Insurance Matters!

VOLUME 3, ISSUE 4 2014-2015

A Newsletter of the **Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of The Florida Bar

Wm. Cary Wright, Tampa
Co-Chair

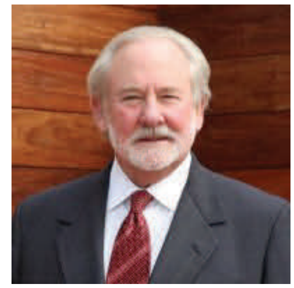
Fred Dudley, Tallahassee
Co-Chair

Scott P. Pence, Tampa
Editor

In This Issue:

Invisible Exclusions, Part II

By: Charles E. Comiskey, CPCU, CIC, CPIA, CRM, PWCA, CRIS, CCM, Sr. Vice President of Brady Chapman Holland & Associates, Houston, TX



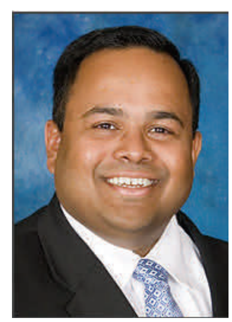
In the last issue of ***Insurance Matters!***, we began the discussion of "invisible" exclusions – exclusions that may not be brought to the attention of the insurance buyer and that will not be declared on a certificate of insurance. Discussed were three endorsements that gutted the contractual liability coverage required in most construction agreements. This discussion focuses on five other largely invisible endorsements that delete needed (and usually required) coverage.

Classification Limitation. General liability coverage usually covers all operations of an insured. A classification limitation restricts that coverage only to certain specifically listed classifications on a policy. If an operations falls outside of that description (in the insurance company's opinion), no coverage is provided. For instance, we recently reviewed the coverage for a large excavation contractor. 100% of their work was performed underground, but their classification as stated on their policy excluded any damage to property underground. Good deal for the insurance company, right? Not so good for the unaware contractor.

See Invisible Exclusions, continued on Page 2

Citizens Property Insurance Corp., v. Perdido Sun Condominium Association, Inc. 2015 WL 2236719 (Supreme Court of Florida, May 14, 2015)

By: Sanjay Kurian, Becker and Poliakoff, Ft. Myers, FL



The Florida Supreme Court issued its opinion in Citizens Property Insurance Corp., v. Perdido Sun Condominium Association, Inc., considering the issue as to whether Citizens Property Insurance could be liable for first party bad faith claims. The Supreme Court determined that Citizens was not liable for such claims and that no exception for such claims existed from Citizens' statutory immunity. This places Citizens in a different position, in regard to insureds, than other insurance carriers who may be offering similar property policies.

The issue was whether the Legislature intended Citizens Property Insurance Corporation, a state-created entity that provides property insurance, to be liable for statutory first-party bad faith claims as an exception to its statutory immunity from suit. The issue had come before the Supreme Court from the First District's decision in Perdido Sun Condominium Ass'n v. Citizens Property Insurance Corp., 129 So. 3d 1210 (Fla. 1st DCA 2014), which had determined that the "willful tort" statutory exception to Citizens' immunity applied to statutory first-party bad faith claims. The First District opinion was at odds with the Fifth District's opinion in Citizens Property Insurance Corp. v. Garfinkel, 25 So. 3d 62 (Fla. 5th DCA 2009) which held that Citizens was statutorily immune. The First District certified a conflict between Districts and the Supreme Court took up the issue.

See Citizens, continued on Page 3

Invisible Exclusions, continued from page 1

Habitational or Residential Exclusion. When addressing a group of contractors, I like to ask how many of them never do any residential work. The vast majority raise their hand. The follow-up question is whether they would do residential work if requested by their largest customer, or their mother or sister, and the story changes. A residential exclusion is an absolute exclusion. There is no exception for certain customers or family members.

What is the definition of "residential"? It varies widely and may be negotiable, but many insurance companies have a very broad definition including anything with a bed – homes, apartments, condos/townhomes, jails/prisons, dorms, barracks, sometimes even hotels or motels. If confronted with a habitational or residential exclusion, don't assume. Ask.

"… discuss these exclusionary endorsements with your insurance broker, and verify that they are not included in your insurance program."

Insured vs. Insured Exclusion. A Named Insured vs. Named Insured endorsement excludes cross claims against members of the same economic family and is perfectly acceptable. An Insured vs. Insured exclusion, however, excludes coverage for any claim made by any insured against any other insured. If your firm is an additional insured on another contractor's coverage, it is an insured. An Insured vs. Insured exclusion eliminates all coverage should your firm bring litigation against that other contractor.

Subsidence Exclusion. A subsidence exclusion is really a thinly-veiled construction defect exclusion. The wording varies from insurance company to insurance company, but usually includes reference to collapse of drains, improper soil compaction, and movement of earth in any manner. For any contractor performing underground or concrete work, a subsidence exclusion could be deadly.

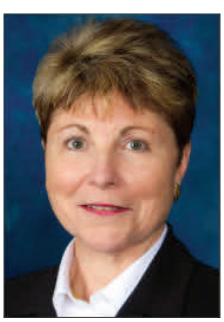
Punitive, Exemplary or Multiplied Damages Exclusion. Punitive/exemplary claims against contractors are rare and difficult to prove, but practically every construction-related claim includes an allegation of violation of the Deceptive Trade Practices Act. This is a much easier allegation to prove, and if proven the damages are multiplied three-fold.

Conclusion. As recommended in the last issue, discuss these exclusionary endorsements with your insurance broker, and verify that they are not included in your insurance program. But what if you are the upstream party depending on a certificate of insurance? Two steps can be taken:

In your insurance requirements, state that these endorsements are prohibited on the downstream party's insurance program; and

Require a copy of the Schedule of Forms and Endorsements page verifying that they haven't been included in the underlying insurance program.

If any of these endorsements are being used, obtain copies and read them carefully with the assistance of your insurance broker. Attempt to negotiate around any undesirable wording, or consider selecting another contractor whose insurance program more closely complies with your needs. IM



Summit Contractors, Inc. v. Crum & Forster Specialty Insurance Company, 2015 WL 628761 (United States District Court, M.D. Tampa Division, February 12, 2015)

By: Claramargaret H. Groover, Becker & Poliakoff, P.A., Orlando, FL

The Middle District of Florida, Tampa, granted summary judgment in favor of the insurer, holding that the insurer was entitled to funds it recovered in subrogation from subcontractors allegedly liable for construction defects on three (3) condominium projects in Central Florida. The insurer was not required to pay over funds to the insured general contractor under the "made-whole doctrine." Payment of such funds would have had the effect of reimbursing money expended by the general contractor as part of its Self-Insured Retention ("SIR") requirement in the policy for each of the three (3) lawsuits. Each SIR totaled $50,000.00 and the policy required the SIR to be paid before the insurer had any legal duty to defend or indemnify the insured general contractor, a distinction from a policy deductible.

See Summit, continued on Page 3

Summit, continued from page 2

The court also observed that the SIR differs from an insurance deductible since the deductible is part of and deducted from overall insurance policy limits, while policy limits stack on top of an SIR.

The court considered the recent Florida Supreme Court decision in *Intervest Construction of Jax, Inc. v. General Fidelity Insurance Co.*, 133 So. 3d 494 (Fla. 2014) but distinguished it on its facts, explaining that Summit, the insured-general contractor, was invoking the "made-whole doctrine" as an affirmative claim unlike the *Intervest* insurer defensively invoking the doctrine as part of its coverage defense. The *Intervest* court held that the insured general contractor could apply to its own SIR requirement those funds recovered from a subcontractor in accordance with its indemnification obligation under the construction contract. Such subcontractor indemnity payment ($1,000,000) which equaled the full amount of the insured general contractor's SIR was credited to the insured and satisfied the SIR requirement. Under the policy the carrier was then obligated to pay in the remaining $600,000 to complete the settlement. The total settlement paid was $1,600,000. The court reasoned that the insured was entitled to first priority to recover under the "made-whole doctrine." The *Intervest* insurance carrier was not entitled to recovery of subcontractor funds to offset its payment of a portion of the settlement. The court further reasoned that *Intervest* was a coverage case, reliant on policy language, while Summit relied upon equitable principles in subrogation, finding that the policy language did nothing to alter or abrogate the common law doctrine.

The insured general contractor did not contribute any additional funds to pay claims, although it did assign its claims for indemnity against non-performing subcontractors to one plaintiff condominium association.

The court's final rationale for awarding the insurer recovery is grounded in its interpretation of the insurance policy. The policy required the insured general contractor to indemnify the insurer for losses it incurred and which were still within the amount of the insured's SIR amounts, thus risking expending its full SIR on any claims. In other words, the insured had no reasonable expectation that any portion of its SIR could be reimbursed to it and as established under the policy language, the insured would have no obligation to pay claims unless and until the SIR were fully paid. IM

Citizens, continued from page 1

Additionally, the First District passed the following question, which it certified to be of great public importance, to the Supreme Court:

WHETHER THE IMMUNITY OF CITIZENS PROPERTY INSURANCE CORPORATION, AS PROVIDED IN SECTION 627.351(6)(s), FLORIDA STATUTES, SHIELDS THE CORPORATION FROM SUIT UNDER THE CAUSE OF ACTION CREATED BY SECTION 624.155(1)(b), FLORIDA STATUTES[,] FOR NOT ATTEMPTING IN GOOD FAITH TO SETTLE CLAIMS?

As noted above, the Supreme Court answered this question in the affirmative. The basis for the opinion was a review of the statutory exceptions to Citizens' immunity. The Supreme Court found no support for the proposition "that the Legislature intended for Citizens to be liable for a breach of the duty to act in good faith by allowing its policyholders to bring a statutory first-party bad faith cause of action." The Supreme Court then reviewed the listed exceptions. The Court noted that an exception to immunity was not provided for and to the contrary, "the Legislature chose to immunize Citizens for 'any action taken by [it] in the performance of [its] duties or responsibilities under ... subsection [627.351(6)(s)],' which necessarily includes a breach of the duty of good faith."

However, possibly complicating matters is that the Court recognized Citizens may still be liable "where a plaintiff claims a defendant engaged in egregious and outrageous actions, bad faith can be elevated to a willful tort, an issue that could turn on the facts of the case." This means that fraud committed during the performance of the contract may amount to a "willful tort" that may look very much like first party "bad faith" with a higher burden of proof of intent. Given the difficulty in proving such fraudulent intent the Court's statement may be for naught.

This case does raise the question whether the Legislature should revise the statute so as to keep Citizen's on the same footing as other carriers. There are pros and cons on both sides of that issue and may be taken up at a later date. IM

"... fraud committed during the performance of the contract may amount to a "willful tort" that may look very much like first party "bad faith" with a higher burden of proof of intent."

Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management.

Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

Co-Chair - Wm. Cary Wright (cwright@cfjblaw.com.com)
Co-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
Vice-Chair and CLE - Michael G. Meyer (michael@jrtampalaw.com)
Vice-Chair, Secretary & Newsletter - Scott P. Pence (spence@cfjblaw.com.com)
Legislative Subcommittee - Sanjay Kurian (skurian@becker-poliakoff.com
Legislative Liaison - Louis E. "Trey" Goldman (treyg@floridarealtors.org)
Website - *Position Open*
Membership - *Position Open*

Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
- Do you know the difference between "claims made" and "occurrence" based insurance policies?

Get answers to these, and many other questions, by attending our **FREE** monthly CLE programs.

When: Noon - 1:00 P.M. ET on the third Monday of every month, excluding government holidays.
Where: Via Teleconference
How: Dial-in number: **888-376-5050**
Participate Code: **8425484201#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-60 minutes.

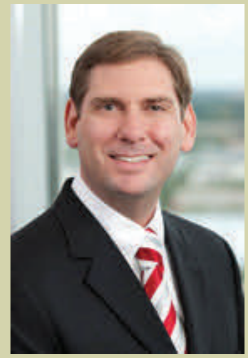
If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

Schedule of Upcoming RPPTL Section Meetings

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

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

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



Scott P. Pence
Editor

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of ***Insurance Matters!***, please contact me at spence@cfjblaw.com.

UPCOMING CLE:

Save the Date:
September 16, 2015

A special RPPTL Section-wide CLE presentation on behalf of the Insurance and Surety Committee, entitled:

Cyber and Data Risks and Related Insurance Issues

to be presented by:

Richard "Rick" Betterley, CMC
Jeremy R. Henley, CHPC
Roberta D. Anderson, Esq.

Check the RPPTL Section's web page for more details about this and other CLE programs.

Did you know?

You can access previous issues of Insurance Matters!, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at http://www.rpptl.org.

http://www.rpptl.org