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# The Middle District of Florida addresses the definition of “property damage” under a commercial general liability policy.

Posted in [Legal Alerts](#) by Jeffery M. Paskert and Dara L. Dawson on Tue Apr 3, 2018

In *Amerisure v. Auchter/Arch*, Case No. 3:16-cv-407-J-39JRK (M.D. Fla. Mar. 27, 2018), the United States District Court for the Middle District of Florida arguably expanded the definition of “property damage” under a commercial general liability (“CGL”) policy, following a seeming trend in federal court decisions in Florida. In *Amerisure v. Auchter/Arch*, the federal district court judge considered whether damages awarded in an underlying lawsuit for the repair and replacement of a defective window system, to address ongoing water intrusion through the windows, was “property damage” covered by a general contractor’s CGL policy. The insurer that issued the CGL policy, Amerisure, argued that the damages awarded were exclusively for the repair and replacement of the defective window system, and therefore were not covered “property damage” under the terms of its policy. The federal district court disagreed, holding that because the repairs were required to prevent ongoing water intrusion and damage to other non-defective work, the costs to repair and replace the defective window system were covered by Amerisure’s policy.

In reaching this holding, the district court focused heavily upon the record and findings of fact in the underlying lawsuit. Reportedly, there was considerable evidence in the record to demonstrate that defects in the window system previously had caused water intrusion and damage to other building components, such as carpets, walls, and ceilings. The trial court in the underlying lawsuit, sitting as the finder of fact, also had concluded that repair and replacement of the window system was required to prevent further water intrusion and future damage. Based upon these facts, the federal district court judge found that the window repair damages were covered “property damage” for which Amerisure was responsible under its CGL policy.

The district court also felt compelled to follow the Eleventh Circuit Court of Appeals’ 2015 opinion in *Carithers v. Mid-Continent Casualty Co.*, 782 F.3d 1240 (11th Cir. 2015). In *Carithers*, the Eleventh Circuit held that the cost of replacing a defective balcony, which had to be replaced in order to repair resulting property damage to the garage to which the balcony was attached, was covered “property damage” under a CGL policy. The *Carithers* court also noted that the balcony repairs were required to stop ongoing damage to the garage. The *Amerisure v. Auchter/Arch* court focused on this language, and interpreted *Carithers* to hold that the costs to repair or replace defective work to stop ongoing property damage were covered by Amerisure’s CGL policy. The court provided the following rationale for its analysis and holding:

Where the evidence and the Final Judgment establish that the defective work caused other “property damage” to otherwise non-defective property, and the record establishes that the property damage caused by the defective work would continue into the future if left unrepaired, *Carithers* teaches that the cost of that repair and/or replacement of the defective work to stop future covered property damage, is subject to indemnification by the insurer of a CGL policy. Such a result makes sense; to find that only the damaged “other” property such as the garage was covered by the CGL policy, would mean that the insured, such as the Carithers, would either be forced to repeatedly file claims with the insurer for the continued and renewed property damage caused by defective leaking balcony, or be foreclosed from recovering the full consequences of the defective work, and recovering the benefit or coverage bargained and paid for with the CGL insurer. Likewise, to exclude payment for the cost of repairing and replacing the leaking Window System would result in continued water intrusion damage to the Building, and resultant damage to non-defective property in the future.

The *Amerisure v. Auchter/Arch* court also analyzed several exclusions in Amerisure's CGL policy, finding that none barred coverage. Accordingly, the court granted partial summary judgment against Amerisure and in favor of the insured's subrogee.

The foregoing analysis is a brief overview of the lengthy *Amerisure v. Auchter/Arch* court's opinion. The opinion likely will have wide-ranging effects upon insurance coverage disputes and construction defect litigation in Florida.