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MEMORANDUM

TO: RPPTL Construction Law Committee

FROM: Ty G. Thompson
Surety & Insurance Subcommittee

DATE: November 14, 2011

RE: Case Law Update

Discovery of Insurance Claims File

Recently, the United States District Court for the Middle District of Florida addressed whether an insured is entitled to discovery of the insurer's claim file in a breach of contract action. At issue in *Gavin's Ace Hardware, Inc. v. Federated Mutual Insurance Company*, 2011 WL 5104476 (M.D. Fla. October 27, 2011) was an insured's claim against the insurer for its failure to perform its obligations and duties to fully compensate the insured for all losses covered under an insurance policy. *Id.* at *1. The insured moved to compel better responses to discovery interrogatories and production following the insured's objections that the requests were subject to "work product, 'claims file,' attorney-client privilege, and irrelevance" protection. *Id.* Citing to both federal and Florida case law, the Middle District concluded that discovery into an insurer's claims handling practices, policies, and protocols is impermissible in a breach of contract claim. *Id.* at *3. Because the insured only alleged a breach of contract action, and not a bad faith claims handling case, the insured's claim file was not subject to production. *Id.* However, the Middle District held that any responsive documents not included in the claims file were to be produced. *Id.*

Don't Forget to Serve Your Notices

In *Stock Building Supply of Florida v. Soares Da Costa Construction Services, LLC*, 2011 WL 4578320 (Fla. 3d DCA October 5, 2011), the Third District Court of

Appeal considered whether a material supplier properly perfected its claim against a section 713.23, Florida Statutes payment bond. There, the material supplier furnished certain materials to a subcontractor on a mixed-use condominium project in Miami, Florida and, under a separate order, delivered materials to the general contractor. *Id.* at * 1. The material supplier furnished two statutory Notices to Owner/Notices to Contractor. *Id.* Due to a lack of funding, the construction on the Project ceased and the material supplier recorded to claims of lien for materials it supplied to the subcontractor and the general contractor. *Id.* The owner paid the liens and the material supplier recorded a satisfaction and waiver and release of lien. *Id.*

Thereafter, the owner terminated the original Notice of Commencement and recorded a new Notice of Commencement wherein it attached a section 713.23 payment bond. *Id.* The material supplier recommenced furnishing materials to the subcontractor and to the general contractor under a separate order. *Id.* The material supplier served the general contractor with a Notice to Owner/Notice to Contractor stating that it was furnishing materials only to the general contractor. Importantly, the material supplier did not serve any notice that it was furnishing materials to the subcontractor. *Id.* Although the general contractor paid the subcontractor in full for the materials furnished to the project, the subcontractor failed to pay the material supplier. *Id.* Consequently, the material supplier served the payment bond surety with its Notice of Nonpayment pursuant to section 713.23(1)(d), Florida Statutes. *Id.*

Following a bench trial, court found that because the material supplier was not in privity with the general contractor, and had to serve notice on the general contractor pursuant to section 713.23(1)(C). *Id.* Because the material supplier failed to do so, the court held that it was not entitled to recover against the general contractor or the surety. *Id.* On appeal, the Third District addressed only one issue: whether the Notices to Contractor were sufficient to satisfy the requirements of section 713.23. *Id.* at * 3.

In a lengthy discussion, the Third District affirmed the trial court and held that the first Notice to Contractor was insufficient because it could only serve to perfect the material supplier's Claim of Lien against the project. Moreover, the material supplier's liens were satisfied prior to the recommencement of the project and all liens were disposed of by the owner when it recorded a Notice of Termination of the original Notice of Commencement. Finally, because the material supplier failed to serve the Notice to Contractor on account of materials it furnished to the subcontractor, the Third District held that the material supplier failed to satisfy section 713.23(1)(c), even though the general contractor may have been aware that the material supplier was furnishing materials to the project under an order by the subcontractor. *Id.* at * 7.