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CONSTRUCTive Talk

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CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE
FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION

Hardy Sounds Off

Dear Members of the CLC,

Welcome to the inaugural edition of the Construction Law Committee's quarterly newsletter, "CONSTRUCTive Talk." We hope this is the first of many publications that will keep Florida's construction lawyers up to speed on current events and provide thoughtful consideration of emerging topics of interest. Most importantly though, we hope this publication encourages you to take advantage of the opportunities the CLC provides for your own professional development and to make the construction bar in Florida an increasingly more diverse, proficient, collaborative



and friendly group.

On behalf of the Committee, I extend a sincere thank you to

Jared Smith for being our Editor, to Sean Mickley (Publications Subcommittee Chair) for his continuing efforts to stoke the presses, to Zackery Scharlepp for his editing assistance, Timothy Bench for his timely article on the Eleventh Circuit's *Carithers v. Mid-Continent Casualty* decision, and to all of our other content contributors, including Fred Dudley (Regulatory Subcommittee Co-Chair and Certification Exam

Chair) and Steve Sellers (Regulatory Sub-Committee Co-Chair) who have so graciously provided monthly case law and regulatory updates to the Committee.

Telephonic meetings are the second Monday of every month at 11:30 A.M. with a CLE presentation beginning at approximately noon. Dial 888-376-5050 and use pass code: 7542148521.

Kind regards, Hardy

Internal Injury:

Eleventh Circuit Court of Appeals Helps Reduce Confusion regarding Insurance Coverage Triggers in Florida
By: Tim Bench, Esq., Rumberger, Kirk & Caldwell, Orlando, FL

Recently, the Eleventh Circuit court of appeals weighed in regarding what event triggers coverage for property damage under a commercial general liability (CGL) insurance policy under Florida law. Although its decision does not entirely settle the issue, it offers a clear improvement over the uncertainty that has pervaded Florida courts in recent years.

In *Carithers v. Mid-Continent Casualty Co.*, married homeowners sued the general contractor that built their home, claiming damag-



es for allegedly defective construction. The contractor's insurer, Mid-Continent Casualty Company, refused to provide it with a defense. The homeowners entered into a settlement with the contractor whereby a consent judgment was entered, and the contractor's rights against its insurer were assigned to the homeowners.

The homeowners then sued Mid-Continent to recover the amount of the consent judgment. Mid-Continent issued four policies to the contractor running from March 9, 2005 to March 9 of each successive year until coverage under the fourth and last policy ended on October 6, 2008. The complaint in the underlying action alleged that the damages to the home could not have been discovered by reasonable inspection until 2010, after there was no longer coverage under any Mid-Continent policy.

There was no requirement in the policy that the damage be discovered or discoverable during the policy period.

Internal Injury: Eleventh Circuit Court of Appeals Helps Reduce Confusion Regarding Insurance Coverage Triggers in Florida (Cont.)

The issue thus became “what event gave rise to coverage?”

Florida law has long been unsettled regarding what “triggers” insurance coverage. Insurance policies generally provide coverage for a covered “occurrence,” and it is the occurrence which triggers coverage. Thus, coverage turns on whether the covered “occurrence” was during the term of the policy. Mid-Continent’s policies defined “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Its policies defined “property damage” as:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it.

Mid Continent argued in the trial court that the “occurrence” which triggers coverage is the actual discovery of the damage, or alternatively when the damage first could have been discovered through a reasonable inspection. The homeowners argued that the triggering “occurrence” is the actual damage to the property, regardless of when it actually was or could reasonably have been discovered. These theories, generally known as the “manifestation” theory and the “injury-in-fact” or “actual damage” theory, respectively, are the two theories that have traditionally been in a tug-of-war in the Florida court coverage cases.

The trial court agreed with the “actual damage” theory argued by the homeowners. Following a non-jury trial, the trial court found that the damage to the home had actually occurred in 2005, during the Mid-Continent 2005-2006 policy period, and therefore that Mid-Continent was liable for all of the damages awarded in the underlying consent judgment. Mid-Continent appealed. Among its arguments on appeal was the argument that the trial court had erred in rejecting the argument that the “occurrence” triggering insurance coverage was the damage rather than the manifestation (discovery) of the damage.

On appeal, the Eleventh Circuit Court of Appeals agreed with the homeowners and trial court. The appellate court noted that the language of the policy itself belied the argument that damage must be discovered during the policy period in order for coverage to apply, since the policy itself only required an “occurrence” during the policy period which resulted in “property damage.” There was no requirement in the policy that the damage be discovered or discoverable during the policy period.

The appellate court did note that application of the “injury-in-fact” trigger could be problematic in situations in which it cannot be readily determined when discovered damage had actually been suffered, and therefore limited its holding that the “injury-in-fact” trigger is the correct one to situations in which it can reasonably be determined when damage actually occurred. This leaves open the application of one of the variants of the “manifestation” theory to situations where it is unduly difficult or impossible to determine when, before its discovery, property damage first occurred. However, where it can be reasonably determined when damage actually occurred, the *Carithers* case provides well-reasoned authority that the date that the “injury-in-fact” occurred is the appropriate trigger for coverage under a CGL policy.

Timothy N. Bench is an attorney in Rumberger, Kirk & Caldwell, P.A.’s Orlando office. His practice includes construction litigation, insurance coverage issues, and general civil liability.

Summary of May CLC Speaker

Fredrick Raymond Dudley is a board certified construction law attorney. Mr. Dudley is a partner in the law firm of Dudley, Sellers, and Healy, P.L. in Tallahassee, Florida



At the last Construction Law Committee Meeting, Fred Dudley presented a legislative update on all bills pending before the legislature. For a more in-depth analysis of the Bills that passed the legislature, and how they will affect the construction law industry please see the Legislative Update on page 3. If you have missed prior CLC meetings and CLEs, they are being made available by podcast. Check the following link for availability: <http://constructionlawcommittee.podomatic.com/>

Caselaw Update

By: Steve Sellers

- ☐ **Cypress Fairway Condominium, etc, et al. v. Bergeron Construction Co., Inc. et al.**, 2015 WL 2129473, No. 5D13-4102 (Fla. 5th DCA April 7, 2015)



Cypress interprets the statute of limitations/repose for construction cases which defines the commencement date, in part, as the date of “completion... of the Contract.” See Section 95.11(3)(c), Florida Statutes. Fifth DCA held “completion of the contract means completion of performance by both sides of the contract, not merely performance by the contractor.”

- ☐ **Jax Utilities Management, Inc., v. Hancock Bank et al.**, 2015 WL 1809322, No. 1D14-664 (Fla. 1st DCA April 22, 2015)

Contractor’s rights to relief against lender on theory of equitable lien and unjust enrichment. Lender obtained a final judgment of foreclosure in September 2011 against developer. In December 2011, contractor filed suit against lender for an equitable lien and unjust enrichment. The suit also included a claim against developer for breach of contract for failure to pay nearly \$500,000 invoiced in June 2009 that developer failed to submit to lender. The trial court entered summary judgment in favor of lender.



The First DCA held that the one-year statute of limitations on contractor’s equitable lien claim commenced when it last performed work and that the limitations period expired well before it filed suit in December 2011. The court summarily rejected contractor’s argument that the limitations period did not begin until lender filed suit to foreclose on the property.

The First DCA also held that Section 713.3471, Florida Statutes, precludes common law remedies such as equitable lien and unjust enrichment. The statute provides a cause of action against a construction loan lender that decides to cease further advances under a construction loan and fails to give notice to the contractor. The court found that the plain language of this law evinces a legislative intent to displace the common law remedies and the law is so repugnant to common law remedies that the two cannot coexist. The opinion does not reveal why the contractor did not pursue the statutory remedy.

Steve E. Sellers is a partner at Dudley, Sellers and Healy, P.L. in Tallahassee, FL. Steve is Board Certified in Construction Law, Civil Trial, and Business Litigation.

Legislative Update

By: Fred Dudley



Legislative Action: The 2015 Regular Legislative Session began on March 3, 2015, and ended somewhere between Tuesday, April 28, 2015, when the House of Representatives adjourned “sine die” and May 1, 2015 when the Senate adjourned.

The following major bills affecting the construction industry were PASSED, all of which are effective July 1, 2015 except HB 87 and HB 383, which become effective on October 1, 2015.

- House Bill 87: Chapter 558 – Notice to Cure (Notice of Claim)
- House Bill 217: Chapter 471 – Engineers (Structural Classification)
- House Bill 383: Chapter 70 – Private Property Rights (Bert Harris, Jr. Act)
- Senate Bill 466: Chapter 553 – Alarm Systems (wireless systems)
- Senate Bill 778: Chapter 255 – Public Works Contracts (Local bidding preferences)
- House Bill 1151: Chapter 553 – Master Permitting (County option for residential)

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.
2. Join the Real Property Probate and Trust Law Section.
3. Email Arnie Tritt at arnold.tritt@atritt.com advising you would like to join the CLC and provide your contact information.

Editor's Corner:

Do you have an article, case update, or topic you would like to see in Constructive Talk? Submit your article, note, or idea to jsmith@rumberger.com or zscharlepp@rumberger.com



Jared E. Smith, Tampa
Editor



Zackery Scharlepp, Tallahassee
Assistant Editor

Upcoming Events

Subcommittee Practice-Get On Board!

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@cfjblaw.com)

ADR - Deborah Mastin (deborahmastin@gmail.com)

Certification Exam - Fred Dudley (dudley@mylicenselaw.com)

Certification Review Course - Deborah Mastin (deborahmastin@gmail.com) and Bryan Rendzio (brendzio@fi-law.com)

CLE Subcommittee - Angela Covington (acovington@cowmpa.com)

Construction Law Institute - Reese Henderson (Reese.Henderson@gray-robinson.com)

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Construction Regulation - Fred Dudley (dudley@mylicenselaw.com) and Steve Sellers (steve@dhsattorneys.com)

Construction Transactions - Claramargaret Groover (cgroover@bplegal.com)

Contractor's University - Lee Weintraub (lweintraub@bplegal.com) and Cary Wright (cwright@cfjblaw.com)

Legislative Subcommittee - Scott Pence (spence@cfjblaw.com)

Membership Subcommittee - Arnie Tritt (Arnold.tritt@atritt.com)

Newsletter - Jared Smith (jsmith@rumberger.com)

Publications Subcommittee - Sean Mickley (smickley@gouldcooksey.com)

Small Business Programs - Lisa Colon-Heron (lcheron@smithcurrie.com)

Website Subcommittee - Brent Zimmerman (bzimmerman@jimersoncobb.com)

Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include .5 hours of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 7542148521 when prompted.

Schedule of Upcoming RPPTL Meetings

July 30-August 1, 2015
Executive Council Meeting &
Legislative Update
The Breakers
Palm Beach, Florida

September 30-October 4, 2015
Executive Council Meeting
(Out of State)
The Ritz Carlton
Berlin, Germany

November 11-15, 2015
Executive Council Meeting
Boca Raton Resort and Club
Boca Raton, Florida