCA Apr. 10, 2015).

The most recent Florida DCA opinion on the subject is *Bioscience West, Inc. v. Gulfstream Property and Cas. Ins. Co.*, Case No. 2D14-3946 (Fla. 2d DCA Feb. 5, 2016) ("*Bioscience West*"). In *Bioscience West*, the policyholder suffered water damage to her home. The policyholder hired an emergency water mitigation company without the insurer's consent, and agreed to assign policy benefits to the contractor in exchange for the contractor's agreement to release the policyholder from payment obligations. The insurer refused to pay the contractor on the basis of the anti-assignment clause.

The trial court agreed with the insurer and dismissed the claim. The appellate court reversed, holding that the anti-assignment clause only prohibited assignment of the entire policy without the insurer's consent, not the assignment of insurance benefits after a loss has occurred. Further, the court held that, even if the insurance policy prohibited post-loss assignment of insurance benefits, Florida's public policy allowing the free assignment of claims would likely trump any such policy language. The court concluded that any change in Florida's long-standing policy would need to come from the legislature.

### Legislative Activity

The Florida legislature has, in fact, taken up this issue during recent sessions, although no new legislation has materialized. Insurers, including state-run Citizens Property Insurance Corporation, have warned that policyholder assignment of benefits to repair contractors have resulted in increased claims cost. Policyholders argue that the assignments are necessary to effectuate repairs when the insurer delays or denies claim payments, and have no impact on the insurer's obligations, which are fixed at the time of the loss.

As the court in *Bioscience West* pointed out, for nearly 100 years Florida's policyholders have had the right to assign post-loss policy benefits without the insurer's consent. Whether the Florida legislature would legislate a change to this deep-rooted common law, or even has the power to do so, remains to be seen. IM

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insurance claims: that being whether an insurer is responsible to pay for the costs of accessing the covered damage. A common example is helpful in evaluating this issue. Many, if not most, of the residential defective construction claims in Florida involve claims of improperly installed stucco leaking and causing damage to the interior of the structure. See Travelers Prop. Cas. Co. of America v. Amerisure Ins. Co. et al., Case No. 5:14-cv-10, 2015 WL 5769247 (N.D. Fla. Sept. 30, 2015). In many of these cases, the stucco itself is undamaged, although arguably, improperly installed. Assuming the stucco is undamaged, the cost of repairing or replacing the stucco itself would clearly be an uncovered loss under J.S.U.B., Pozzi, and Auchter. However, the resulting water leakage to the substrate beneath the stucco would clearly be a covered loss. See id. If the only way to access the loss is to go through the stucco, which is commonly true, the question then becomes whether or not the cost of accessing the covered loss is covered under the CGL policy. In insurance parlance, this element of damage is known by three separate terms, all of which functionally mean the same thing: "Rip and Tear Damages," "Access Costs," or "Get to Damages." In the last 18 months, this unanswered question has been answered resoundingly in favor of insureds.

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The first case to directly address the issue was the Eleventh Circuit's Opinion in Carithers v. Mid-Continent Cas. Co., 782 F.3d 1240 (11th Cir. 2015). The Carithers decision addressed a series of issues important to CGL, including trigger of coverage and the scope of the duty to defend. However, the biggest impact of the Carithers decision was in its holding relative to "rip and tear" damages. In Carithers, the claimant, the Honorable Hugh A. Carithers, Circuit Court Judge, obtained a judgment against a contractor insured by Mid-Continent Casualty Company. One of the elements of damages for which Judge Carithers obtained judgment was damage to the ceilings and walls of his garage. The damage to the ceilings and walls of the garage were caused by water seeping in from a defective balcony. All of the parties agreed that the defective balcony was not covered under J.S.U.B., Pozzi, and Auchter. The parties did, however, agree that the resulting water damage in the ceilings and walls of the garage were covered. The only manner to access the covered water damage was to rip and tear through the defective balcony. Judge Carithers sought coverage for the cost of accessing the damage to the garage by tearing through the balcony. In affirming the trial court's award of these damages, the court noted:

> Under Florida law, the Carithers had a right to "the costs of repairing damage caused by the defective work...." J.S.U.B., 979 So. 2d at 889. 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 these damages.

Carithers, 782 F.3d at 1251. The Eleventh Circuit made clear the cost of accessing such damages were covered under its interpretation of Florida law.

Shortly after the Carithers decision, Florida's Fifth District Court of Appeal addressed the identical issue in Mid-Continent Casualty Company v. Treace, 186 So. 3d 11 (Fla. 5th DCA 2015). In Treace, the claimants, the Treaces, successfully sued their contractor for water damage to their home. The Treaces' claim included cost to access and repair the water damage caused by faulty construction. In a very short treatment of the rip and tear issue, the court noted:

> Without further discussion, we affirm that portion of the trial court's judgment which found the damages awarded for the cost to access and repair the water damage were covered by MCC's policy.

Treace, 186 So. 3d at 12. Following Treace, the federal and state courts, in speaking to the issues of access

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to rip and tear costs, all have uniformly held in favor of such damages being available under the CGL product.

Moreover, the decision of Judge King in Pavarini Construction Co. v. Ace American Insurance Company further expanded coverage for rip and tear and related damages. Case No. 14-cv-20524, 2015 WL 9686009 (S.D. Fla. Oct. 30, 2015). In Pavarini, coverage was sought under an excess CGL policy. The defective construction condition in question was the result of the omission of significant amounts of reinforcing steel within critical concrete structural elements causing destabilization. The omitted steel compromised the buildings structural support system resulting in excessive movement of the building components. This structural problem, in turn, caused stucco debonding and cracking on the walls of the building and worsening cracking of the concrete elements, all of which in turn, led to water intrusion. However, while these conditions were common throughout the building, the defective construction conditions were not yet present in every location in the building. Importantly, it was undisputed that the undamaged areas would eventually suffer damage from these conditions. Thus, the excess CGL carrier disputed whether coverage was available for repair of the entire building or only those areas which had already sustained physical damage. In authorizing coverage for the loss, Judge King noted:

> In interpreting a substantively identical insurance policy, the United States Court of Appeals for the Eleventh Circuit held that the complete replacement of defective subcontractor work may be covered when necessary to effectively repair ongoing damage to otherwise non-defective work. See Carithers v. Mid-Continent Casualty Company, 782 F.3d 1240 (11th Cir. 2015). There, a balcony that had been defectively installed by a subcontractor was causing runoff and resulting water damage to an adjacent garage. Although the balcony itself did not constitute independent "property damage" under the terms of the policy, its replacement was necessary in order to effectively repair the garage. "In other words, to repair the garage, it was necessary to completely replace the defectively constructed balcony." Memorandum and Order, Carithers v. Mid–Continent Casualty Company, No. 12–00890, 2014 WL 11332308 (M.D. Fla. Mar. 11, 2014), DE 126 at 8. Similarly here, in order to adequately repair the non-defective project components, the building had to be stabilized. Even if the predominant objective of the repair effort was to fix the instability caused by the defective subcontractor work, it is undisputed that the same effort was required to put an end to ongoing damage to otherwise non-defective property, e.g. damage to stucco, penthouse enclosure, and critical concrete structural elements. See DE 128 at 2–3; DE 131 at ¶¶ 52–63. Thus, the ACE policy provides for complete indemnification.

Id. at *4. In addition to these holdings, the Court noted the following in a footnote:

> Citing J.S.U.B., Defendant argues somewhat incidentally that mitigation of damages is not covered. Nowhere in J.S.U.B. is mitigation of damages mentioned. On the contrary, J.S.U.B. stands for the proposition that claims for repairing structural damage caused by the defective work of subcontractors may be covered. **As a natural corollary, coverage may exist for costs to repair defective work in order to prevent further structural damage and covered loss.** See, e.g. Carithers v. Mid-Continent Cas. Co., 782 F. 3d 1240, 1251 (11th Cir. 2015). [Emphasis Added]

Id. Pavarini is presently on appeal to the Eleventh Circuit.

Based on the foregoing decisions, broad "rip and tear" coverage appears to be here to stay in Florida at least until this issue is treated by either the Florida Supreme Court or another one of Florida's District Court of Appeal. IM

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## Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management. IM

## Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

Co-Chair - Wm. Cary Wright (cwright@carltonfields.com)
Co-Chair, Secretary & Newsletter - Scott P. Pence (spence@carltonfields.com)
Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
Co-Vice-Chair and CLE - Michael G. Meyer (mgmeyer83@gmail.com)
Legislative Subcommittee - Sanjay Kurian (skurian@becker-poliakoff.com
Legislative Liaison - Louis E. "Trey" Goldman (treyg@floridarealtors.org)
Website - ***Open***
Membership - ***Open***

## Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
- Do you know the difference between "claims made" and "occurrence" based insurance policies?

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The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-50 minutes.

If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

## Schedule of Upcoming RPPTL Section Meetings

July 28–31, 2016
Executive Council Meeting &
Legislative Update
The Breakers
Palm Beach, Florida

October 5-9, 2016
Executive Council Meeting
The Walt Disney Work Board-Walk Inn
Lake Buena Vista, Florida

December 7-11, 2016
Executive Council Meeting
The Westin Resort and Marina
Key West, Florida

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of ***Insurance Matters!***, please contact me at spence@cfjblaw.com.

### *We Need You!*

We are in need of persons to chair our website and membership subcommittees. Please contact us if you would like to become more involved.

### Did you know?

You can access previous issues of Insurance Matters!, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at http://www.rpptl.org.

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