CASE NO. 10-10960-G

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMELIA ISLAND COMPANY,

Appellant,

v.

AMERISURE MUTUAL INSURANCE COMPANY and AMERISURE INSURANCE COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS, FLORIDA HOME BUILDERS ASSOCIATION, AND UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT, AMELIA ISLAND COMPANY, FOR REVERSAL

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Amelia Island Company v. Amerisure, et al.
Docket Number: 10-10960-G

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Movants (seeking to appear as *Amici*), the Florida Home Builders Association and National Association of Home Builders, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-3 and 27-1, certify that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations known to Movants that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock and other identifiable legal entities related to a party:

1. Amelia Island Company, Defendant/Appellant;
2. Amerisure Insurance Company, Plaintiff/Appellee;
3. Amerisure Mutual Insurance Company, Plaintiff/Appellee;
4. Bachara, Henry G., Jr., Esq., Counsel for Appellant;
5. Bachara Construction Law Group, P. A., Counsel for Appellant;
6. Boyle, Mark A., Sr., Esq., Counsel for Amicus Curiae;
7. Boyle & Gentile, P.A., Counsel for Amicus Curiae;
8. Broad and Cassel, Counsel for Amicus Curiae;

9. Caven, John, Esq., Registered Agent for Auchter Company;

10. Corrigan, The Honorable Timothy J., United States District Judge, Middle District of Florida;

11. Creed, Rebecca Bowen, Esq., Counsel for Appellant;

12. Elder, Donald E., Esq., Counsel for Appellee;

13. Florida Home Builders Association, Amicus Curiae;

14. Hassell, F. Bradley, Esq., Counsel for Appellees;

15. Hassell, Moorehead & Carroll, P.A., Counsel for Appellees;

16. Hetrick, Keith, Esq., General Counsel for Amicus Curiae, Florida Home Builders Association;

17. Huber, Michael F., Esq., Counsel for Amicus Curiae, United Policyholders;

18. Jaffe, David S., Esq., Counsel for Amicus Curiae, National Association of Home Builders;

19. Markey, Bradley R., Esq., Bankruptcy Counsel for Appellant;

20. Miller, David K., P.A., Counsel for Amicus Curiae;

21. Mills Creed & Gowdy, P.A., Counsel for Appellant;

22. Morris, The Honorable Thomas E., United States Magistrate Judge, Middle District of Florida;

23. National Association of Home Builders, Amicus Curiae;

24. Sears, Julie G., Esq., Counsel for Appellant;

25. Smith, Thomas C., Esq., Counsel for Appellees;

26. Stutsman, Thames and Markey, P.A., Bankruptcy Counsel for Appellant;

27. Thames, Richard R., Esq., Bankruptcy Counsel for Appellant;

28. The Auchter Company, Defendant;

29. Tressler LLP, Counsel for Appellee;

30. United Policyholders, Amicus Curiae; and

31. Ver Ploeg & Lumpkin, P.A., Counsel for Amicus Curiae.

PREFACE

This Amicus Curiae Brief is filed on behalf all Amici Curiae in support of AMELIA ISLAND COMPANY.

"AIC" – Refers to Appellant, AMELIA ISLAND COMPANY.

"AMICI" – Refers to NATIONAL ASSOCIATION OF HOME BUILDERS, THE FLORIDA HOME BUILDERS ASSOCIATION, and UNITED POLICYHOLDERS.

"BFPDE" – Refers to Broad Form Property Damage Endorsement.

"BUILDER" – Refers to the insured, The Auchter Company.

"BUILDINGS" – Refers to the Inn and Conference Center.

"CGL" – Refers to Commercial General Liability insurance policy(ies), generally.

"IB" – Refers to AIC's Initial Brief, and will be followed by a notation of the page referenced.

"INSURER" – Refers collectively to Appellees, AMERISURE MUTUAL INSURANCE COMPANY and AMERISURE INSURANCE COMPANY.

"ISO" – Refers to Insurance Services Organization.

"PCOH" – Refers to Products Completed Operations Hazard.

"SUBCONTRACTOR EXCEPTION" – Refers to the exception to Exclusion "1" in BUILDER'S POLICIES.

"BUILDER'S CGL POLICIES" – Refers to the post-1986 commercial general liability policies issued by Appellee, Amerisure Insurance Company, to BUILDER.

"BUILDER'S UL POLICIES" – Refers to the following form umbrella liability policies issued by Appellee, Amerisure Mutual Insurance Company, to BUILDER.

"BUILDER'S POLICIES" – Refers to both the BUILDER'S CGL POLICIES and BUILDER'S UL POLICIES.

"TRIAL COURT" – Refers to the Honorable Timothy J. Corrigan, District Judge and the United States District Court, Middle District of Florida, which issued the District Court Opinion on appeal herein.

"'YOUR WORK' EXCLUSION" – Refers to Exclusion "l" in BUILDER'S POLICIES.

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STATEMENT IDENTIFYING AMICI AND THEIR INTEREST IN CASE

AMICI, NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB"), FLORIDA HOME BUILDERS ASSOCIATION ("FHBA"), and UNITED POLICYHOLDERS ("UP"), file this Amicus Brief supporting the position of Appellant, AMELIA ISLAND COMPANY ("AIC"), and opposing the position of Appellees, AMERISURE MUTUAL INSURANCE COMPANY and AMERISURE INSURANCE COMPANY (collectively "INSURER").

NAHB is a non-profit professional and trade association whose mission is to enhance the climate for housing and the building industry. NAHB's goals are to promote home ownership; foster a healthy and efficient housing industry; and, promote policies that will keep safe, decent, and affordable housing a national priority. NAHB's membership is comprised of more than eight hundred (800) state and local building associations representing over one hundred seventy-five thousand (175,000) members throughout all fifty (50) states, the District of Columbia, and Puerto Rico. One-third of NAHB's members are home builders and/or remodelers. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB's builder members construct about 80 percent of the new homes built each year in the United States. NAHB's website is www.nahb.org.

FHBA is an affiliate of NAHB and shares its goals and objectives. FHBA is a non-profit professional and trade association representing approximately nine thousand (9,000) corporate members who are involved in Florida's home building and remodeling industry. FHBA's affiliate members include all twenty-eight (28) local home builders associations in Florida. The FHBA has appeared as *amicus* in many Florida cases related to the construction industry and has standing in its own right to represent members in certain types of actions. See Florida Home Builders Ass 'n v. Dept. of Labor and Empl. Security, 412 So. 2d 351 (Fla. 1982).

United Policyholders is a national non-profit 501(c)(3) organization dedicated to helping solve insurance problems and advocating for individual and commercial insurance consumers. The organization serves Florida residents and businesses through three programs: Roadmap to Preparedness (encouraging disaster loss reduction through mitigation and proper insurance), Roadmap to Recovery, (helping consumers secure full and timely insurance settlements so as to be able to recover from adverse and catastrophic events) and the Advocacy & Action program (advocating for insurance consumers through *amicus curiae* briefs, legislative advocacy and participation in the National Association of Insurance Commissioners). The United States Supreme Court and appellate courts throughout the country consider and often adopt insurance principles that are

advocated in UP amicus briefs. For more information, visit www.unitedpolicyholders.org.

This case will have a substantial impact on the manner in which the construction industry operates in Florida, on the availability of low and moderate income housing, and on the rights of the home-buying public. The CGL policies in this case are commonly relied on by contractors and others to cover liability for property damage to the project after completion.

AMICI urge reversal of the ruling below. More specifically, AMICI request this Court to hold that the damages in the instant case constitute covered property damage under all relevant BUILDER'S POLICIES.

STATEMENT OF ISSUES

Whether, under Florida law applying the standard 1986 form Commercial General Liability (CGL) policy containing products-completed operations hazard coverage, a carrier must cover an insured contractor's liability for property damage occurring after the structure is complete, when such damage is caused by a subcontractor's defective work installing non-defective materials, which results in damage to these materials and to the functionality or use of the structure, requiring repair or replacement to correct the damage and avoid further damage. AMICI would answer this issue in the affirmative, in favor of coverage, and seek reversal of the District Court's ruling.

SUMMARY OF ARGUMENT

Recently, the Florida Supreme Court recognized significantly broadened coverage for liability for defective construction under the 1986 CGL policies with PCOH coverage, in U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007) and Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008). Under these cases, coverage is available to contractors whose subcontractors' defective work cause damage to the project after operations are complete. The INSURER attempted to avoid the results of J.S.U.B. and Pozzi by characterizing the errors of the subcontractor in the instant case as "improperly performed work" and thus not constituting "property damage." At least some aspects of "property damage" herein are indistinguishable from those covered in J.S.U.B. and Pozzi. More specifically, the record discloses – or at least does not foreclose – that the subcontractors' errant work resulted in:

- Physical damage to the underlying substrate materials which were not the work product of the subcontractor;
- Physical damage to or loss of use of non-defective materials installed by the subcontractor; and
- Physical damage to or loss of use of the remainder of the project as a whole, rendering it effectively useless without replacement of work that was not defective.

The actual occurrence of physical damage or loss of use requires a finding of coverage in this case. Absent such damage, the merely mis-performed work does

not constitute "property damage" as that term is defined in the BUILDER'S POLICIES. However, once the physical damage or loss of use threshold has been met, coverage under the CGL coverage grant is available, unless excluded by the policy exclusions which are strictly construed in the insured's favor. Importantly, the BUILDER'S POLICIES cover those consequential damages the BUILDER becomes legally obligated to pay "because of" property damage, thus entitling AIC to coverage for the entirety of the damages awarded in the arbitration award on March 31, 2009.

The damages in this case constitute covered "property damage" as recognized under J.S.U.B. and Pozzi; thus, it is appropriate to analyze the exclusionary language in the BUILDER'S POLICIES to evaluate the availability of coverage. The relevant exclusion is the "YOUR WORK" EXCLUSION discussed in great detail in both J.S.U.B. and Pozzi. This exclusion would bar coverage for the subject loss, but for the all-important SUBCONTRACTOR EXCEPTION, which provides, **"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."** Under the unambiguous language of the SUBCONTRACTOR EXCEPTION, coverage is available even if the only physical damage is to the materials upon which the subcontractor performed work. The drafting history of this SUBCONTRACTOR EXCEPTION, (corroborated by

the ISO circulars issued contemporaneous with the policy form), and the decisions in J.S.U.B. and Pozzi verify that BUILDER'S POLICIES cover damages of the type suffered in this case.

I. The Losses in the Instant Case are Covered.

A. The Undisputed Facts of This Case Satisfy the "Property Damage" Requirement of the CGL Insuring Agreement.

The relevant grant of coverage under the subject BUILDER'S POLICIES states as follows:

> 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"; and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.

(Emphasis added). BUILDER'S POLICIES define "property damage" as:

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

(Emphasis added).

The focus of INSURER'S arguments and the ruling below was whether "faulty workmanship" constitutes "property damage" under the BUILDER'S CGL. Faulty workmanship constitutes a covered occurrence when it leads to unintended physical damage or loss of use of the subject BUILDING which BUILDER is legally obligated to correct. Simplistically, it is not the "faulty workmanship" which makes the loss covered, but the effect of the "faulty workmanship", that being the unexpected and unintended damage to the building materials. In the instant case, it is not the improper installation of the tiles which represents a covered loss. If the tiles were installed incorrectly and never resulted in physical injury or loss of use, no coverage would be available for the cost to remove and re-secure the tiles. Rather, it is the unintended physical damage to the tiles, substrate, and portions of the roof rendered useless which constitute covered property damage under the BUILDER'S POLICIES. As one court correctly noted:

> ... the mere existence of a construction defect does not trigger coverage under an "occurrence" basis policy; coverage is triggered only if the defect causes property damage during the policy term.

Iberia Parish Sch. Bd. v. Sandifer & Son Constr. Co., 721 So. 2d 1021, 1023 (La. App. 3rd Cir. 1998). BUILDER'S POLICIES cover "property damage" caused by an "occurrence" and define "property damage," in part, as "physical injury to tangible property." INSURER argues that damage to the BUILDING itself cannot constitute "property damage." That contention, however, does not comport with the definition of "property damage" contained in BUILDER'S POLICIES.

Importantly, the threshold for constituting a "physical injury," a definitional term of "property damage," is quite low. **Any** physical or material alteration resulting in a detriment constitutes "physical injury" in a CGL policy. See Lindsay Drilling & Contracting v. U.S. Fidelity & Guar. Co., 676 P.2d 203 (Mont. 1984) and Swank Enters. v. All Purpose Servs., Ltd., 154 P.3d 52 (Mont. 2007). See also, Zurich Am. Ins. Co. v. Cutrale, 2002 U.S. Dist. LEXIS 26829 (M.D. Fla. 2002) ("[t]he accidental introduction of an adulterant is a physical event that causes injury or damage just as surely as the damage resulting from the collision of two automobiles"). More specifically, the definition of "property damage" in this case **does not** state "physical injury to tangible property of **others**," or "physical injury to tangible property **of third parties,**" or "physical injury to **work not performed by the insured or its subcontractors**." Most courts have rejected the

argument that "property damage" must be to property owned by or work performed by a third party. As one court has noted:

> Travelers claims that the trial court erred by concluding that Diamaco met its threshold burden of establishing that the "property damage" here was within the insuring clause of the policies. ... Travelers argues that Diamaco's claim was not eligible for coverage as "property damage" because there was no damage to the property of others, only to the property of the insured. We reject this argument. ... **Had Travelers intended to exclude from its insuring clause the property of the insured in this case, it could easily have done so.**

Diamaco, Inc. v. Aetna Cas. & Sur., 983 P.2d 707, 709-11 (Wash. Ct. App. 1999) (emphasis added). At present, no state's highest court holds that there is a "third party" requirement in the definition of "property damage." The majority of commentators and courts that have considered this issue have refused to judicially import the third-party damage concept into the definition of "property damage" where the policy itself did not include it. Phillip L. Bruner & Patrick J. O'Connor, 4 Bruner & O'Connor on Construction Law, Ch. 11 (1st ed. 2002) (updated 2005) at 114; Patrick J. Wielinski, Insurance for Defective Construction, Ch. 5 at 117-18 (2d ed. International Risk Management Institute 2005); and James Duffy O'Connor, What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction, 21 WTR Construction Law, 15, 17 (2001).

As noted in the Initial Brief of AIC ("IB"), page 23, some carriers have limited their policy definitions of "property damage" to "other property." See

Adair Group v. St. Paul Fire & Marine Ins. Co., 2005 U.S. Dist. LEXIS 32102 (D. Colo. 2005) (no coverage where "property damage" was **defined** as damage to property of others); and Nabholz Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 354 F. Supp. 2d 917 (E.D. Ark. 2005) (same). Here, by its explicit terms, the "property damage" definition requires only that there be physical injury to tangible property or loss of use. The existence of these modified policy terms in Adair, Nabholz, and other similar cases, is a tacit admission by the insurance industry that the term "property damage" does **not** have the narrow construction INSURER advocated before the TRIAL COURT.

The carrier in J.S.U.B. first took the position that its CGL policy did not cover "breach of contract" based claims. J.S.U.B., 979 So. 2d at 884-5. The Florida Supreme Court disagreed and noted that if the carriers wished this result, it was incumbent on them to contract for it by the use of specific policy language. Id. The court noted that there were specialized endorsements available in the market place which explicitly excluded coverage for breach of contract claims. J.S.U.B. 979 So. 2d at 884-5, citing B. Hall Contr. Inc. v. Evanston Ins. Co., 447 F. Supp. 2d 634, 639 (M.D. Tex. 2006). Similarly, the J.S.U.B. court found instructive the existence of the CG 22 94 and CG 22 95 endorsements **eliminating** the SUBCONTRACTOR EXCEPTION. Id. The J.S.U.B. court recognized that if, as posited by the carriers, the SUBCONTRACTOR EXCEPTION did not apply to

restore coverage (meaning an occurrence and property damage) why did endorsements exist to eliminate such coverage. Id. at 896. This rationale is equally applicable to INSURER'S argument in this case that no "property damage" exists. If INSURER wanted to limit the concept of property damage to materials other than those used in the subcontractor's work, **it was incumbent on it to do so by clear and specific language.** Id. at 884. Such language does not exist in BUILDER'S POLICIES, and this Court cannot rewrite BUILDER'S POLICIES to import an endorsement in favor of INSURER.

Even if there were ambiguity, the rules of construction would require a result which favors AIC. The term "property damage," found in the coverage grant, must be given the broadest possible meaning amongst all reasonable meanings. Provisions of an insurance policy that define insuring or coverage clauses are construed in the broadest possible manner to affect the greatest extent of coverage. Westmoreland v. Lumbermens Mut. Cas. Co., 704 So. 2d 176, 179 (Fla. 4th DCA 1997).

INSURER's claim that the insured's own work is not covered under CGLs belies the fact that this particular CGL form was created by drafters cognizant that contractors do little direct work on the project, delegating to subcontractors who are technically proficient and licensed specialists. Moreover, AMICI agree that

faulty workmanship does not always produce an insured loss. The definitions and policy terms require a case by case analysis.

Here, there was unintended and unexpected physical injury to the BUILDING in question, bringing the loss within the BUILDER'S POLICIES. Exclusion "l." would have barred coverage for the subject loss but for the SUBCONTRACTOR EXCEPTION, which causes the exclusion to be inapplicable. A good example of this distinction is the West Orange Lumber Company, Inc. v. Ind. Lumbermens Mut. Ins. Co., 898 So. 2d 1147 (Fla. 5th DCA 2005), discussed in both J.S.U.B. and Pozzi. In West Orange, the lumber company was alleged to have provided lower quality cedar siding than was required by the contract. Id. The only damage alleged was the cost or expense of the vendor to remove the product and supply a substitute conforming to the contract requirements. Id. Crucially, there is nothing in the case which indicates that there was any physical damage to tangible property or loss of use of the subject property. Id. There was simply no "property damage" as required to trigger coverage. Id. Accordingly, the result of the West Orange case is correct. Examples of "faulty workmanship" which do not involve "property damage," include, but are not limited to, use of incorrect or insufficient materials, wrong color or type of paint, failure to complete job-related tasks, and improper installation of doors that open in the wrong direction.

The West Orange facts stand in complete contrast to the instant case where, as a result of the errors of subcontractors, thousands of concrete tiles broke and blew off the roof then hit other tiles, breaking those tiles. Additionally, many tiles simply became detached because of the improper installation and fell to the ground and then broke. As a consequence of this property damage, the arbitration panel determined the entire roof must be replaced and the hotel must be closed while the roof is replaced. **It is this distinction that makes coverage available under BUILDER'S POLICIES.** Where the defective construction results in unintended physical injury or loss of use, coverage is available unless clearly excluded by the CGL. These cases demonstrate that the terms "property damage" and "occurrence" **do** have a role in the initial coverage evaluation, but are not dispositive with respect to "faulty workmanship" which causes unintended physical damage or loss of use of property.

Crucially, nothing in the definitions of either "occurrence" or "property damage" allows a distinction between whether the property damaged is the insured's work or a subcontractor's work or anyone else's work. **This distinction is found in the exclusions.** INSURER, by specific exception to the "YOUR WORK" EXCLUSION, intentionally afforded additional coverage to its insureds, starting with the 1986 policy form. See Section B, *infra*, discussing historical development of 1986 CGL forms. To be clear, AMICI are **not** arguing that all

defectively performed work constitutes a covered loss, or otherwise qualifies as "property damage" under BUILDER'S POLICIES. Instead, the key is whether the definitional term "property damage" has been met – meaning there has been either physical damage to tangible property or a loss of use.

Importantly, once the property damage threshold is met, coverage is available to BUILDER for all aspects of loss for any damages for which BUILDER becomes liable "because of" "property damage." The CGL is specifically designed to indemnify the insured for those sums which the insured becomes legally obligated to pay because of "property damage." "Because of" activates coverage of consequential damages as a result of "because of" property damage. The portions of the roof which were not physically damaged but which were determined to be useless by the arbitration proceeding constitute covered "property damage."

A simple analogy to a personal injury claim helps explain the format of the policy. The policy provides coverage for those losses the insured becomes legally obligated to pay "because of" "bodily injury". The carrier and its insureds are liable not merely for the medical bills directly resulting from physical injury, but any lost wages occasioned by the physical injury, as well as pain and suffering and other intangible damages of the claimant. The last two elements are not "bodily injury", however, they are sums for which the insured becomes legally liable as a

consequence of bodily injury, and thus, such damages are covered under standard form CGL policies. The arbitrator in the instant case awarded the remediation of the entire roof because of the property damage to those roof tiles which fell off. The award of damages for repair and replacement of the roof is a direct consequence of the "property damage" actually incurred, thus representing a covered loss under the CGL policy even to the extent of tiles which were not physically damaged.

Additionally, the tiles constitute "loss of use." The term "loss of use" found in the "property damage" definition of BUILDER'S POLICIES is undefined. Florida law gives a broad construction to the loss of use term even when undefined in a CGL policy. Ironically, in Commercial Union Ins. Co. v. R.H. Barto Co., Div. of Atlas Air Conditioning Corp., 440 So. 2d 383 (Fla. 4th DCA 1983), a carrier successfully denied coverage on a claim based on a loss of use exclusion. Even though the term was found in an exclusion, the court construed the term "loss of use" to include the loss of use of office space not physically injured or destroyed, resulting from the failure of the insured's products or work to meet the level of performance warranted or represented. Id. This case and others like it make clear where property becomes unusable, even if unaccompanied by physical damage, the "loss of use" definition is met. Scott C. Turner, Insurance Coverage of Construction Disputes, §33.7 (2d ed. 1999) and cases cited therein.

Relative to the subject claim, the arbitrator's ruling is that the remaining portions of the roof, even though not physically damaged, are not useable for their intended use. These claims easily fit within the "loss of use" component of the "property damage" definition of BUILDER'S POLICIES. See Eljer Manufacturing, Inc. v. Liberty Mutual Ins. Co., 972 F.2d 805, 814 (7th Cir. 1992) ("the incorporation of a defective product into another product inflicts physical injury in the relevant sense on the latter at the moment of incorporation"), and Goodyear Rubber & Sup. Co. v. Great American Ins. Co., 471 F.2d 1343, 1344 (9th Cir. 1973) ("when one product is integrated into a larger entity and the product proves defective, the damage is considered as damage to the entity to the extent that the market value of the entity is reduced by an amount in excess of the value of the defective product.").

B. The Subject Loss is Covered Under the Language of J.S.U.B. and Pozzi.

Properly read, both the J.S.U.B. and Pozzi opinions require coverage under the undisputed facts of this case. The J.S.U.B. and Pozzi opinions recognize that the plain language of a policy controls the analysis of whether coverage is available for a loss. Both opinions recognize that the "property damage" requirement of the coverage grant is met when there is physical damage to tangible property. Importantly, the J.S.U.B. and Pozzi decisions brought Florida in line

with the vast majority of jurisdictions who have decided the availability of coverage under post-1986 CGL policies in the last ten (10) years. See J.S.U.B., 979 So. 2d 871; Pozzi, 984 So. 2d 1241; see also, U.S. Fid. & Guar. Co. v. Cont'l Cas. Co., 120 S.W.3d 556 (Ark. 2003); Am. Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004); Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006); Essex Ins. Co. v. Holder, 261 S.W.3d 456 (Ark. 2007); Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007); Travelers Indem.Co. of Am. v. Moore & Assocs., 216 S.W.3d 302 (Tenn. 2007); Auto Owners Ins. Co. v. Newman, 684 S.E.2d 541 (S.C. 2009); Revelation Indus. v. St. Paul Fire & Marine Ins. Co., 206 P.3d 919 (Mont. 2009); and Architex Ass'n v. Scottsdale Ins. Co., 27 So. 3d 1148 (Miss. 2010).

1. Florida Supreme Court J.S.U.B. Decision.

In J.S.U.B., the contractor had purchased CGL policies which included PCOH coverage. J.S.U.B., 979 So. 2d 871. The contractor had suffered a series of losses whereby its soil subcontractors had failed to properly compact soil upon which the foundation and homes were built. Id. There was resulting physical damage to the homes. Id. The contractor sought coverage under its CGL policies from the carrier, who denied claims, citing to Florida case law disallowing coverage for construction defects under prior CGL policies. Id. at 875. The Florida Supreme Court framed the issue as follows:

> The conflict issue is whether 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.
>
> We answer this question in the affirmative. We conclude that defective work performed by a subcontractor that causes damage to the contractor's completed project and is neither expected nor intended from the standpoint of the contractor can constitute "property damage" caused by an "occurrence" as those terms are defined in a standard form commercial general liability policy. **Accordingly, a claim made against the contractor for damage to the completed project caused by a subcontractor's defective work is covered under a post-1986 CGL policy unless a specific exclusion applies to bar coverage. In this case, the terms of the policy included an exception to the "Your Work" exclusion for faulty workmanship by a subcontractor** and did not include a breach of contract exclusion. We therefore approve the Second District's decision in *J.S.U.B.* and disapprove the Fourth District's decision in *Lassiter*.

Id. at 874-5 (footnotes omitted, emphasis added).

After definitively holding that such construction defect claims constitute an occurrence, the J.S.U.B. court moved on to the question of whether the damage in question constituted "property damage" as that term is defined under the CGL policy. Id. The CGL policy at issue in J.S.U.B. had a definition of the term "property damage" identical to BUILDER'S POLICIES' definition in this case. The court specifically rejected the argument that "faulty workmanship" that injures only the work product itself does not result in "property damage," because "just like the definition of the term 'occurrence,' the definition of 'property damage' in

the CGL policies does not differentiate between damage to the contractor's work and damage to other property." Id. (footnotes omitted). The court rejected the contention that the work could never be "property damage" in cases of faulty construction because the defective work rendered the entire project damaged from its inception. Id. In direct contrast to this position, the court noted, "[f]aulty workmanship for defective work that has damaged the otherwise non-defective completed project has caused 'physical injury to tangible property' within the plain meaning of the definition of the policy. If there is no damage beyond the faulty workmanship or defective work there may be no resulting 'property damage.'" Id. The court then analyzed two prior Florida decisions as exemplars of its view.

The first was the previously-discussed West Orange case (siding did not conform to contract). See Section A, *supra*. The second was the decision of Auto Owners Ins. Co. v. Tripp Constr., Inc., 737 So. 2d 600 (Fla. 3d DCA 1999). In analyzing Tripp, the court noted that coverage would not be available for merely repairing or replacing construction defects, but that coverage was available when damage "caused by construction defects 'to other elements of the subject home.'" Tripp, 737 So. 2d 600. The court cited other decisions that merely mis-performed work, which had not resulted in physical damage to tangible property or loss of use, did not meet the threshold of the coverage grant under CGL policies. Id.; see also Cincinnati Ins. Co. v. Venetian Terrazo, Inc., 198 F. Supp. 2d 1074 (E.D. Mo.

2001) and Lennar Corp. v. Great Am. Ins. Co., 200 S.W.3d 651 (Tex. App. 2006). The court agreed with the analysis in Travelers Indem. Co. of Am. v. Moore & Assocs., 216 S.W.3d 302 (Tenn. 2007), and quoted directly from the decision analyzing the property damage issue:

> [A] "claim limited to faulty workmanship or materials" is one in which the sole damages are for replacement of a defective component or correction of faulty installation.
>
> We conclude that Hilcom's claim is not limited to faulty workmanship and does in fact allege "property damage." Moore's subcontractor allegedly installed the windows defectively. Without more, this alleged defect is the equivalent of the "mere inclusion of a defective component" such as the installation of a defective tire, and no "property damage" has occurred. The alleged water penetration is analogous to the automobile accident that is caused by the faulty tire. Because the alleged defective installation resulted in water penetration causing further damage, Hilcom has alleged "property damage." Therefore, we conclude that Hilcom has alleged damages that constitute "property damage" for purposes of the CGL.

Moore & Assocs., 216 S.W.3d at 310 (citations omitted). Thus, it is clear that under J.S.U.B., once the physical damage or loss of use threshold is met, coverage is available under the CGL policy unless otherwise barred by operation of exclusions. See J.S.U.B., 979 So. 2d 871. There is simply no requirement that there be damage to "other property" as posited by the ruling of the Trial Court below, as any physical injury or loss of use implicate coverage.[1]

[1] In this respect, the coverage analysis is analogous to the Florida Supreme Court's decision in Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161 (Fla.

2. Pozzi I decision.

Prior to the Florida Supreme Court's final decision in Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008), it issued a decision in the Pozzi matter on the same day J.S.U.B. was decided, Auto-Owners Ins. Co. v. Pozzi Window Co., 2007 Fla. LEXIS 2391 (Fla. 2007). This opinion was later modified on rehearing; however, a review of the initial opinion, particularly when contrasted with the rehearing opinion, makes clear the scope of coverage under BUILDER'S POLICIES provided coverage for the instant loss.

The Pozzi I court framed the facts as follows:

> The underlying facts are undisputed. Coral Construction of South Florida, Inc., and Coral's president James J. Irby ("Builder") constructed a multimillion dollar house in Coconut Grove, Florida. The house included windows that were manufactured by Pozzi Window Company ("Pozzi") and installed by the Builder's subcontractor. After moving into the house, the owner complained of water leakage around the windows, which was caused by the defective installation of the windows. The homeowner filed suit against Pozzi, the Builder, and the subcontractor who installed the windows.

Id. In Pozzi I, the court framed the issue as whether Auto Owners' policies provided coverage for repair or replacement of defective windows. Id. The court held "[b]ecause the subcontractor's defective installation of the windows is not

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2003). In that case, which interpreted a builder's risk policy, the court held that even though building defects were known, such claims were not covered because they had not resulted in physical damage to the premises. Id. Thus, under Swire, the builder was responsible for remedying the defects. Id.

itself 'physical injury to tangible property,' there is no 'property damage' under the terms of the CGL policies." Id.

3. Pozzi II decision.

Pozzi moved for rehearing, which was granted, resulting in the Florida Supreme Court's final opinion, Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008). On rehearing, the Florida Supreme Court noted that this Court's certification opinion characterized the defective work in two distinct ways:

> ... whether the Policies cover [the builder's] liability for the repair or replacement of the defectively installed windows. Pozzi, 446 F.3d at 1179. However, the opinion later refers to "the repair or replacement of the defective windows." Id. at 1181. In fact, the federal district court also used the terms "defective windows" and "defective installation" interchangeably, noting first that the issue in the case was "whether insurance coverage exists for the repair [of] the defective windows," and later finding that coverage existed because "the defective installation of the windows" was performed by a subcontractor. **Accordingly, there appears to be a factual issue as to whether the windows themselves were defective or whether the faulty installation by the Subcontractor caused damage to both the windows and other portions of the completed project.**

Pozzi, 984 So. 2d 1241 (emphasis added). Thus it was clear, under the Florida Supreme Court's Pozzi II decision that the "property damage" definition was met **for damage to materials installed by that subcontractor that were not defective before being installed.** Id. The Florida Supreme Court then remanded the matter to this Court, which held that the damages claimed by Pozzi were "damages occasioned to the windows installed by the window subcontractor as a

result of the defective installation." Pozzi Window Co. v. Auto-Owners Ins., 2008 U.S. App. LEXIS 20715 (11th Cir. Fla. 2008). It is this distinction and the resulting physical damage to materials which were otherwise non-defective at the time of installation that allows coverage. This is syllogistically identical to the fact pattern in the instant case.

C. Because of the Existence of an "Occurrence" and "Property Damage," Coverage is Available to BUILDER Pursuant to an Exception to Exclusion "l."

1. The Damage to "YOUR WORK" EXCLUSION.

The exclusion and its exception reads as follows:

> 2. Exclusion - This insurance does not apply to:
>
> l. Damage To Your Work
>
> "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.**

(Emphasis added.) AMICI do not claim that exclusion "l." creates coverage. Coverage exists because of an "occurrence" and "property damage," and the absence of any applicable exclusion. The above exclusion would be applicable and bar coverage, but for the SUBCONTRACTOR EXCEPTION which maintains coverage for this claim.

2. The Plain Language of the SUBCONTRACTOR EXCEPTION Makes Clear That Coverage is Available to BUILDER Under the 1986 CGL Form.

In response to La Marche v. Shelby Mut. Ins. Co., 390 So. 2d 325 (Fla. 1980), Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979), and similar decisions interpreting the 1973 CGL policy form throughout the country to deny coverage for defective subcontractor work, "[m]any contractors were unhappy with this state of affairs, since more and more projects were being completed with the help of subcontractors." American Girl, 673 N.W.2d 65; see also Russ & Segalla, *supra* § 129: 18 ("Due to the increasing use of subcontractors on construction projects, many general contractors were not satisfied with the lack of coverage provided under [the 1973 ISO CGL] commercial general liability policies where the general contractor was not directly responsible for the defective work."). Responding to these market considerations, the ISO designed the so-called broad form property damage endorsement ("BFPDE"). Contractor insureds could obtain, for a higher premium, a BFPDE which excluded coverage **only** for property damage to work actually performed by the general contractor. Coverage was available to the contracting insured:

- For damage to his work arising out of a subcontractor's work;
- For damage to a subcontractor's work arising out of the subcontractor's work; and

- For damage to a subcontractor's work, or if the insured is a subcontractor to a general contractor's work or another subcontractor's work, arising out of the insured's work.

Md. Casualty Co. v. Reeder, 221 Cal. App. 3d 961 (Cal. App. 1990); Russ & Segalla, *supra* § 129: 18; and Eric M. Holmes, Holmes' Appleman on Insurance 2d, § 132.9 at 153. Thus, liability coverage was extended to the insured's completed work when the damage arose out of work performed by a subcontractor. Reeder, 221 Cal. App. 3d at 972; Russ & Segalla, *supra*, § 129:18; and Holmes, *supra* at 153. Later, the SUBCONTRACTOR EXCEPTION to Exclusion l. which was derived from the BFPDE was incorporated into the 1986 version of the CGL, and has survived the more recent amendments to the CGL. Wielinski, *supra*, at Ch. 11.

Under Florida's rules of insurance policy construction, courts are required to give full meaning and effect to the SUBCONTRACTOR EXCEPTION. Under its plain language, the exclusion does not apply if either:

- the damaged work was performed on your behalf by subcontractor; or

- the work out of which the damage arises was performed on your behalf by subcontractor.

Thus, by specific, plain, and unambiguous language, the SUBCONTRACTOR EXCEPTION maintains coverage not merely for damage arising from the subcontractor's work to "other property," but also for the **damaged work itself**.

AMICI acknowledge that the definition of "property damage" must first be met in order to maintain coverage under the SUBCONTRACTOR EXCEPTION. See Section A, *supra.* The fact that the SUBCONTRACTOR EXCEPTION specifically maintains coverage for the damaged work of the subcontractor exposes the question – why would coverage be maintained for damage to the subcontractor's work, unless such claims were covered in the first place? Interpreting the policy *in pari materia* by giving operative effect to all portions of the policy as required by Fla. Stat. §627.419 and J.S.U.B., 979 So. 2d 871, coverage is maintained and not excluded.

3. The History and Intent of the Damage to SUBCONTRACTOR EXCEPTION Make Clear That Coverage is Available to BUILDER Under the 1986 CGL Form.

The plain language of the definitions of "occurrence" and "property damage" and SUBCONTRACTOR EXCEPTION is also supported by reference to the drafting history of the documents. The Florida Supreme Court's decisions in Pozzi and J.S.U.B. cite this drafting history, in particular the ISO Circulars, as relevant in its analysis. J.S.U.B., 979 So. 2d 871 and Pozzi, 984 So. 2d 1241. Copies of the ISO Circular, Broad Form Property Damage Coverage Explained, No. GL 79-12, January 29, 1973 and ISO Circular, Commercial General Liability Program Instructions Pamphlet, No. GL-86-204 (July 15, 1986), are attached in the

Appendix as Exhibits "A" and "B" respectively. *In toto*, it is very clear, and the ISO Circulars show:

- The types of damage occasioned in the subject case met the definitions in the coverage grant - - meaning they are both an "occurrence" and "property damage";
- The loss in question falls within the "your work" exclusion;
- That coverage is restored for that aspect of loss which represents either the subcontractor's damaged work or damages which arose from the subcontractor's work to other property.

Relevant portions of the January 29, 1979 Broad Form Property Damage Circular, General Liability GL 79-12 are excerpted below:

(The following applies to exclusion (z) in Advisory Endorsement ADV.-3006-Broad Form Property Damage Endorsement)
(Including Completed Operations)

ADVISORY ENDORSEMENT LANGUAGE	EXPLANATION OF INTENT
(z) with respect to the completed operations hazard and with respect to any classification stated below as "including completed operations", to property damage to work performed by the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.	(z) – This exclusion in endorsement ADV.-3006, which modifies the corresponding policy exclusion, provides broad form completed operations property damage coverage by excluding only damages caused by the named insured to his own work. Thus, (1) The insured would have no coverage for damage to his work arising out of his work. **(2) The insured would have coverage for damage to his work**

	arising out of a subcontractor's work. **(3) The insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.** **(4) The insured would have coverage for damage to a subcontractor's work, or if the insured is a subcontractor to a general contractor's work or another subcontractor's work, arising out of the insured's work.**

See Appendix Exhibit "A." (Emphasis added). The BFPDE coverage was intentionally incorporated into the baseline CGL form beginning in 1986. The issuance of the 1986 policy was preceded by an ISO product titled ISO Commercial Lines Policy and Rating Simplification Project Introduction and Overview ("1986 ISO Circular"), the stated purpose of which was "[t]o help insurers and their representatives learn about the new policy." The booklet also was designed to acquaint one:

> ... with the new Commercial General Liability Program:
>
> - why the program was designed as it was,
> - what are some of the factors to consider in choosing between the alternative versions of the new policy, and
> - how the classifications and rules are changing.

See Appendix Exhibit "B," 1986 ISO Circular, Foreword. Relative to construction defect coverage, the 1986 ISO Circular provided:

ISO GENERAL LIABILITY POLICY REVISION
COMPARISON OF CURRENT AND REVISED CONTRACTS

COVERAGE HIGHLIGHTS (Refer to Policies for Details)

	CURRENT "OCCURRENCE" POLICY	**NEW "OCCURRENCE" POLICY**	**NEW "CLAIMS-MADE" POLICY**
9. *Property Damage*	Various exclusions address property damage to the insured's products or work or to property in the insured's care, custody or control. Generally such damage is not covered if due to an inherent defect in the product or work itself, or to negligence in handling or working on the entrusted property. Recall or withdrawal of products, work, or property incorporating them is specifically excluded. Other loss of use, including loss of use of uninjured property, is covered if due to physical injury inflicted on other property by the insured's products or work, or if due to sudden and accidental physical injury to the products or work	Exclusions have been completely rewritten and clarified with no change in overall scope of coverage. **"Broad Form" coverage has been incorporated in the new provisions.** Real property is specifically eliminated from the definition of "your product," so that the broad form coverage for work and completed operations clearly applies. Care, custody, or control exclusion has been restricted to personal property to clarify further the application of these provisions. A new definition of "impaired property" clarifies the application of the "failure to perform" and "sistership" exclusions (m and n).	Same as new "occurrence" policy.

	themselves after they are put to use. Broad Form Endorsement narrows concept of care, custody or control so that coverage is provided for parts of property other than those on which the insured is actually working at the time of the damage. Endorsement also covers damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed.	*(emphasis added)*	

It is thus also clear from the 1976 ISO Circular that BFPDE coverage **were intended to cover physical damage even if the only damage was damage to the subcontractor's work.** This drafting history is consistent with virtually all of the scholarly analyses, both contemporary with and subsequent to, the issuance of the 1986 CGL policy. Eric M. Holmes, Holmes' Appleman on Insurance 2d, § 132.9; James D. Hendrick and James P. Wiezel, The New Commercial General Liability Forms – An Introduction and Critique, 36 Fed'n Ins. Corp. Couns. Q. 317, 360 (1986); Fire, Casualty and Surety Bulletins, Public Liability, Aa 16-17 (The National Underwriter Co. (1993); Commercial Liability Annotated CGL Policy, International Risk Management Institute (7th Reprint, January 2001), Section 5 at

V.D. 47-8; Allan D. Windt, Insurance Claims & Disputes, Representation Of Insurance Companies and Insureds § 11:1, at 285 (4th ed. 2001 & Supp. 2005); Thomas J. Casamassima and Jeanette E. Jerles, Defining Insurable Risk in the Commercial General Liability Insurance Policy: Guidelines for Interpreting the Work Product Exclusion, WL 12-JAN CONSLAW 3 (Jan. 1992); Jotham D. Pierce, Jr., Allocating Risk Through Insurance and Surety Bonds, WL 425 PLI/Real 193, 199 (1998); and Comprehensive General Liability Policy Handbook, p. 106 (Nelson, P., Ed.); and Turner, §33.7.

CONCLUSION

The losses in the instant case constitute "property damage." More specifically, the damage to the tiles in question and the unsuitability of the undamaged tiles for their intended use meet the definition of "property damage" in the CGL policy form as physical injury, loss of use, or both. As a result of the existence of property damage, the insured is entitled to be reimbursed for consequential damages flowing from that "property damage" under the broad coverage grant. Such losses would have been excluded under the policy by operation of the "YOUR WORK" EXCLUSION, however, coverage is maintained for the damages in this case as a result of the SUBCONTRACTOR EXCEPTION. Both the unambiguous language of the policy, the rules of construing insurance policies, and the drafting history make clear that damages occasioned by the work

of subcontractors are covered even if the only damage is damage to that subcontractor's work. The ruling below should be reversed.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)

I HEREBY CERTIFY that this Amicus Curiae Brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B)(i), 32(a)&7)(B)(i) and 29(d). This brief contains 6,724 words, calculated using Microsoft Office Word 2007, which is no more than one-half the maximum authorized for AIC'S Principal Brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by regular U. S. Mail to Henry G. Bachara, Jr., Esquire and Julie G. Sears, Esquire (Counsel for Amelia Island Company), Bachara Construction Law Group, P.A., One Independent Drive, Suite 1800, Jacksonville, FL 32202 and F. Bradley Hassell, Esquire and Thomas C. Smith, Esquire (Counsel for Amerisure Mutual Insurance Company and Amerisure Insurance Company), Hassell, Moorhead & Carroll, 1616 Concierge Blvd., Suite 100, Daytona Beach, FL 32117, on this 15th day of June, 2010.

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