2018 WL 4293149
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida.

AMERISURE INSURANCE COMPANY and AMERISURE MUTUAL INSURANCE COMPANY, Plaintiffs,

v.

THE AUCHTER COMPANY, ARCH INSURANCE COMPANY, LANDMARK AMERICAN INSURANCE COMPANY, TSG INDUSTRIES INC., AND B & B OF DUVAL COMPANIES, INC., etc., Defendants.

Case No. 3:16-cv-407-J-39JRK
|
Filed 03/27/2018

ORDER

Brian J. Davis United States District Judge

***1** This construction site insurance coverage dispute is before the Court on two motions seeking a determination whether the $5 million cost to repair and replace an office building's defective leaking window system in order to prevent further water intrusion constitutes "property damage" covered by a Florida commercial general liability ("CGL") policy. Pending are Arch Insurance Company's Motion for Partial Summary Judgment Against Amerisure (Doc. 160) ("Arch Motion"), and Plaintiffs' Cross-Motion for Partial Summary Judgment Against Arch Insurance Company. (Doc. 169) ("Amerisure Motion") (collectively "Motions"). The parties have each responded in opposition to the cross motions, and with leave of Court, have filed replies.[1] The parties, Plaintiffs Amerisure Insurance Company and Amerisure Mutual Insurance Company ("Amerisure") and Defendant-Counterclaimant Arch Insurance Company ("Arch") seek a declaration regarding whether Amerisure, as the commercial general liability insurer of general contractor The Auchter Company ("Auchter"), is liable to indemnify Auchter's surety Arch for money paid to building owner Riverside Avenue Partners, Ltd. ("RAP"), specifically $5 million for repair and replacement of windows, to satisfy a Final Judgment in favor of RAP for damages incurred in the construction of RAP's building ("Building").

I. Facts[2]

A. The Project

This case arises out of a September 21, 2005 construction contract between RAP and Auchter ("RAP-Auchter Construction Contract") for the construction of a 13-story office building. Between 2004 and 2008, Amerisure issued several primary and umbrella insurance policies that list Auchter as the named insured in connection with the RAP building project. (Doc. 116 at 2-3); (Docs. 116-1 through 116-8).

In accordance with the RAP-Auchter Construction Contract, Arch executed payment and performance bonds as Auchter's surety, guaranteeing the obligations of Auchter under the RAP-Auchter Construction Contract. (See Doc. 24-1 at 3, 6); (Doc. 24-3 at 3); (Docs. 51-6, 51-7 (Arch Payment Bond and Performance Bond (collectively "Bonds") to Auchter)). The Bonds incorporated the provisions of the RAP-Auchter Construction Contract. On September 13, 2005, as part of the consideration for issuing the Bonds and as a condition precedent for issuance of the Bonds, Auchter executed a General Agreement of Indemnity ("GIA" or "Auchter Indemnity Agreement to Arch") in which Auchter agreed to indemnify and hold Arch harmless for any losses sustained or incurred by reason of having executed the Bonds. (Doc. 51-13 (9/13/05 Auchter Indemnity Agreement to Arch or "GIA")).

***2** Towards the end of 2006, Auchter experienced financial difficulties on its large jobs, including the RAP Project, and had difficulty completing the RAP Project. Eventually, Arch as surety took over the RAP Project from Auchter. (Doc. 24-1 at 6-7). On April 25, 2007, Auchter assigned to Arch, all of Auchter's rights in connection with the "Bonded Contracts." (Doc. 51-12). Arch assumed full control and management of the Project. (Doc. 24-1 at 7).

In 2007, Arch attempted to complete some of the items of work on a "Deficiency List," or "Punch List" for the Project that listed more than 1,000 items. (Doc. 24-1 at 19). As the months passed, Arch made very little headway in completing all of the outstanding work. Arch disputed many of the items on the Deficiency List and as a result, many went unresolved. Id. at 20. Additionally, the

Building experienced water intrusion during rainstorms. Id. at 8-9, 20.

After substantial additional delays in completing the work, Arch maintained that it was not obligated to indemnify RAP for losses resulting from incomplete and defective construction. Arch also asserted that RAP would have to retain its own contractor to complete the work. (Doc. 24-1 at 9-10). On April 12, 2010, Arch demanded final payment from RAP, though punch list items were pending and RAP had not yet received a final certificate of occupancy. Id. at 10. The final certificate of occupancy was issued on June 10, 2010. Id. at 14. RAP retained an outside contractor in September, 2011 to complete the unfinished work and resolve remaining problems. Id. at 10, 22. The contractor, Auld and White Constructors, compiled a detailed list of work that needed to be done. Id. at 23-33.

B. The Underlying RAP Lawsuit

1. The Claims

The difficulties with the RAP Project culminated in the state-court declaratory judgment and breach of contract lawsuit styled Riverside Avenue Partners. Ltd. v. The Auchter Company, Case No. 16-2010-CA-006433, filed in the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida on May 20, 2010. (See Doc. 24-8 at 3); (Doc. 24-1 at 3) ("Underlying RAP Lawsuit"). RAP filed an Amended Complaint on March 8, 2012. (Doc. 24-3). RAP named as defendants Auchter and Arch in its capacity as surety and assignee for Auchter. Auchter filed a Third-Party Complaint against several subcontractors and material suppliers, including TSG Industries, Inc. ("TSG"), the subcontractor hired by Auchter to construct the Building's Window System. (See Doc. 24-8 at 3). RAP sought a declaratory judgment establishing Auchter's and Arch's liability, and damages for breach of contract, and breach of the performance bond, and damages that included "(1) delay damages for the failure to complete construction by the required completion date; (2) damages for deficiencies in the glass and glazing systems of the building envelope; and (3) damages for unfinished or deficient punch list work." (Doc. 24-1 at 3). RAP sought from Auchter actual damages arising out of "Auchter's delay in achieving substantial completion," and for the cost of correcting defective or nonconforming work. (Doc. 24-3 at 12-13).

Amerisure provided Auchter with a defense in the Underlying RAP Lawsuit under a Reservation of Rights Letter dated June 24, 2010, which was supplemented March 30, 2012. (Doc. 24-4). In the June 2010 letter, Amerisure recounted the allegations of the RAP Complaint, including the

> specific allegation that on December 25, 2006 the building suffered water damage from rain storms and water intrusion through the roof and curtain wall system which allegedly damaged the competed office build out work performed by tenant improvement contractors. Water intrusion continued to occur on [the] 11th, 12th floors, to the extent that the tenant Everbank deemed their offices unusable.

***3** (Doc. 24-4 at 3). Amerisure tendered its defense to Auchter, with reservation of rights, pursuant to two policies: Amerisure's Commercial General Liability Policy Number GL 2009278030006, effective January 1, 2006 to January 1, 2007; and GL 2009278040007, effective January 1, 2007 to January 1, 2008, which are similar. (Docs. 24-4 at 3; 24-13; 24-14). Amerisure wrote in the Reservation of Rights Letter:

> For coverage to exist there must be an "occurrence" that results in "property damage". The policy does not provide coverage for an insured's allegedly defective workmanship that does not result in damages to anything other than the work itself, as this does not meet the definition of "property damage" within the policy. Any consequential damage resulting from any of the construction defects may be covered, however those damages however [sic] are still subject to the remainder of the policy, including exclusions and endorsements.

(Doc. 24-4 at 4). Amerisure wrote that "[a]ny settlements entered into without Amerisure's consent will be considered a voluntary payment and Amerisure will not consider payment of such settlements." Id. at 10.

Florida Circuit Court Judge Harvey L. Jay[3] conducted a 28-day non-jury trial in the Underlying RAP Lawsuit from March 24, 2014 through May 2, 2014. (Doc. 24-1 at 3-4). The trial consisted of 32 witnesses, the testimony of 10 witnesses by deposition, and hundreds of exhibits. Id. On November 5, 2014, Judge Jay issued an 87-page Final Judgment resolving the competing claims between the six remaining litigants.

2. The Final Judgment

In his lengthy and thorough findings of fact, Judge Jay found that the Building experienced continued instances and reports of water intrusion problems since before RAP took occupancy of the building, starting in December 2006. (Doc. 24-1 at 15); (see Doc. 24-3 at 5). Judge Jay repeatedly referred to the water intrusion problems, occurring in 2007, June 2008, through 2009, into April 2010. (Doc. 24-1 at 8-10, 15, 20, 42, 44).

> RAP continued to experience water intrusion problems with the building. In an attempt to catalogue these events, RAP started maintaining a leak log to identify the areas of water intrusion.... While the building has leaked predominantly on the top three floors and on the first floor, during the past few years, leaks have also been confirmed on other floors, floors that had not leaked for several years.

Id. at 15; see also id. at 20 ("RAP continued to experience instances of water intrusion into its building whenever there was a rainstorm.").

RAP hired IBA Consultants ("IBA"), "a company specializing in building envelope design and forensic investigation - to determine the cause of the water intrusion and to evaluate the reasonable cost to repair these problems." (Doc. 24-1 at 15). IBA president Mark Baker performed a forensic investigation of the Project and testified that Window System subcontractor TSG had deviated from the Project shop drawings and product approval documents in several respects. For instance, it failed to use specified factory gaskets around the windows, allowing water to penetrate through, and installed perimeter sealants in the wrong location. Id. at 16; (see also Doc. 169-2 at 11-12 (Trial Tr. Vol. 6 at 761-65)). The IBA forensic investigation also revealed that TSG had blocked diverters in the horizontal sections of the windows, preventing water that made it past the gaskets to "weep out." Id. at 16; (see also (Doc. 168-4 at 35 (Trial Tr. Vol. 5 at 719-20)); (Doc. 1682 at 3-5, 7, 10-13 (Trial Tr. Vol. 6 at 729-33, 734-35, 742-43, 755-57, 761-68)). Judge Jay credited the testimony of Mr. Baker:

> ***4** Baker concluded that the latent defects to the window systems were systemic and that the entire system warranted remediation. Without correcting the underlying defects in the window system drainage systems, Baker opined that RAP will experience leaking in all of the windows as the gaskets shrink and age over time.

(Doc. 24-1 at 17); see also Id. at 44. To fix the Window System, "the glass must be removed from the inside of the building," causing significant disruption to the tenants and requiring "both drywall and ceiling panels to be removed to access the back side of the glass in order to take the clips out and to remove the interior gaskets." (Doc. 24-1 at 17-18). Based on the testimony and evidence presented at trial, Judge Jay concluded that:

> The overwhelming evidence established that the [ ] Building has leaked on multiple floors since RAP's tenants first took occupancy. In fact, it is clear to the Court that the water intrusion problem continues. This fact was confirmed by multiple witnesses, including witnesses for the Defendants.

(Doc. 24-1 at 42).

> Based on IBA's diagnostic testing and window deconstruction - as well as eyewitness confirmation of seepage - the evidence established that water leakage

> has occurred and continues to happen throughout the window systems.
>
> As such, it is clear that the latent defects to the window systems are systemic and require remediation of the entire system. Without correction of the underlying defects in the window drainage systems, the evidence establishes that all of the windows will eventually leak as the gaskets further shrink - with age - over time.

Id. at 43-44. Judge Jay rejected testimony that attributed the water intrusion to areas such as the roof and exterior wall panels. Id. at 40-41, 44-45.

Citing to testimony and based on estimates by RAP's forensic consultant IBA and RAP's outside contractor Auld and White, retained in 2011 to complete the work on the Building, Judge Jay determined the damages that RAP was due to recover included the following:

> RAP shall recover $3,762,821 to repair the building envelope, which includes a total of $375,000 to conduct necessary testing and to obtain the required product approvals. RAP shall also recover $1,062,492 as the amount required to perform interior repairs in connection with removing and replacing windows. Additionally, RAP shall recover $241,720.01 for the sums previously paid to IBA and other consultants to determine the cause of water intrusion. The total damages due to RAP in connection with the defective building envelope and water intrusion are $5,067,033.01.

(Doc. 24-1 at 46); see also Id. at 17-18 (citing trial testimony supporting the damages amounts).

Turning to Auchter's/Arch's third party claim against TSG, Judge Jay determined, based upon the state trial court's findings of fact, and in light of Auchter's assignment of its claims against TSG to Arch, judgment was due to be entered against TSG in favor of Arch, as the proper third party plaintiff in the Underlying RAP Action. Judge Jay awarded

> damages in favor of Arch and against TSG in the amount of $5,067,033.01. These pass-through damages include the expenses to repair the building envelope, the monies needed to perform interior repairs in connection with removing and replacing the windows and the sums paid to IBA and other consultants to determine the cause of the water intrusion. All of these items of damages are within the scope of the work of TSG on the Project.

***5** (Doc. 24-1 at 83-84). Judge Jay entered judgment in pertinent part as follows:

> 3. Judgment is entered in favor of Arch Insurance Company and against TSG Industries, Inc. in the amount of $5,067,033.01. This judgment shall accrue post judgment interest at the statutory interest rate.

(Doc. 24-1 at 87). [4] Final Judgment was entered in favor of RAP and against Arch and Auchter joint and severally, on November 5, 2014. (Doc. 24-1 at 88).

3. Evidence at Trial [5]

***6** Mr. Baker testified that water built up in all the windows and leaked into the building as a result of the diverter plate blocking water from exiting through the drain holes. (Doc. 168-2 at 5 (Trial Tr. Vol. 6 at 735)). According to Mr. Baker,

> As water builds up, that unsealed joint is exposed to water, and if water goes through that metal to metal joint, it actually enters into the building and runs down the vertical mullions, which is what we saw during our testing, it's what the tenants reported. It was all very consistent.

Id. at 7 (Trial T. Vol. 6 at 744). He testified that water build up in the gutter "potentially leaks through this joint, which is consistent with what we saw when we tested it and consistent with what was reported to us from tenants, consistent with the photographs we saw of water leakage." Id. at 11 (Trial Tr. at 758). Regarding water intrusion, Mr. Baker testified that with 100 percent of the windows he tested, "water stayed on the sill, but on 28 percent of them it actually leaked into the building.... 28 percent, water found a path - because as the water built up, water found a path into the building and dripped inside the building. Almost a third." Id. at 33 (Trial Tr. Vol. 6 at 846); see also Doc. 162-8 at 14 (Trial Tr. Vol. 8 at 1019 ("Twenty-eight percent of the openings tested ... - water was not contained within the intermediate horizontal member and leaked into the building and was visible in the building.... 28 percent .. actually physically leaked physical water into the building.")). [6] According to Mr. Baker, repairing the building envelope was "fantastically simple.... That's what is going to stop the water leakage, build [the Window System] the way it was originally intended, originally designed to. This wasn't a complicated problem or complicated to fix. It's build it the way it was designed, intended and tested." (Doc. 168-2 at 34 (Trial Tr. Vol. 6 at 850-51)).

Arch cites to the trial testimony of Charles R. Warden, the chief maintenance engineer for the Project who worked for the company responsible for maintaining the Building (Doc. 160 at 5). Mr. Warden identified the images in photographs as water leaks and "[s]aturated ceiling tile" in numerous locations in the building on different floors, and testified regarding damaged ceiling tiles and papers. (Doc. 160-1 at 116-19, 123-24 (Trial Tr. Vol. 10 at 1261-64; 1266-68, 1271, 1274-75, 1292-93)). He states that the stained ceiling tiles were replaced "many times." Id. at 117, 119 (Vol 10 at 1268, 1274-75). Steven Main, a consultant with Rolland, DelValle & Bradley ("RDB") and assistant project manager who compiled the Punch List of "deficient and incomplete work," testified that he observed water entering the building "between the concrete curb and the framed exterior" in three locations in the penthouse and that the "wall was saturated with water." (Doc. 60-1 at 177 (Trial Tr. Vol. 11 at 1405)); (see Doc. 24-1 at 18-19). In other locations, Mr. Main observed either in person or in photographs "water standing in the ceiling tiles in the southwest corner of the butler's pantry of the ... tenant build-out. And moisture could also be felt in the fabric wallcoverings in that area"; stained ceiling tiles; "ponding water on the carpet" of an occupied space in the building; and "[w]ater staining on the ceiling tile above and drips of water forming underneath the upper mullion of the windows." (Doc. 160-1 at 177-79 (Trial Tr. Vol. 11 at 1406-07, 1410, 1412-14)). Paul J. Lunetta, vice president and treasurer of RAP, testified regarding an email from a tenant about a leak on the 12th floor of the building expressing concern about possible damage to carpeting and furniture. (Doc. 160-1 at 346 (Trial Tr. Vol. 21 at 2786)). Trial exhibits include numerous e-mails discussing water intrusion and damage and staining to ceiling tiles, wet walls with mold growth, water ponding on window sills, water entering through the window system, saturated carpet, and "[t]he file 'TS Fay Water Intrusion Report' referenc[ing] the 80 pages (bookmarks show details) in the pdf named 'water damage.' " (Doc. 121-2 at 1-56). The record also includes photographs depicting instances of water intrusion and water damage throughout the building, including photographs of water damage near windows. (Doc. 21-3 at 1-52; Doc. 21-4 at 1-14; Doc. 21-5 at 1-7). [7]

***7** Paul Lunetta, executive vice president of Harden & Associates, and vice president and treasurer of RAP wrote to Auchter on January 24, 2007 regarding "Water Damage" seeking to confirm that

> 1) Auchter has filed a water damage claim to the TI [tenant improvement] areas with their insurance carrier and 2) That the pricing from [tenant contractor] Solutions is acceptable to Auchter. Please let me know today so that I can direct the TI Contractors to proceed if Auchter does not plan to do the work. We need to have the affected areas removed and replaced quickly to mitigate any further damage by mold growth ....

(Doc. 121-7 at 24); (see also id. at 25 (January 12, 2007 Letter from Lunetta to Auchter regarding "the water intrusion issue" and his "concern[ ] over an apparent lack of urgency by Auchter in mitigating the damage that was caused by the water intrusion," recounting observing water on the ninth floor, "a rather large volume of water ... in the middle of the 7th floor," and "standing water on the 12th and 13th floors."). Surmising that water was entering

the building through the roof and the windows, Lunetta wrote in 2007 that the tenant contractor had presented change orders "to repair and replace the damaged drywall, ceiling and flooring," and that "[t]he damage to the drywall is spreading and has to be removed immediately." Id. Mr. Lulnetta testified that rental concessions and the cost of replacement of stained ceiling tiles and wet carpet were not included in RAP's list of damages presented in the Underlying Lawsuit. (Doc. 169-6 at 10 (Trial Tr. Vol. 24 at 3091-92)); (see Doc. 24-1 at 3, 57 ("RAP is entitled to three different categories of damages: 1) repairs to the building envelope; 2) repairs or completion to deficiency items or to items on the punch list; and 3) damages for delay."). RAP's damages report included consultant costs ("all invoices for determining the cause of the water intrusion and also to determine the appropriate resolution to it."). (Doc. 168 at 12 (Trial Tr. at 2844)); (see generally Doc. 168-8 (Damages Summary submitted by RAP)).

4. Post Judgment

The GIA between Arch and Auchter provided Arch with the exclusive right and authority to resolve the Judgment in the Underlying Lawsuit. (Doc. 116-17 at 2). On June 8, 2015, RAP, Auchter and Arch filed in the Underlying RAP Lawsuit a joint stipulation regarding "Attorneys' Fees, Costs and Expenses," agreeing that RAP was entitled to recover a total of $1,912,691.50 in attorneys' fees and $862,655.92 in costs and expenses. (Doc. 51-10). Arch and RAP entered into a Limited Release Agreement, thereby satisfying all amounts owed under the Stipulation. (See Doc. 51 at 40).

On August 27 and 28, 2015, RAP and Arch entered into a Settlement Agreement, Mutual Release and Assignment of Claims with regards to the Final Judgment. (Doc. 24-17 ("Settlement Agreement"). Arch agreed to pay RAP $16,800,000.00 as Settlement Funds to satisfy the Final Judgment as to Auchter and Arch, which was in addition to the amounts already paid to RAP in connection with its claims for attorney's fees and costs in the Underlying RAP Lawsuit. Id. at 3. The Arch-RAP Settlement Agreement preserves Arch's rights to pursue recovery from Auchter, Auchter's insurers, and third parties in relation to reimbursement for RAP's attorney's fees, costs, and the Settlement Fund. Id. at 3-4. On September 11, 2015, RAP filed a Satisfaction of Judgment in the Underlying RAP Lawsuit. (Doc. 51-11). When Arch made payment to RAP to resolve the Final Judgment, Arch became subrogated to the position of Auchter against Amerisure. Auchter had also assigned its rights under the Amerisure Policy to Arch. (Doc. 24-17 at 8); (see also Doc. 116-16 (April 25, 2007 assignment)).

C. Arch v. Auchter State Court Lawsuit

***8** On August 3, 2015, Arch sued Auchter in state court for contractual indemnity pursuant to the indemnity agreement ("GIA") and for common law indemnification, seeking all funds Arch has paid in connection with its bonds insuring and guaranteeing Auchter. The case is styled Arch Insurance Company v. The Auchter Company, Case No 2015-CA-005022, in the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida ("Arch v. Auchter Lawsuit"). (Doc. 116-18; Amended Complaint in Arch v. Auchter Lawsuit). On November 29, 2016, the Florida Circuit Court granted Arch's motion for partial summary judgment as to contractual indemnification. (See Doc. 159-1 at 4). On March 27, 2017, the state court entered final summary judgment in favor of Arch and against Auchter on Arch's common law indemnity claim. Id. at 18. Having granted both of Arch's indemnity claims, the state court entered Final Judgment in favor of Arch and against Auchter in the following amounts: (1) $19,575,347.40 paid in satisfaction of the Final Judgment from the Underlying RAP Lawsuit; (2) $5,997,827.90 for Arch's attorney's fees and costs incurred in the Underlying RAP Lawsuit; and (3) $73,892.50 in attorney's fees and $2,466.89 in costs incurred by Arch in the Arch v. Auchter Lawsuit. See id. at 18-19.

D. This Lawsuit

Amerisure filed this action on October 23, 2015, naming as Defendants Auchter, Arch, RAP, Landmark American Insurance Co. ("Landmark") (TSG's insurer), TSG, and B&B of Duval Companies, Inc. ("B&B"). (Doc. 1). The operative complaint is Amerisure's Amended Complaint, which was filed on December 11, 2015. (Doc. 24 ("Amended Complaint"). [8] Amerisure seeks, inter alia,

> a declaration that it owes no duty to indemnify Auchter and Arch, as alleged assignee of Auchter under Commercial General Liability

> (herein "CGL") insurance policies and Umbrella Liability (herein "Umbrella") insurance policies (collectively referred to herein as "Amerisure Policies") issued by Amerisure to Auchter in connection with a Final Judgment entered in the underlying action [Underlying RAP Lawsuit], and/or in connection with Arch's settlement with [RAP]....

Id. ¶ 2. Amerisure brings 10 counts seeking various declarations in connection with the Final Judgment in the Underlying RAP Lawsuit, the first six counts relating to Amerisure and Arch's relationship:

> Counts I, II: Amerisure has no indemnity obligation regarding the deficient punch list and future work estimates;
>
> Counts III, IV: Amerisure has no indemnity obligation in connection with the unfinished or deficient glass glazing work on the building envelope and future work estimates;
>
> Counts V, VI: Amerisure has no indemnity obligation for delay damages due to the failure to complete the RAP Project as required by contract.

Counts VII through X are directed towards Amerisure's relationship with Landmark.

Arch answered the Amended Complaint on April 18, 2015, and asserted a Counterclaim against Amerisure and a Crossclaim against Landmark. (Doc. 51). With leave of Court, Arch filed an Amended Counterclaim against Amerisure on October 12, 2016. (Doc. 116). In the Counterclaim against Amerisure, Arch seeks a declaration that pursuant to the Amerisure Policies, Amerisure has a duty to indemnify Arch as assignee and/or subrogee of Auchter in connection with the amounts awarded against Arch in the RAP Final Judgment, and the Stipulation entered in the Underlying RAP Lawsuit, and reimbursement for the amounts Arch paid in satisfaction for the Final Judgment and Stipulation. Additionally, Arch seeks a declaration that the Amerisure Policies provide indemnity coverage for any damages awarded in favor of Arch in the Arch v. Auchter Lawsuit in state court. Id. at 11-18. Arch as assignee and/or subrogee of Auchter also asserts a breach of contract claim against Amerisure under the Amerisure Policies for the settlement amounts paid in satisfaction of the RAP Lawsuit Final Judgment. Id. at 17-18. Amerisure has asserted a number of affirmative defenses to Arch's Counterclaim. (Doc. 120 at 25).

E. The Relevant Insurance Policy Provisions Relating to "Property "Damage"

***9** Pursuant to the Amerisure Policies,[9] Amerisure is obligated to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (Doc. 24-13 at 13); (Doc. 24-14 at 10). The Amerisure Policies provide, in part:

> SECTION I - Coverages
>
> COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> ...
>
> b. This insurance applies to "bodily injury" and property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"....

(Doc. 24-13 at 13); (Doc. 24-14 at 10). "Property damage" is defined 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; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Doc. 24-13 at 27); (Doc. 24-14 at 23-24). An "occurrence" is defined as:

an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

(Doc. 24-13 at 26); Doc. 24-14 at 23).

The following policy exclusions are contained in the Amerisure CGL Policies:

b. Contractual Liability

"[P]roperty damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement[.]

...

j. Damage To Property

"Property damage" to:

...

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

...

I. Damage to Your Work [10]

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property [11] Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

(Doc. 24-13 at 14-17); (Doc. 24-14 at 11-14).

II. Standard of Review

***10** Under Rule 56, Federal Rules of Civil Procedure (Rule(s)), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a); see also, e.g., Altman Contractors. Inc. v. Crum & Forster Specialty Ins. Co., 832 F.3d 1318, 1321-22 (11th Cir. 2016) (citing Fed. R. Civ. P. 56(a)). In determining whether summary judgment is appropriate, the court must view all of the evidence and draw all reasonable factual inferences in favor of the nonmoving party. Stephens v. Mid-Continent Cas. Co., 749 F.3d 1318, 1321 (11th Cir. 2014). Upon review of cross motions for summary judgment, "the Court must determine whether either of the parties deserves judgment as a matter of law on the undisputed facts." T-Mobile S. LLC v. City of Jacksonville, Fla., 564 F. Supp. 2d 1337, 1340 (M.D. Fla. 2008); see United States v. Consol. City of Jacksonville, No. 3:12-cv-451-J-32MCR, 2015 WL 3618367, at *1 n.1 (M.D. Fla. June 9, 2015) (A "court may not resolve factual disputes or make credibility findings in reviewing cross-motions for summary judgment.") (citing Ga. State Conference of NAACP v. Fayette Cty. Bd. of Comm'rs, 775 F.3d 1336, 1346-48 (11th Cir. 2015)). " 'Cross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed ....' " United States v. Oakley, 744 F.2d 1553, 1555 (11th Cir. 1984) (citation omitted). "When the only question a court must decide is a question of law, summary judgment may be granted." Saregama India Ltd. v. Mosley, 635 F.3d 1284, 1290 (11th Cir. 2011). "The

interpretation of provisions in an insurance contract is a question of law." Stephens, 749 F.3d at 1321.

The "[d]isposition of a summary judgment motion in a declaratory judgment action is governed by the same basic principles that generally rule the grant or denial of such a motion." Binaham. Ltd. v. United States, 724 F.2d 921, 924 (11th Cir. 1984). "Summary judgment is appropriate in declaratory judgment actions seeking a declaration of coverage when the insurer's duty, if any, rests solely on the applicability of the insurance policy, the construction and effect of which is a matter of law." Northland Cas. Co. v. HBE Corp., 160 F. Supp. 2d 1348, 1358 (M.D. Fla. 2001): see also Md. Cas. Co. v. Fla. Atl. Orthopedics. P.L., 771 F. Supp. 2d 1328, 1331-32 (S.D. Fla. 2011).

III. Discussion

A. "Property damage"

1. Duty to Indemnify [12]

Arch seeks indemnity from Amerisure, Auchter'S CGL insurer, for payment made to RAP in settlement of the Final Judgment as surety, assignee, and based upon common law indemnity. " 'An insurer's duty to indemnify is narrower than the duty to defend and must be determined by analyzing the policy coverage in light of the actual facts in the underlying case.' " Diamond State Ins. Co. v. Boys' Home Ass'n. Inc., 172 F. Supp. 3d 1326, 1341-42 (M.D. Fla. 2016) (quoting J.B.D. Constr., Inc. v. Mid-Continent Cas. Co., 571 F. App'x 918, 927 (11th Cir. 2014)). "As such, '[t]he duty to indemnify is dependent upon the entry of a final judgment, settlement, or a final resolution of the underlying claims.' " Id. (quoting J.B.D. Constr., Inc., 571 F. App'x at 927). "[A]n insurance company's duty to indemnify an insured party ... 'is determined by the underlying facts adduced at trial or developed through discovery during the litigation.' " Stephens, 749 F.3d at 1324 (quoting U.S. Fire Ins. Co. v. Hayden Bonded Storage Co., 930 So. 2d 686, 691 (Fla. 4th DCA 2006)): see also, e.g. Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1193 n.10 (11th Cir. 2002) (" 'An insurer's duty to indemnify is ordinarily determined by analyzing the policy coverages based on the actual facts of the underlying case.' " (citation omitted)); MarineMax, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA., No. 8:10-cv-1059-T-33AEP, 2013 WL 425832, at *6 (M.D. Fla. Feb. 4, 2013) (The duty to indemnify is determined "by reference to the actual facts and circumstances of the injury."); Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248, 1258 (M.D. Fla. 2002) ("[T]he duty to indemnify is determined by the underlying facts of the case."). "In other words, to determine whether there is a duty to indemnify, one looks at the actual facts .... And in order for a duty to indemnify to arise, the insurance policy must cover the relevant incident." Stephens, 749 F.3d at 1324. In Florida, the insured has the burden of proving that a claim is covered by an insurance policy. Mid-Continent Cas. Co. v. Frank Casserino Constr., Inc., 721 F. Supp. 2d 1209, 1214-15 (M.D. Fla. 2010).

2. Indemnity for "Property Damage"

***11** The Amerisure Policies provide coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which [the] insurance applies." (Doc. 24-13 at 13); (Doc. 24-14 at 10). The Amerisure Policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and includes "[l]oss of use of tangible property that is not physically injured." (Doc. 24-13 at 27); (Doc. 24-14 at 23-24). The Amerisure Policies exclude from coverage " '[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.' " However, the "your work" exclusion does not apply "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." (Doc. 24-13 at 17); (Doc. 24-14 at 14). The Amerisure Policies provides coverage for damage to the completed project caused by TSG's negligent work, but do not provide coverage for the repair of the defective subcontractor work itself. See, e.g. Pavarini Constr. Co. (Se) Inc. v. Ace Am. Ins. Co., 161 F. Supp. 3d 1227, 1232-33 (S.D. Fla. 2015).

The Florida Supreme Court of Florida in U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007) interpreted this definition and held that "faulty workmanship or defective work that has damaged the otherwise nondefective completed project has caused 'physical injury to tangible property' within the plain meaning of the definition in the policy." 979 So. 2d at 889. However, the court also found that "[i]f there is no damage beyond the faulty workmanship or defective

work, then there may be no resulting 'property damage.' " Id.. "[T]here is a difference between a claim for the costs of repairing or removing 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.' " J.S.U.B., 979 So. 2d at 889. The J.S.U.B. court held that "physical injury to the completed project that occurs as a result of defective work can constitute 'property damage' " as defined by the CGL policy, provided there is no specific exclusion that otherwise excludes coverage. Id. at 891; see also Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241, 1248 (Fla. 2008) ("[T]he mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage unless that defective component results in physical injury to some other tangible property."). In J.S.U.B., a home general contractor was insured by a CGL policy. After completion and delivery of the homes to the homeowners, damage to foundations, drywall, and other interior portions of the homes appeared, indisputably caused by subcontractors' use of poor soil and improper soil compaction and testing. J.S.U.B., 979 So. 2d at 875. Pursuant to the CGL policy, the insurer paid for damage to the homeowners' personal property that resulted from the subcontractor's faulty work, but denied insurance coverage for the costs of repairing the structural damage to the homes. Id. at 876. J.S.U.B., the general contractor, filed a declaratory action to determine whether the CGL policy covered property damage caused by the defective work of its subcontractors. Id. The Florida Supreme Court determined that "a post-1986 standard form commercial general liability (CGL) policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work." Id. at 874-75.

"It is well-settled under Florida law that when damages in an underlying claim include only the costs associated with the repair, removal, and/or replacement of defective work without any allegations of physical injury to 'some other tangible property,' there is no 'property damage' under the Policy, and therefore no coverage." Nat'l Tr. Ins. Co. v. Graham Bros. Constr. Co., 916 F. Supp. 2d 1244, 1254 (M.D. Fla. 2013). "In other words, 'there is a difference between a claim for the costs of repairing or removing 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." ' " Id. (citation omitted)). In sum, there is no coverage under CGL policies for repairing and replacing defective work of a subcontractor. Amerisure Mut. Ins. Co. v. Auchter Co., 673 F.3d 1294, 1306-07 (11th Cir. 2012). "If there is no damage beyond the faulty workmanship or defective work, then there may be no resulting property damage." J.S.U.B., 979 So. 2d at 889.[13] Cf. Core Constr. Servs. Se., Inc. v. Crum & Forster Specialty Ins. Co., 658 F. App'x 534, 536 (11th Cir. 2016) (holding that under Florida law, a condominium development owner's claim against general contractor alleging that, due to subcontractor's negligent and defective installation of roofs on condominiums, the owner had to repair and replace roofs of the condominiums resulting in damages in excess of $2,500,000, was not a claim for "property damage" within the meaning of commercial the CGL policy issued to contractor's subcontractor, and thus, insurer owed no duty to defend or indemnify the contractor as an additional insured in the underlying action; the owner did not allege that any part of the buildings or development other than the roof, was damaged by the defective roof.).[14] Under Florida law, "a surety's liability and an CGL's liability are not co-extensive. While a CGL insurer is liable for personal injury or property damage that results from defective construction, a CGL insurer is not liable for the 'replacement or repair of the product.' ... On the other hand, a surety is obligated to repair the defect." Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248, 1262 (M.D. Fla. 2002) (quoting LaMarche v. Shelby Mut. Ins. Co., 390 So. 2d 325, 326 (Fla. 1980)).

***12** Determining whether Amerisure is liable to Auchter or Arch as a first party surety or as a third party claimant pursuant to its right to indemnification under the terms of the Amerisure Policies requires an examination of the underlying facts.

3. The Parties' Arguments

a. Arch's Argument

Arch contends that "Amerisure is obligated to indemnify Arch for the $5,067,033.01 Arch paid to RAP for the

repair and replacement of the Window System ... because the Window System necessarily had to be replaced in order to stop the water intrusion," making the cost recoverable as "property damage" caused by an "occurrence" under the Amerisure Policies. (Doc. 160 at 10-11). While recognizing that if there are no damages to property beyond the faulty workmanship or defective work of a contractor, then there may be no resulting "property damage" under the Amerisure Policies, Arch argues that "when faulty workmanship damages other property and must be repaired in order to fix the other property, any expenses incurred in correcting the faulty work constitute 'damages because of "property damage' " within the meaning of a post-1986 CGL policy." (Doc. 160 at 12 (citing Carithers v. Mid-Continent Cas. Co., 782 F.3d 1240, 1251 (11th Cir. 2015) and Pavarini Constr. Co., 161 F. Supp. 3d at 1233-34; (see also Doc. 173 at 10). Because "the leaky Window System caused water damage to personal property and to the otherwise non-defective work of the tenant's contractors," and the court in the Underlying Action "found that the only way to stop the ongoing water intrusion (and, thus, the ongoing 'property damage') would be to replace the entire Window System," repair and replacement of the Window System is due to be indemnified by Amerisure under the Policies. (Doc. 160 at 13-14); (see also Doc. 173 at 1).

Arch contends in its Motion that it is entitled to indemnity for the $5,067,033.01 paid in satisfaction that portion of the Final Judgment entered against Arch and Auchter for the repair and replacement of the defective Window System, required in order to stop ongoing water damage to other non-defective property. (Doc. 160 at 2). It argues that "when faulty workmanship damages other property and must be repaired in order to fix the other property, any expenses incurred in correcting the faulty work constitute 'damages because of ... property damage' " within the meaning of Amerisure's CGL Policies. Id. at 12. In support of its argument, Arch cites to the decisions in Carithers, 782 F.3d 1240 and Pavarini Constr. Co., 161 F. Supp. 3d 1227.

In Carithers, which is binding precedent on this Court, see Carithers, 782 F.3d at 1249 (citing United States v. Chubbuck, 252 F.3d 1300, 1305 n. 7 (11th Cir.2001) ("the prior precedent rule applies to interpretations of state law"), homeowners, as assignee of the insured general contractor, brought an action against the CGL insurer seeking to recover sums awarded homeowners by a consent judgment in the homeowners' underlying lawsuit against the insured contractor for construction defects and resulting property damage. 782 F.3d at 1243. The coverage issue was decided following a bench trial before the district court. id. at 1244. The homeowners' expert testified at the bench trial that the damage to the homeowners' garage was the product of wood rot caused by a fungus. Id. The district court concluded that "the incorrect construction of a balcony, which allowed water to seep into the ceilings and walls of the garage leading to wood rot, caused property damage to the garage." Id. The district court concluded that the insurer was liable for

> ***13** the cost of repairing the balcony itself, which ... had to be replaced in order to repair the property damage to the garage. In other words, though the balcony was not property damage (because it was the defective work of a sub-contractor), the balcony was part of the cost of repairing the garage, which was property damage.

Id. at 1244-45. The Eleventh Circuit Court of Appeals affirmed this portion of the district court's order as follows:

> The district court found that the balcony was defectively constructed, which caused damage to the garage. The district court also recognized that, under Florida law, the defectively constructed balcony was not covered by the policy. However, the district court found as a fact that, in order to repair the garage (which the parties agree constituted property damage), the balcony had to be rebuilt. [The insurer] does not contend that this factual finding was clearly erroneous. Rather, Mid-Continent contends that the [homeowners] cannot recover for any defective work, even where repairing that work is a necessary cost of repairing work for which there is coverage.
>
> We hold that the district court did not err in awarding damages for the cost of repairing the balcony. Under Florida law, the [homeowners] 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 [homeowners] were entitled to these damages.

Id. at 1251: see also Mid-Continent Cas. Co. v. Gamma Constr., Inc., No. 16-cv-20928-KING, 2016 WL 8813760, at *2 (S.D. Fla. July 6, 2016) (staying declaratory action regarding insurer's duty to indemnify pending resolution of underlying liability determination in state court, observing that the underlying factual issues are important to resolving an insured's indemnity claim because Florida law "involves the resolution of Important questions of fact, such as the extent to which the defective work damaged otherwise non-defective completed product and whether the defective work had to be replaced in order to effectively repair the non-defective product." (citing Carithers, 782 F.3d at 1251)).

The second decision cited by Arch is Pavarini Constr. Co., 161 F. Supp. 3d 1227. In Pavarini, the insured, a general contractor (Pavarini) for a condominium construction project, brought an action against its CGL insurer for indemnity of all costs to repair property damage caused by two subcontractors' defective work. 161 F. Supp. 3d at 1229-31. The subcontractors were hired to install concrete masonry unit walls and reinforcing steel, and to supply and install reinforcing steel within cast-in-place concrete columns, beams and shear walls. Id. at 1230. "The work performed by both subcontractors was so seriously deficient ... [that'] [t]he building's compromised structural support system resulted in excessive movement of building components [which], in turn, caused stucco debonding and cracking on the walls of the building, worsening cracking of cast-in-place concrete elements (columns, beams, and shear walls), and cracking in the mechanical penthouse enclosure on the roof, which led to water intrusion." Id. The parties did not dispute that Pavarini incurred $25 million in costs "relating to the remediation effort." Id. The defendant insurer argued that the repairs to the building were not covered by the CGL policy "because the repairs only remedied the subcontractors' defective work, not 'property damage' as defined by the [CGL] policy." Id. at 1232. The court was asked to determine "what constituted the repair of nondefective work as opposed to the repair of defective work." Id. at 1233. In so doing, the court observed: "if the defective work causes damage to otherwise non-defective completed product, i.e., if the inadequate subcontractor work caused cracking in the stucco, collapse of the penthouse enclosure, and cracking in the critical concrete structural elements, [the contractor] is entitled to coverage for the repair of that non-defective work." Id. (citing Amerisure, 673 F.3d at 1306).

***14** Reviewing the Eleventh Circuit's decision in Carithers, supra, the Pavarini court found that "[s]imilarly,"

> 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.... Thus, the [CGL] policy provides for complete indemnification.

Pavarini, 161 F. Supp. 3d at 1234. The court observed that J.S.U.B., supra, "stands for the proposition that claims for repairing structural damage caused by the defective work of subcontractors may be covered," leading to the "natural corollary [that] coverage may exist for costs to repair defective work in order to prevent further structural damage and covered loss." Id. at 1234 n. 6 (citing Carithers, 782 F. 3d at 1251).

b. Amerisure's Argument

Amerisure argues that "Arch cannot sustain its burden in demonstrating that the Window System ... caused 'property damage' to other, non-defective components of the Project [because] no such award was made in the Final Judgment, much less requested during the course of the trial." (Doc. 168 at 1). Amerisure contends "all amounts awarded in the Final Judgment were exclusively for the repair and replacement of the Window System, which does not qualify as 'property damage' under a CGL policy." Id. (citing Amerisure, 673 F.3d at 1308 and Palm Beach Grading, Inc. v. Nautilus Ins. Co., 434 F. App'x 829 (11th Cir. 2011)); (see also Doc. 168 at 2; Doc. 169 at 1; Doc. 182 at 2, 4). Amerisure argues that Arch is bound by the Final Judgment, and may not modify the Final Judgment to include damage to other non-defective property in order to recover under Amerisure's CGL Policies, because "[t]he Final Judgment resolved RAP's claims of damages." (Doc. 182 at 5-6) ("[T]he

Final Judgment binds Arch and precludes it from re-litigating the content of the $5,067,033.01 award for repair and replacement of he Window System."). Amerisure contends that "[t]he Final Judgment - a culmination of the trial testimony and evidence - confirms that this award was exclusively for the repair of the defective Window System." (Doc. 182 at 8). Amerisure argues that "Arch's speculation and conjecture predicated on isolated references to 'water intrusion' or the Project not being 'watertight' neither alter the content of the Final Judgment nor sustain Arch's burden in proving 'property damage.' " (Doc. 168 at 19).

Amerisure asserts that the decision in Carithers does not provide support for Arch recovering indemnity under the Amerisure Policies for the cost of repair and replacement of the defective Window System installed by TSG. Amerisure contends that the Eleventh Circuit "held that there was coverage for rebuilding the balcony because such costs were integral to repair the damage caused by the defective balcony to the other, non-defective component of the home, i.e., the garage." (Doc 168 at 18). Amerisure contends that "[n]o such damage to a non-defective component was requested or awarded in the Final Judgment, much less any testimony or suggestion at trial that repairing the Window System was integral to repair any alleged damage." Id.

***15** Amerisure also distinguishes the decision in Pavarini, contending it does not support Arch's request for indemnity for the cost of replacing and repairing the defective Window System at issue here. This is because, "[d]amage beyond the structural work itself was plainly evident, and was awarded in the judgment. Because of the consequential damage to the other non-defective work, the building had to be stabilized to repair other damaged project components." (Doc. 168 at 19). Amerisure argues Pavarini is inapposite from the facts in this case, because "no such damage to other non-defective property was caused by the Window System, or awarded in the Final Judgment." Id.

Amerisure argues that the decision in Palm Beach Grading, supra, supports its position that it is not liable to indemnify Arch for $5 million for replacement and repair of the Window System. (See Docs. 168 at 15; 169 at 12; 182 at 8). In Palm Beach Grading, a general contractor brought an action for indemnity against a subcontractor's CGL policy for $256,208 stemming from the repair of a defective sewer system pipe, after having obtained a final judgment against the subcontractor that included that amount. 434 F. App'x at 829-30. As a result of the defective sewer pipe work, the contractor (through its replacement subcontractor) was required to dig up, repair and re-bury sections of the sewer line. Id. at 830. "Repairing the defective sewer line required damaging other components of the ... Project, including, for example, digging through and breaking apart the surrounding subgrade, road, curbing, sidewalk, and asphalt," resulting in $256,208.01 in repair costs. Id. In affirming the district court's entry of summary judgment in favor of the defendant insurer, the Eleventh Circuit concluded that "the repair costs [the general contractor PBG] incurred as a result of [the subcontractor's] negligence are not covered under the CGL policy .... because the damage does not constitute 'property damage' within the meaning of the policy." Id. at 830. Construing similar language as contained in the Amerisure CGL Policies at issue here, the court in Palm Beach Grading found as follows:

> The problem with PBG's claim is that the defective pipe did not cause damage independent of the repair and replacement of the pipe. For example, the pipes never burst, caused sinkholes, or caused back-ups. Rather, PBG's claim is solely for the costs of repairing and removing the defective pipe, which is not a claim for "property damage."

434 F. App'x at 831 (cting J.S.U.B., 979 So.2d at 890; Pozzi Window Co., 984 So.2d at 1248).

Amerisure also cites to the Eleventh Circuit's decision in Amerisure Mut. Ins. Co. v. Auchter Co., 673 F.3d 1294 in support of its argument that it is not liable for indemnifying the cost or repairing and replacing the defective Window System in this case. (Doc. 168 at 16). In Amerisure v. Auchter, a subcontractor was hired to install the entire roof of an inn owned by the Amelia Island Company ("Amelia"), including the roofing substrate system and the roofing tiles. 673 F.3d at 1296. The subcontractor's installation of the roofing tiles was defective, constituting an "occurrence" under the general contractor's CGL. Id. at 1300. Subsequently, as many as 25% of the tiles on the roof blew off of the roof during windstorms and hurricanes. Id. at 1296.

Amelia sued the general contractor Auchter Company ("Auchter") to recover damages in connection with the defective roof; the owner did not allege in the underlying action "that falling roof tiles damaged any other property or part of the [construction] project." Id. at 1297. "Nor did Amelia allege that the loss of tiles had caused the roof to fail in such a way as to allow the elements to damage other components of the project." Id. The underlying case went to arbitration, and the arbitrator found the general contractor Auchter liable to Amelia the owner for breach of contract and awarded $2,167,313.67 in damages for the defective installation of the roof. Id. at 1297. The state court converted the arbitrator's award into a state court final judgment. Id. at 1297-98. Auchter's CGL insurer ("Amerisure") brought a declaratory judgment indemnity action in federal court seeking a declaration that Amelia's claim against Auchter was not covered by the CGL policies issued to the general contractor. Id. at 1297.

***16** Construing the terms of a CGL insurance policy similar to those in the instant case, and citing to J.S.U.B., 979 So. 2d at 890 and Pozzi Window, 984 So. 2d at 1248, the Amerisure court determined that "if a subcontractor is hired to install a project component and, by virtue of his faulty workmanship, installs a defective component, then the cost to repair and replace the defective component is not 'property damage,' " and the property owner's claim against the general contractor for the inn's defective roof "is not a claim for 'property damage' within the plain wording of the CGL policy" because the subcontractor's "defective installation of the Inn's roof did not cause 'physical injury to tangible property' as required to trigger coverage under the CGL." Amerisure v. Auchter, 673 F.3d at 1306-07. The court found that

> The only damages Amelia alleges are those to correct the faulty roof supplied by Auchter's subcontractor. In so claiming, Amelia is effectively seeking to secure the roof that Auchter should have installed in the first instance: one that conformed with the contract specifications. Amelia's claim is thus simply a "claim for the cost of repairing the subcontractor's defective work."

Id. at 1307 (quoting J.S.U.B., 979 So. 2d at 890). The court noted that "Amelia's claim all along has been solely to remedy the installation of a defective component, which in this case is the roof as a whole," including the tiles, and that Amelia "has never claimed ... damage to any component of the Inn other than the roof itself and thus has not claimed 'property damage.' " Id. at 1308, 1310 (emphasis omitted).

In reaching its decision, the Amerisure court reviewed the Florida Supreme Court's decision in J.S.U.B., including existing decisions differentiating between a claim for the costs of repairing and removing defective work, which is not "property damage," from a claim for the cost of repairing damage caused by defective work, which is a claim for "property damage." Amerisure, 673 F.3d at 1301-04; J.S.U.B., 979 So.2d at 889. The Amerisure court also cited cases recognizing the distinction. 673 F.3d at 1304. For instance, in Lennar Corp. v. Great Am. Ins. Co., 200 S.W.3d 651, 679 (Tex. Ct. App. 2006), abrogated on different grounds by Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118 (Tex. 2010), the court held that the cost of removing and replacing defective synthetic stucco to preempt water damage to buildings was not "property damage." The Lennar court found that "considering the summary judgment evidence, we cannot conclude that it was necessary for Lennar to remove and replace all the [synthetic stucco] in order to repair the water damage, if any, to each home. Therefore, the costs incurred by Lennar to remove and replace [synthetic stucco] as a preventative measure are not 'damages because of ... property damage.' " Lennar Corp., 200 S.W.3d at 679. On the other hand, in Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 310 (Tenn. 2007), "a subcontractor's defective window installation caused 'property damage' because the defective installation allowed water penetration that damaged the windows' surroundings." Amerisure, 673 F.3d at 1304 (citing Moore, 216 S.W. 3d at 310). In Moore, the Tennessee Supreme Court observed the following:

> A shingle falling and injuring a person is a natural consequence of an improperly installed shingle just as water damage is a natural consequence of an improperly installed window. If we assume that either the shingle or the window installation will be completed negligently, it is foreseeable that damages will result. If, however, we assume that the installation of both the shingle and the window will be completed properly, then neither

> the falling shingle nor the water penetration is foreseeable and both events are "accidents." Assuming that the windows would be installed properly, Moore could not have foreseen the water penetration. Because we conclude the water penetration was an event that was unforeseeable to Moore, the alleged water penetration is both an "accident" and an "occurrence" for which there is coverage under the "insuring agreement."

***17** Moore, 216 S.W. 3d at 309.

4. The Court's Previous Order

On September 27, 2017, the Court entered a Order denying Amerisure's Motion for Summary Judgment (Doc. 112) seeking a partial summary judgment declaring that it is not liable to indemnify Arch, as Auchter's surety, for money paid to RAP to satisfy the underlying Final Judgment entered in favor of RAP for damages incurred in the construction of RAP's building. (Doc. 191; 09/27/17 Order). See Amerisure Ins. Co. v. Auchter Co., No. 3:16-cv-407-J-39JRK, 2017 WL 4862194 (M.D. Fla. Sept. 27, 2017). Amerisure had argued that it is not required to indemnify Arch because Arch's payment of the settlement in satisfaction of the Final Judgment "does not qualify as damages because of 'property damage' caused by an 'occurrence.' " (See Doc. 191 at 19). The Court denied Amerisure's Motion because factual questions existed regarding what damages, if any, listed in the underlying Final Judgment, constituted "property damage" under Amerisure's Policies. Id. at 25-30. The Court noted that Arch has the burden to allocate damages and show that the Final Judgment and subsequent settlement and satisfaction, or portions thereof, represented costs that fell within the coverage provisions of the Amerisure Policies. Id. In so doing, the Court observed that "[a] claim for costs incurred for repairing damage to other elements of the subject building caused by water intrusion through the defective window system is a claim for "property damage" under the Amerisure Policies." Id. at 27. The Court found that "by citing to evidence and testimony in the state court trial record, Arch presents evidence indicating that property damage occurred as a result of water intrusion through the defective window system, creating a genuine issue of material fact that damages can be allocated between covered and noncovered claims." Id. at 28.

5. Analysis

The issue raised by the cross Motions is much more narrow than was disputed in Amerisure's earlier motion and addressed by the Court in its Previous Order. Rather than raising a question of allocation of "property damages," the issue here is whether Amerisure is liable to indemnify Arch for "[t]he total damages due to RAP in connection with the defective building envelope and water intrusion" in the amount of $5,067,033.01. (See Doc. 24-1 at 46). Arch has narrowed the issue to focus on the $5 million repair and replacement of the Window System alone, arguing that the Eleventh Circuit in Carithers expanded the reach of "property damage" under a standard CGL insurance policy to include repairs and replacement necessary to prevent further ongoing damage to otherwise non-defective property.

Amerisure argues that TSG president Baker "found no evidence of damage because of the alleged water intrusion through the faulty Window System," and that he concluded that "any and all defects were limited to the Window System." (Doc. 168 at 5 (citing Doc. 24-1 at 15, 18 (Final Judgment ¶¶ 4, 13)); (see also Doc. 169 at 5). Amerisure contends that Mr. Baker "did not identify any damage to non-defective work caused by the alleged water intrusion, and in fact confirmed that all water intrusion as a result of the defective Window System was limited to the Window System itself." (Doc. 168 at 6 (citing Doc. 24-1 at 17-18, 46 (Final Judgment ¶¶ 9-12)); see also Doc. 169 at 5). The record establishes otherwise. Judge Jay noted that RAP retained Mr. Baker "to determine the cause of the water intrusion and to evaluate the reasonable costs to repair these problems." (Doc. 24-1 at 15-16 (Final Judgment ¶ 4)); see also id. at 18 (Final Judgment ¶ 13 (RAP hired consultants "to determine the cause of the water intrusion" and "to perform investigation and repairs in connection with the water intrusion issue."). Judge Jay reached his conclusion regarding RAP's recovery in relation to the Window System, citing to the costs estimates of IBA and RAP general contractor Auld & White, and including the cost to repair the building envelope, the cost of interior repairs

in connection with removing and replacing the windows, and sums paid to consultants to determine the cause of the water intrusion, for a total of $5,067,033.01 "in connection with the defective building envelope and water intrusion." (Doc. 24-1 at 46). Judge Jay did not find affirmatively that there was no other damage caused by water intrusion through the windows. IBA was retained by RAP to determine the source of the water intrusion and the cost to fix the problem; it was not hired to search for specific property damage and to calculate the dollar amount of the damage. Mr. Baker testified that 28 percent of the windows he observed allowed water to leak into the Building beyond the window sills. (Doc. 162-6 at 33 (Trial Tr. Vol. 6 at 846). This leakage was confirmed by his own observation, photographs, and reports by building tenants.

***18** Amerisure dismisses Arch's citation to Mr. Warden's testimony regarding evidence of water intrusion that he observed, arguing that "[n]owhere ... does Mr. Warden quantify the nature and scope of the alleged damage to ceiling tiles, or, perhaps, more importantly, qualify, that any such ceiling tiles were the result of leakage from the Window System." (Doc. 168 at 7-8). Amerisure contends that Mr. Main's testimony about "saturated" walls pertained to the elevator equipment room and sprinkler system. (Doc. 168 at 8 (citing Doc. 168-9 at 14 (Trial Tr. Vol 11 at 1405)). The record indicates that Mr. Main's testimony was about his observations on different floors of the building and different locations. (Doc. 168-9 at 14 (Trial Tr. Vol. 11 at 1405-06). Amerisure also implies that water intrusion was due to an incomplete roof. (Doc. 168 at 9 (citing Doc. 168-10 at 16-17 (Trial Tr. Vol 12 at 1537-39)). Notably, the state trial court in the Underlying RAP Lawsuit in its November 2014 Final Judgment found not credible and rejected testimony that the water intrusion in the building came from other sources such as the roof. The court noted testimony establishing the roof-related issues had all been corrected, and determined that the leaking Window System was the source of ongoing water intrusion on "multiple floors" including those not adjacent to the roof, and that "the water intrusion problem continues." (Doc. 24-1 at 40, 42, 44-45). Amerisure cannot re-litigate the state court's finding in the context of this lawsuit. Amerisure does not address the substance of the testimony of Ms. Flynn, or the letters by Mr. Lunetta recounting damage to property caused by water intrusion.

Finally, Amerisure argues that RAP sought no damages for loss to personal property, ceiling tiles and carpet. "RAP's damages sought ... were solely for the repair of the Window System." (Doc. 168 at 8 (citing Lunetta testimony and Doc. 168-8 (RAP damages summary)); (see also Doc. 169 at 6-77; Doc. 182 at 3). Amerisure's argument would be relevant if Arch, by its Motion, were seeking specific damages to repair the carpet, ceiling tiles and drywall. Then Arch's Motion would fail for lack of evidence in the record and failure to allocate the dollar amount of damages to these components. See J.B.D. Constr. 571 F. App'x at 928 ("Nothing on the record suggests that the settlement, including the estimated remediation costs, were to repair physical damage to property other than the fitness center itself."). But Arch is seeking indemnity under the Amerisure Policies for the entire $5 million cost of repairing and replacing the Window System to stop ongoing damage to otherwise non-defective property, under the theory announced in Carithers, eliminating the need to quantify and allocate the damage to the other property. Unlike J.B.D., where the "engineering reports ... vaguely speak of water intrusion points, not to water damage," 571 F. App'x at 928-29, there is no genuine dispute as to any material fact that the evidence in this record establishes that water intruded through the defective Window System into the building, that water did not enter the building through any other identified source, and that water damaged ceiling tiles, drywall and carpeting.

In his Final Judgment, Judge Jay thoroughly chronicled the extensive evidence of water intrusion into the Building over a period of years, as set forth above. In crediting and accepting the testimony of IBA president Mark Baker, Judge Jay isolated the cause of the water intrusion to the defective Window System, specifically rejecting testimony that attributed the water intrusion to areas such as the roof and exterior wall panels. Judge Jay also concluded that the water intrusion through the Window System extended beyond the window sills. (Doc. 24-1 at 16, 43-44); (see also Trial Tr. at 735, 743-44, 757-58, 846, 1019). Additionally, Judge Jay determined that the Window System needed to be repaired and replaced in order to stop ongoing water intrusion. (Doc 24-1 at 17, 44 (accepting Mr. Baker's conclusion that "[w]ithout correcting the underlying defects in the window drainage systems, ... RAP will experience leaking in all of the windows as the gaskets shrink and age over time.")); id. at 44 ("Without correction of the underlying defects in

the window drainage systems, the evidence establishes that all of the windows will eventually leak."). Judge Jay was not required to link water intrusion through the defective Window System to damage to other non-defective tangible property. Indeed, in denying intervention to insurers Amerisure and Landmark American Insurance Company, TSG's insurer, Judge Jay acknowledged that specific insurance issues were not before the state court, and that to allow intervention in the Underlying RAP Lawsuit and permit the insurers to litigate coverage issues "would inject new issues into the lawsuit that would not otherwise be included in the Court's analysis and evaluation of the facts during trial of this pending action." (Doc.1 39-3).

> ***19** At trial in the pending action, the Court will not determine claims, facts or legal issues that would be dispositive or common to a separate coverage action to determine the duties owed under insurance policies issued by Landmark American Insurance Company or American [sic] Mutual Insurance Company to their respective insureds.

Id.; see generally Spencer v. Assurance Co. of Am., 39 F.3d 1146, 1149 (11th Cir. 1994) ("The coverage issues which Assurance raised in the district court were not litigated in the circuit court action, nor were they necessarily determined by the circuit court judgment.... We find no authority to extend the estoppel principle to preclude the litigation of issues not necessarily determined by a judgment issued by a previous court."). This Court finds that the state court record is sufficiently developed and establishes that there is no genuine dispute of fact that water intrusion through the defective Window System caused damage to otherwise non-defective tangible property in the form of walls, ceiling tiles and carpet, unrelated to the Window System or the work that TSG was hired to do, and that repair and replacement of the defective Window System was required to prevent ongoing property damage. Under Carithers, the cost of repairing and replacing the defective Window System constitutes "property damage," resulting in coverage. See also Pavarini Constr. Co., 161 F. Supp. 3d at 1233-34 & n.6 ([C]overage may exist for costs to repair defective work in order to prevent further structural damage and covered loss.").

In Carithers, the record was configured to address coverage questions, which were decided in a bench trial before the district court. 782 F.3d at 1244. The district court determined that "the incorrect construction of the balcony, which allowed water to seep into the ceilings and walls of the garage leading to wood rot, caused property damage to the garage." Id. The district court found that though the homeowners' balcony standing alone was not "property damage" because it was defective work of a subcontractor, "the balcony was part of the cost of repairing the garage, which was property damage." Id. at 1244-45. The Eleventh Circuit affirmed the district court's awarding damages for the cost of repairing the balcony as property damage with the cost of repairing the garage. Id. at 1251. Focusing on the district court's finding that "the balcony was defectively constructed, which *caused* damage to the garage," and that "in order to repair the garage (which the parties agree[d] constituted property damage), the balcony had to be rebuilt," the court found that "repairing the balcony was part of the cost of repairing the garage." Id. (emphasis added). The Eleventh Circuit concluded that "the Carithers had a right to 'the costs of repairing damage caused by defective work.' " 782 F.3d at 1251 (quoting J.S.U.B., 979 So. 2d at 889). Focusing on a causation analysis, the court determined that repairing and/or replacing the balcony was necessary to stop ongoing damage to the garage, and accordingly included that cost in the "property damage" coverage. Notably, the amount of damage to the garage was not a part of the court's analysis; just the causation of the damage.

Under Carithers, the Court need not ascertain the value of the damage to "other property" - here, the damage to the tenants' carpet, walls and ceilings caused by water intrusion through the defective windows. Rather, it is the *fact* of damage to otherwise non-defective property and the *cause* of that damage which compels a finding that coverage exists. It is not speculative to conclude on this record that the water dripping into the building through the defective Window System, caused the Building tenants' carpets, drywall and ceiling tiles to become saturated. Compare Amerisure v. Auchter, 673 F.3d at 1300 ("Amelia never alleged that the defective installation [of the roof] *caused* damage to any other component of the project but the roof (emphasis added)); Palm Beach Grading, 434 F. App'x at 831 (finding that "the defective pipe did not *cause* damage independent of the repair and replacement of the pipe. For example,

the pipes never burst, caused sinkholes, or cause back-ups." (emphasis added)); Pozzi Window Co., 984 So. 2d at 1248 ("[t]he mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage unless that defective component *results in* physical injury to some other tangible component." (emphasis added)).

***20** Moreover, unlike the facts in Amerisure v. Auchter, 673 F.3d at 1300, where "Amelia never alleged that the defective installation [of the roof] caused damage to any other component of the project but the roof," damage to tenants' improvements caused by water intrusion through the Window System was noted during the construction phase of the Project and in the pleadings filed in the Underlying RAP Lawsuit. Payment for the cost of the water damage was also discussed and made. [15]

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 Court recognizes the apparent disparity and even the arguable inequities when the occurrence of wet carpet, stained ceiling tiles and soggy drywall results in a $5 million liability to indemnify the insured for the repair and replacement of the entire defective Window System, a liability that would otherwise not exist absent damage from the undisputed water intrusion. But the Court is bound by the precedent set forth in Carithers, which in this Court's view, represents a logical interpretation of the law of "property damage" in the context of standard CGL insurance policies. Carithers teaches that property damage includes the cost of repairing a defect in order to stop the continuing ongoing property damage, whether or not that defective work falls within the previous definition of the insured's "work" or not. As noted by the Tennessee Supreme Court, "water damage is a natural consequence of an improperly installed window." Moore. 216 S.W.3d at 309 (cited in Amerisure, 673 F.3d at 1303-04, 1306; J.S.U.B., 979 So. 2d at 877, 882, 883-84, 885, 888, 890).

***21** Under Carithers, the qualitative and quantitative disparity and the balance of possible inequities are not the determinative factors. Rather it is the *fact* that the damage to otherwise non-defective property is *caused* by the defective work, and is *ongoing* unless the defective work is corrected that dictates this result. While it is unclear whether the various business risk exclusions cited by Amerisure, are equally modified by the decision in Carithers, the Court determines that at this point in time, and pending further development of the law, the Court is required to interpret and apply the Carithers definition of "property damage" to include the cost of repairing any defect to stop ongoing property damage, to the facts of this case.

B. Conditions and Exclusions

Under Florida law, once the insured shows coverage, the insurer has the burden of proving an exclusion. Carithers, 782 F.3d at 1250; Frank Casserino Constr., 721 F. Supp. 2d at 1215. "If there is an exception to an exclusion, however, then the burden returns to the insured to prove the exception and show coverage." Id. (citing E. Fla. Hauling, Inc. v. Lexington Ins. Co., 913 So. 2d 673, 678 (Fla. 3d DCA 2005)). "Exclusions function to restrict and shape the coverage otherwise afforded." Amerisure Mut. Ins. Co. v. Am. Cutting & Drilling Co., No. 08-60967-CIV, 2009 WL 700246, at *4 (S.D. Fla. Mar. 17, 2009) (citing J.S.U.B., 979 So. 2d at 882).

Amerisure argues that it is not liable to indemnify Arch for the $5 million set forth in the Final Judgment based upon various other contract conditions and exclusions. Specifically, Amerisure raises the " 'No Action' and 'Voluntary Payments' conditions," (Doc.169 at 2); (see also Doc. 168 at 2, 19); the " 'Your Work' " "exclusions j(5) and j(6)," (Doc. 169 at 14-15); (see also Doc. 168 at 25 and Doc. 182 at 10); the " 'Impaired Property'

Exclusion," (Doc. 169 at 15-16); (see also (Docs. 168 at 25 and Doc. 182 at 10); and the "Contractors Professional Services Liability Endorsement." (Doc. 169 at 2). Amerisure also argues in its response to Arch's Motion that "the 'Contractual Liability' exclusion bars Arch's claims." (Doc. 168 at 23). The Court will address each of these conditions and exclusions in turn.

1. The "No Action" and "Voluntary Payment" Clauses [16]

Amerisure argues that Arch's post-judgment settlement with RAP violated the "no action" and "voluntary payment" conditions in the Amerisure Policies which Amerisure argues "expressly require that the insureds and their subrogees refrain from voluntary payment, comply with all policy terms, and proceed only on agreed settlements." (Doc. 168 at 22).

***22** The Court examined the "no action" condition in its previous Order. There, the Court found that Arch's post-judgment settlement with RAP did not, as a matter of law, violate the "no action" provision inasmuch as the Final Judgment satisfied the clause's condition precedent that all " 'claims be finally determined and come to an end." The Court also concluded that the "no action" provision did not apply to Arch in its capacity as a " 'third party claimant' having obtained a judgment against Auchter in the Arch v. Auchter Lawsuit for the amounts paid in the Underlying RAP Lawsuit." (Doc. 191 at 12, 13-19).

Amerisure did not raise the "voluntary payment" condition in its earlier motion for summary judgment (see Docs. 112, 128) and the Court did not address it in the Previous Order. Amerisure mentions this condition in a footnote in its pending Motion, (Doc. 169 at 2), and discusses it in its response to Arch's pending motion. (See Doc. 168 at 19).

The "Voluntary Payment" condition provides:

> d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

"This provision clearly excludes any voluntary payments made by an insured without the insurer's permission." EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am., 845 F.3d 1099, 1115 (11th Cir. 2017).

Amerisure argues that because Arch as assignee and subrogee steps into the shoes of Auchter, it has no greater rights than Auchter and must abide by the conditions of the Amerisure Policies. (Doc. 168 at 19). Amerisure disputes Arch's argument that the "no action" and "voluntary payment" clauses are unenforceable because Arch became a subrogee afer entering into the post-judgment Settlement, and that compliance with the provisions "are vitiated by the existence of a judgment." (Doc. 168 at 21-22).

Arch contends that it was not bound by the Amerisure Policies at the time it entered the post-judgment Settlement Agreement, and that the satisfaction of the underlying Final Judgment was "statutorily required." (Doc. 160 at 16). Further, Arch contends that it was "not bound by the Policies until *after* it satisfied the Final Judgment in the Underlying Action and stepped into Auchter's shoes as Auchter subrogee." Id. (citing Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 646 (Fla. 1999) (stating that a subrogee must pay off the entire debt before it earns subrogation rights)). Further, Arch contends that upon entry of the Final Judgment, Arch and Auchter were legally obligated to satisfy the judgment, and that satisfaction of a judgment is involuntary. Id. (citing Great Am. Ins. Co. v. Stolte, Inc., 491 So. 2d 352, 352 (Fla. 4th DCA 1986)).

As with the "no action" provision, the record indisputably establishes that Arch did not violate the "voluntary payment" provision of Amerisure's Policies when it satisfied the Final Judgment as to RAP. The "Settlement" was entered to satisfy an existing Final Judgment; it was not "voluntary" or an "assume[d]... obligation" because RAP's claim had been adjudicated and the judgment was final. Additionally, as noted in the Court's Previous Order, Amerisure fails to address how the "voluntary payment" provision of its Policies can be applied to bar Arch's claim for indemnity under the Amerisure Policies in Arch's capacity as a "third party claimant," having obtained a judgment against Auchter in the Arch v. Auchter lawsuit for the amounts paid in the Underlying RAP Lawsuit. (See Doc. 191 at 17). Finally, the Court previously cited the lack of evidence pertaining to the

ten months between the Underlying RAP Lawsuit Final Judgment, and Arch's settlement of the Final Judgment with RAP, despite the fact that a money judgment had been entered against Amerisure's insured, raising questions of material fact. (Doc. 191 at 18-19). For all of these reasons, on this record, the Court determines that the "voluntary payment" provision does not bar coverage.

2. Contractors Professional Services Liability Endorsement

***23** Likewise, the Court in its Previous Order addressed Amerisure's argument that the Contractors Professional Services Liability Endorsement, which provides coverage for the insured's liability from professional services, and several exclusions applicable to the Professional Services Endorsement, bar coverage. (Doc. 191 at 12-13, 33-38). The Court found that "[t]he Underlying RAP Lawsuit Final Judgment raises factual issues regarding Auchter's negligent performance of professional services," id. at 37, and that "Amerisure has failed to establish that there are no genuine issues of fact that Auchter made no' ... error or omission' in connection with its performance or failure to perform" professional services. Id. at 38.

3. The "Impaired Property" Exclusion

The Amerisure Polices exclude coverage for:

> m. Damage To Impaired Property Or Property Not Physically Injured
>
> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

(Doc. 24-13 at 14-17); (Doc. 24-14 at 11-14) ("Exclusion M"). Exclusion M is included in CGL policies "to prevent the insured from claiming economic losses resulting from the insured's work or work product." Transcont'l Ins. Co. v. Ice Sys. of Am., Inc., 847 F. Supp. 947, 950 (M.D. Fla. 1994); see also Pinkerton & Laws. Inc. v. Royal Ins. Co. of Am., 227 F. Supp. 2d 1348, 1354 (N.D. Ga. 2002) (construing Florida law). The exclusion applies if there is no injury to other property and there is "merely ... economic loss resulting from injury to the product itself." Pinkerton, 227 F. Supp. 2d at 1354. The exclusion does not apply, however, if the evidence "establishes damages to other property." Id. Additionally, Exclusion M does not apply "to situations arising from a sudden and accidental injury to the product which results in economic loss." Id.

> The "impaired property" exclusion in a standard CGL policy precludes coverage for property damage to property, other than the insured's work or product, which is not physically damaged and which damage is caused by the insured's faulty work or product. This exclusion precludes coverage for loss of use claims arising from faulty work or products when there is no physical injury to the property. This exclusion prevents the insured from claiming economic losses resulting from the insured's work or product.... This exclusion does not apply when there is physical damage to other property into which the insured's work or product has been incorporated, or if the insured's work cannot be repaired or replaced without causing physical injury to other property.

Certain Underwriters at Lloyds v. NOA Marine, Inc., No. 8:11-CV-63-T-17TGW, 2012 WL 1623527, at *15 (M.D. Fla. May 9, 2012) (citing Transcont'l Ins. Co., 847 F. Supp. at 950 and Commercial Union Ins. Co. v. R.H. Barto Co., 440 So. 2d 383, 386–88 (Fla. 4th DCA 1983) (CGL policy not intended to provide coverage to repair insured's faulty workmanship and material, without other physical damage arising therefrom). "Exclusion M does not bar coverage if the Court determines that the damaged property was 'other property' rather than [the insured's] 'work' as defined by the insurance contract." Pinkerton, 227 F. Supp. 2d at 1355; see also W. Orange Lumber Co. v. Indiana Lumbermens Mut. Ins. Co., 898 So. 2d 1147, 1149 (Fla. 5th DCA 2005) (finding that under Exclusion M and other provisions of the CGL policy, the insurance

policy does not "cover pure construction defects, absent damage to the property or person of third parties.").

***24** Amerisure argues that this exclusion "bars coverage for property damage to a contractor's own work as long as there is no damage to other property by the defective work." (Doc. 169 at 15 (citing Transcont'l Ins. Co., 847 F. Supp. at 950 and W. Orange Lumber Co., 898 So. 2d at 1148-49). Amerisure contends that because "there was no award for any other damaged, non-defective property caused by the Window System - but rather the award was for the repair and replacement of the Window System itself, the Impaired Property Exclusion clearly applies to bar any coverage." (Doc. 169 at 15).

Arch responds that the "Impaired Property" exclusion "does not apply to the damages arising out of the defective Window System because ... the Window System caused water intrusion, which did, in fact, physically injure other property." (Doc. 160 at 24). Arch contends that Amerisure "falsely equivocates the need to show the *existence* of damage to other property with the need to show a *monetary award recovered* for damage to other property." (Doc. 173 at 15) (emphasis in original).

The record establishes that other non-defective property was physically injured by the water intrusion through the Window System, so the portion of the exclusion that addresses property that has not been physically injured does not apply. Inasmuch as under Carithers, the cost of repairing and replacing the Window System in order to prevent ongoing damage to otherwise non-defective property, is deemed "property damage," within the meaning of Section I of the Amerisure Policies, see supra, the Court determines that Exclusion M does not to preclude coverage for the $5,067,033.01 award for "the defective building envelope and water intrusion."

4. "Your Work" and "Damage to Property" j(5) and)(6) Exclusions

The Amerisure Policies exclude liability for the following:

> j. Damage To Property
>
> "Property damage" to:
>
> ...
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> ...
>
> I. Damage to Your Work [17]
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(Doc. 24-13 at 14-17); (Doc. 24-14 at 11-14).

The exclusions at issue are "business risk exclusions." Am. Cutting & Drilling Co., 2009 WL 700246, at *4; J.S.U.B., 979 So.2d at 878. Pursuant to these exclusions, "CGL policies generally do not cover contract claims arising out of the insured's defective work or product because of the operation of the business risk exclusions." Am. Cutting & Drilling Co., 2009 WL 700246, at *4 (citing J.S.U.B., 979 F. 2d at 885). " 'The business risk exclusions eliminate coverage for liability for property damage to the insured's own work or product-liability that is typically actionable between the parties pursuant to the terms of their contract.' " J.S.U.B., 979 So. 2d at 886-87 (quoting Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W. 2d 65, 78 (Wis. 2004)). Under the j(5) and j(6) Exclusions, "damage to any property that the [insured] was not performing operations on, or incorrectly performing work on, is not excluded." Am. Equity Ins. Co. v. Van Ginhoven, 788 So. 2d 388, 391 (Fla. 5th DCA 2001): see also Essex Ins. Co. v. Kart Constr., Inc., No. 8:14-cv-356-T-23TGW, 2015 WL 4730540, at *4 (M.D. Fla. Aug. 10, 2015) ("[U]nder Florida law, Section G) (5) excludes from coverage only damage to the part of the real property on which the insured is operating at the moment of accident."); Commodore Plaza Condo. Ass'n, Inc. v. QBE Ins. Corp., No. 12-22534-CIV-SEITZ/SIMONTON, 2013 WL 12097507, at M (S.D. Fla.

May 21, 2013) ("While the Policy excludes coverage for property damage to the particular property on which the insured, or its contractors or subcontractors, are working, it does not exclude coverage for property which was damaged incidental to the work."). "Exclusion J(5) excludes coverage for property damage which occurs when the insured or others working on its behalf 'are performing operations.' " Pinkerton, 227 F. Supp. 2d at 1356. Exclusion j(6) excludes the cost to replace or repair the insured's faulty workmanship. Id. As to the "Your Work" exclusion, " '[b]y incorporating the subcontractor exception into the "your-work" exclusion, the insurance industry specifically contemplated coverage for property damage caused by a subcontractor's defective performance.' " J.S.U.B., 979 So. 2d at 887 (quoting Lamar Homes. Inc. v. Mid-Continent Cas. Co.. 242 S.W.3d 1, 12 (Tex. 2007)).

***25** Amerisure argues that the business risk exclusions "bar coverage for damages to a contractor's own work, which is all that is at issue in the instant Motion." (Doc. 169 at 14). Amerisure contends that the record establishes that "there is no genuine issue of material fact that the property damage in this case was to the windows upon which TSG (and Auchter as general contractor) was performing its operations and the j(5) Exclusion applies to exclude coverage." Id. at 15. Amerisure argues that because "any damage to the Window System occurred while Auchter was performing its operations, the j(5) Exclusion bars coverage." (Doc. 168 at 25). Additionally, "[a]s the Window System must be repaired because Auchter's work was faulty, the j(6) Exclusion also applies." (Doc. 169 at 15); (see also Doc. 168 at 25). Amerisure contends that water intrusion into the building does not negate the exclusions because "the Final Judgment only awarded amounts for the repair of the Window System - no amount was awarded for damages to non-defective work." (Doc. 182 at 10).

Arch contends that "[e]ven assuming, *arguendo*, that the damages awarded for the repair and replacement of the Window System implicates [the "Your Work"] exclusion, the 'subcontractor' exception to the exclusion clearly applies," and the "Your Work" exclusion does not preclude coverage for replacement of the Window System. (Doc. 160 at 20). Arch argues that the j(5) Exclusion "is inapplicable because neither Auchter nor TSG were performing any ongoing operations on the tenant improvements when the water intrusion caused 'property damage' to the tenant contractors' work," and that neither Auchter nor TSG performed any work on ceiling tiles, carpet, or any other part of the tenant improvements. Id. at 21. Arch asserts that the " 'property damage' to the otherwise non-defective work of the tenant contractors did not arise out of the 'operations' that Auchter or TSG performed." Id. Likewise, Arch argues that the j(6) Exclusion does not apply "because neither Auchter nor TSG ever performed 'work' on the tenant improvements that were damaged by the water intrusion." Id. at 22.

The Court agrees with Arch's arguments. The evidence does not support a finding that water damage to the tenants' carpeting, ceiling tiles and drywall constituted property damage to Auchter's "work," and establishes "damage to property other than the work performed by [Auchter]." See Auto-Owners Ins. Co. v. Elite Homes. Inc., 676 F. App'x 951, 955 (11th Cir. 2017). Moreover, even if these components are considered Auchter's "work," the "Your Work" exclusion does not apply because the damaged work or the work out of which the damage arises was performed on Auchter's behalf by subcontractor TSG. As to the Property exclusions, there is no evidence to establish that Auchter's and TSG's work was incorrectly performed on walls, carpets and ceilings which are tenant improvements, precluding the application of the j(6) exclusion, or that the property damage to floors, walls and ceilings caused by the water intrusion through the Window System was where Auchter and/or TSG were "performing operations," triggering the j(5) exclusion. Water intrusion damage from leaking windows is not a "business risk" as contemplated by the "Your Work" and the "Property j(5) and j(6) Exclusions," assumed by Auchter and its subcontractor TSG for which it agreed to exclude insurance indemnity protection.

5. Contractual Liability

Though it does not raise the Contractual Liability Exclusion in its own Motion for Partial Summary Judgment, Amerisure does assert the exclusion in its response to Arch's Motion. (See Doc. 168 at 22). The Contractual Liability Exclusion found in the Amerisure Policies, excludes coverage as follows:

b. Contractual Liability

> "[P]roperty damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement[.]

***26** (Doc. 24-13 at 14); (Doc. 24-14 at 11).

In its Previous Order, the Court examined the Contractual Liability Exclusion in the face of this record and concluded that the Contractual Liability Exclusion does not bar coverage in this case, because Arch has a common law right of indemnity from Auchter independent of its right to indemnity under the general indemnity agreement with Auchter. (Doc. 191 at 31-33).

For the foregoing reasons, it is hereby

ORDERED:

1. Arch Insurance Company's Motion for Partial Summary Judgment Against Amerisure (Doc. 160) is **GRANTED** as set forth herein.

2. Plaintiffs' Cross-Motion for Partial Summary Judgment Against Arch Insurance Company (Doc. 169) is **DENIED** as set forth herein.

3. The Clerk shall not enter judgment until ordered to do so by the Court. See Fed. R. Civ. P. 54(b). [18]

DONE AND ORDERED in Jacksonville, Florida, this 27th day of March, 2018.

All Citations

Slip Copy, 2018 WL 4293149

Footnotes

1 In addition to the Motions, the Court considers Plaintiffs' Response in Opposition to Arch Insurance Company's Motion for Partial Summary Judgment (Doc. 168) ("Amerisure Response"); Arch Insurance Company's Reply to Plaintiffs' Response in Opposition to Arch Insurance Company's Motion for Partial Summary Judgment (Doc. 176) ("Arch Reply"); Arch Insurance Company's Response in Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment Against Arch Insurance Company (Doc. 173) ("Arch Response")); and Plaintiffs' Reply in Support of Their Cross-Motion for Partial Summary Judgment Against Arch Insurance Company (Doc. 182) ("Amerisure Reply").

2 The following are selected facts relevant to the issues presented by Arch's Motion and Amerisure's Motion. In order to provide more background, the Court incorporates the facts set forth in its previous Orders. (See Docs. 157, 158, 191).

3 Judge Jay has since been appointed to the Florida First District Court of Appeal.

4 The state court entered judgment in favor of RAP and against Auchter in the amount of $11,267, 515.75, and entered judgment against Arch, who was jointly and severally liable for the same damages as Auchter, in the amount of $8,791,460.72. (Doc. 24-1 at 86-87). The discrepancy between the two amounts was a result of a set-off of $2,476,055.03 in favor of Arch. Id. The total Final Judgment is as follows:

> 1. Judgment is entered in favor of Riverside Avenue Partners, Ltd., and against The Auchter Company in the amount of $11,267,515.75. This judgment shall accrue post judgment interest at the statutory interest rate.
>
> 2. Judgment is entered in favor of Riverside Avenue Partners, Ltd., and against Arch Insurance Company in the amount of $8,791,460.72. This judgment shall accrue post judgment interest at the statutory interest rate. Consistent with the Court's analysis of the Arch counterclaims against RAP, this part of the judgment has been reduced based on Arch's entitlement to the remaining Contract balance and Arch's claims for PCO reimbursement and the Auchter fee.
>
> 3. Judgment is entered in favor of Arch Insurance Company and against TSG Industries, Inc. in the amount of $5,067,033.01. This judgment shall accrue post judgment interest at the statutory interest rate.
>
> 4. Judgment is entered in favor of The Auchter Company and Arch Insurance Company and against B&B of Duval in the amount of $263,487.54. This judgment shall accrue post judgment interest at the statutory interest rate.

Id. at 86-88.

5 Amerisure argues that Arch is "bound by the Final Judgment," which is "conclusive and binding," and that Arch's citation to "mere references to 'water intrusion' in the trial transcript and the Final Judgment" does not overcome the Final Judgment which awarded amounts "solely for the repair and replacement of the Window System itself." (Doc. 168 at 1-2).

> " 'An insurer's duty to indemnify is ordinarily determined by analyzing the policy coverages based on the actual facts of the underlying case.' " Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1193 n.10 (11th Cir. 2002) (citation

omitted). This includes a review of the underlying trial transcript. See Arnett v. Mid-Continent Cas. Co., No. 8:08-CV-2373-T-27EAJ, 2010 WL 2821981, at *6 (M.D. Fla. July 16, 2010). Judge Jay declined to resolve insurance coverage issues in the Underlying RAP Lawsuit. (Doc. 139-3 ("At trial in the pending action, the Court will not determine claims, facts or legal issues that would be dispositive or common to a separate coverage action to determine the duties owed under insurance policies.")). While the parties may not re-litigate the findings of the state trial court, evidence presented to the state court upon which the trial judge based his findings and Final Judgment, is relevant to determining coverage issues in this Court. See generally Spencer v. Assurance Co. of Am., 39 F.3d 1146, 1149 (11th Cir. 1994) ("The coverage issues which Assurance raised in the district court were not litigated in the circuit court action, nor were they necessarily determined by the circuit court judgment.... We find no authority to extend the estoppel principle to preclude the litigation of issues not necessarily determined by a judgment issued by a previous court.").

The Court has not independently read the massive trial transcript to the Underlying RAP Lawsuit. Rather, it refers to testimony specifically cited by the parties. See Fed. R. Civ. P. 56(c)(1) and (c)(3) ("The court need consider only the cited materials, but may consider other materials in the record."); see also Mendenhall v. Backmun, 456 F. App'x 849, 852 (11th Cir. 2012) (district court on summary judgment did not abuse its discretion in limiting its review of the record to specific portions of the exhibits the parties expressly cited in the pleadings).

6 Mr. Baker tested 356 windows. (Doc. 162-2 at 14 (Trial Tr. Vol. 8 at 1019)).

7 Arch also cites to the deposition testimony of tenant corporate representative Mary Flynn regarding the need to replace drywall because of water intrusion. (Doc. 160 at 6); (Doc. 173 at 7). Amerisure objects to the consideration of the Flynn deposition because there is no evidence that Judge Jay considered the Flynn deposition testimony in reaching his determinations. (Doc. 168 at 9 (citing Doc. 24-1 at 4-5)). Ms. Flynn testified that the first water leak she as a tenant experienced was "during our tenant buildout" following a summer rain storm. (Doc. 160-2 at 29-30 (Flynn Dep. at 29-30)). "We already had the drywall installed, and [tenant contractor] Solutions had to tear out the drywall and the insulation and redo it because of the water leaks." Id. at 31. Ms. Flynn recounted three additional "water leaks" "since that time." Id. "[T]o determine whether there is a duty to indemnify, one looks at the actual facts." Stephens v. Mid-Continent Cas. Co., 749 F.3d 1318, 1324 (11th Cir. 2014). An insurer's duty to indemnify " 'is determined by the underlying facts adduced at trial or developed through discovery during the litigation.' " Id. (quoting U.S. Fire Ins. Co. v. Hayden Bonded Storage Co., 930 So. 2d 686, 692 (Fla.4th DCA 2006)); see Amerisure Mut. Ins. Co. v. Auchter Co., No. 3:08-cv-645-J-32HTS, 2010 WL 457386 (M.D. Fla. Feb. 4, 2010) (entering summary judgment in favor of insurer in indemnity declaratory judgment action, considering evidence submitted to the district court at Docs. 35, 36, 40, 43, 44), aff'd, 673 F.3d 1294 (11th Cir. 2012). Arch has submitted the sworn deposition testimony of Ms. Flynn, taken in the Underlying RAP Lawsuit. (Doc. 160-2) To the extent that it is not inconsistent with the state court's findings of fact and the Final Judgment in the Underlying RAP Lawsuit, the Court can consider the sworn testimony. That being said, the Court reaches the same conclusion that the water intrusion through the defective Window System caused "property damage" even without considering Ms. Flynn's testimony.

8 RAP was dismissed from this case without prejudice on December 11, 2015, on stipulation by Amerisure and RAP. (Docs. 22, 23).

9 See Amerisure's Commercial General Liability Policy Number GL 2009278030006, effective January 1, 2006 to January 1, 2007; and GL 2009278040007, effective January 1, 2007 to January 1, 2008, which are similar. (Docs. 24-4 at 3; 24-13; 24-14).

10 "Your work" is defined as "(1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations." (Doc. 24-13 at 28); (Doc. 24-14 at 24).

11 "Impaired property" is defined as:

> [T]angible property other than "your product" or "your work", that cannot be used or is less useful because:
>
> a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> b. You have failed to fulfill the terms of a contract or agreement;
>
> if such property can be restored to use by:
>
> a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
>
> b. Your fulfilling the terms of the contract or agreement.

(Doc. 24-13 at 25); (Doc. 24-14 at 21) (Section V - Definitions.8).

12 In this diversity action, the parties agree that Florida substantive law governs the determination of the issues before the Court. The Amerisure Policies were negotiated and delivered in Florida, and Florida law controls. (See Doc. 169 at 10

(citing AIG Premier Ins. Co. v. RLI Ins. Co., 812 F. Supp. 2d 1315, 1321 (M.D. Fla. 2011); Lumbermens Mut. Cas. Co. v. August., 530 So. 2d 293, 295 (Fla. 1988)); (Doc. 160 (citing Florida substantive law throughout)).

13 The term "accident" as used in the definition of "occurrence" is undefined. Florida courts construe "accident to mean "injuries or damage neither expected nor intended from the standpoint of the insured." State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1076 (Fla. 1998). "[F]aulty workmanship that is neither intended no expected from the standpoint of the contractor can constitute an 'accident' and thus, an 'occurrence' under a post 1986 CGL policy." J.S.U.B., Inc., 979 So. 2d at 888.

The parties do not dispute that faulty workmanship or negligent construction of the Window System by TSG constitute an "occurrence." See Pozzi Window Co., 984 So. 2d at 1243) (observing that a subcontractor's defective work can constitute an "occurrence" under a post-1986 standard form commercial general liability policy); J.S.U.B., Inc., 979 So. 2d at 888 (A subcontractor's faulty workmanship that is neither intended nor expected from the standpoint of the contractor "can constitute an 'accident' and, thus, an 'occurrence' under a post-1986 CGL policy."). The question presented by the cross-motions for summary judgment in this case is whether TSG's faulty workmanship resulted in "property damage" covered by the Amerisure Policies.

14 "Although an unpublished opinion is not binding ..., it is persuasive authority." United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000) (per curiam). See generally Fed. R. App. P. 32.1; 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").

15 On January 24, 2007, RAP, through Paul Lunetta, wrote to Auchter wanting to confirm whether "Auchter has filed a water damage claim to the Tl [tenant] areas with their insurance carrier." (DOc. 21-7 at 24). On November 6, 2007, Zurich, RAP's builders' risk carrier on the Project reported that a payment in the amount of $104,032.00 had been made for water damage primarily to drywall on the 5th, 6th, and 9th floors of the Building. (Doc. 75-4); see also Amerisure Ins. Co. v. Auchter Co., No. 3:16-cv-407-J-39JRK, 2017 WL 3601387, at *6, 8 (M.D. Fla. Mar. 30, 2017) (Doc. 158 at 13, 16).

RAP's Amended Complaint, filed in the Underlying RAP Lawsuit, repeatedly referred to water damage to tenant property caused by water intrusion. (See Doc. 24-3 (RAP Amended Complaint ¶¶ 14, 15, 22). Auchter and Arch's Amended Third Party Complaint, filed in the Underlying RAP Lawsuit against various subcontractors, including TSG, dated April 6, 2012, in the Underlying RAP Lawsuit alleged that "RAP's Amended Complaint asserts that the Project suffered substantial water damage from rain storms with water intrusion occurring through the roof, window and curtain wall systems, which damaged the completed office build out work performed by tenant improvement contractors stemming from an occurrence of such water intrusion on December 25, 2006 during construction and further unrelated water intrusion occurrences before and after Project completion, in and around September 17, 2007 and thereafter." (Doc. 24-5 at 6-7). Indeed, the water intrusion damage alleged in the pleadings of the Underlying RAP Lawsuit was acknowledged by Amerisure in its reservation of rights letter. (See Doc. 24-4 at 3).

16 SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

2. Duties In the Event Of Occurrence, Offense, Claim Or Suit

...

c. You and any other involved insured must:

...

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"[.]

...

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

(Doc. 24-13 at 22-23); (Doc. 24-14 at 19-20).

17 "Your work" is defined as "(1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations." (Doc. 24-13 at 28); (Doc. 24-14 at 24).

18 Following all dispositive motion practice, the parties will be ordered to submit a Notice setting forth the posture of all claims, counterclaims, crossclaims and affirmative defenses asserted in the pleadings.

End of Document