Trending Topics in Florida Insurance Law
RPPTL
July 10, 2017

Greg Podolak, SDV Southeast
Ashley Cooper, SDV Southeast
Hannah Austin, SDV Southeast

About SDV

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Today's Discussion

- Rip & tear coverage

- Construction defects and FL 558

- Wrap exclusions

- Concurrent causation in first-party claims

- Products-completed operations extension endorsement

- Apartment-to-condo conversion

Rip & Tear Coverage

- Intentional damage occurs while fixing defect - is this intentional damage an "occurrence" under a CGL policy?

- Example: tearing through a wall to fix an electrical cable

- Carithers v. Mid-Continent Cas. Co., 782 F.3d 1240, 1245-46 (11th Cir. 2015) (interpreting Florida law).

    - Construction defects in balcony of new caused water to leaks that caused damage to garage.

    - Balcony needed to be replaced in order to fix damage to garage.

    - Court determined that cost of replacing balcony was part of covered "damages" under CGL policy, but affirmed that cost of repairing defective balcony would not be covered if there was no corresponding property damage to other parts of house.

- See also Pavarini Const. Co. (SE) Inc. v. ACE American Ins. Co., Case No. 14-cv-20524, 2015 WL 845581 (S.D.Fla. February 25, 2015).

Construction Defects & § 558 Fla. Stat.

- 11th Circuit certified the following question to the Florida Supreme Court: "Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a "suit" within the meaning of the CGL policies issued by C&F to ACI? Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 832 F.3d 1318 (11th Cir. 2016).

- *In actions brought alleging a construction defect, the claimant shall, at least 60 days before filing any action…serve written notice of claim on the contractor...* § 558.004 Fla. Stat. (2016).

- Upon receipt of a § 558.004 notice, ACI demanded a defense from its insurer C&F.

  - C&F asserted that the § 558.004 claim did not fit policy definition of "suit."

  - The C&F CGL policy defined "suit" as a "*civil proceeding in which damages. . . to which this insurance applies are alleged. 'Suit' includes: a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.*"
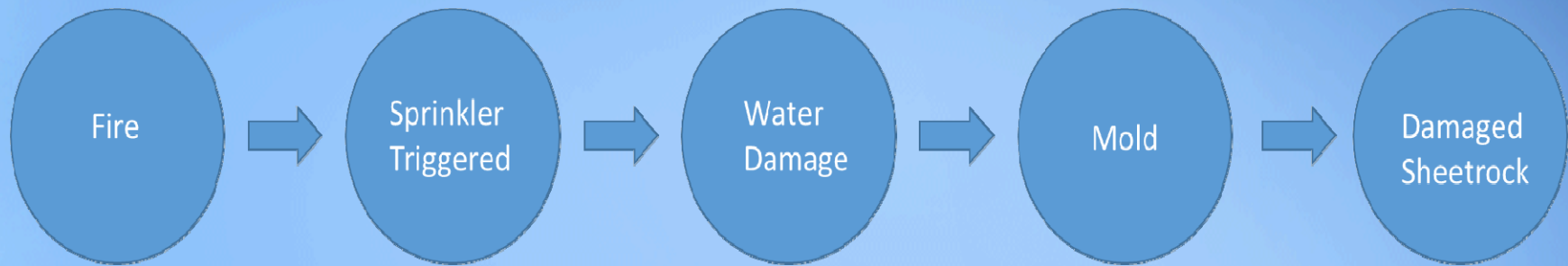
Wrap Exclusions

- Unenrolled subcontractors oftentimes have wrap-up exclusions in their GCL policies.

- <u>TNT Equip., Inc. v. Amerisure Mut. Ins. Co.</u>, Case No. 6:15-cv-1461, 2016 WL 5146198 (M.D. Fla. Sept. 21, 2016).

  - Wrap-up policy issued by Liberty to project owner.

  - TNT and Stowell were subcontractors working on project –TNT leased construction equipment from Stowell.

  - Amerisure issued policy to Stowell, policy contained wrap exclusion.

  - TNT was add'l insured under Amerisure policy issued to Stowell.

  - BI lawsuit against TNT was not covered by Amerisure b/c of wrap exclusion.
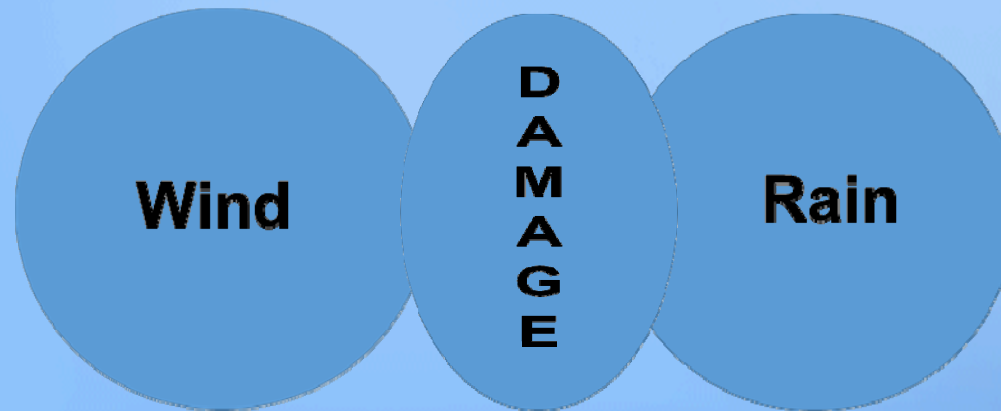
Concurrent Causation in First Party Claims

- Perils oftentimes combine to cause loss, some covered and some not covered.

- Sebo v. American Home Assurance Co., 208 So.3d 694 (Fla. 2016).

    - Approving Wallach v. Rosenberg, 527 So.2d 1386 (3d DCA 1988) and disapproving American Home Assurance Co. v. Sebo, 141 So.3d 195 (Fla. 2d DCA 2013).

    - Supreme Court held that concurrent causation doctrine applies when covered and non-covered perils combine to cause a loss and there is no anti-concurrent causation clause in the insurance policy.

    - Did not eliminate efficient proximate cause doctrine, only held that EPC is inappropriate to apply in cases where loss was caused by combined effect of multiple perils, rather than one peril creating "chain of events" that lead to loss.

- Some insurance policies exclude losses regardless of EPC and CC.

- Some policy will have anti-CC or anti-EPC clause for some losses but not others. See Paulucci v. Liberty Mut. Fire Ins. Co., 190 F.Supp.2d 1312, 1319-20 (M.D.Fla. 2002) (citation omitted) (insurer can contract around concurrent causation doctrine).

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

Fungi Or Bacteria

a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

B. The following exclusion is added to Paragraph **2. Exclusions** of **Section I – Coverage B – Personal And Advertising Injury Liability:**

2. Exclusions

This insurance does not apply to:

Fungi Or Bacteria

a. "Personal and advertising injury" which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.

b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

C. The following definition is added to the **Definitions** Section:

"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

Products-Completed Operations Extension Endorsement

- Supposed to protect the insured following completion of a project.

- Can limit or narrow coverage if inconsistent with coverage in base CGL policy.

- Base CGL policy usually provides some coverage for completed projects.

- Pavarini Const. Co. (SE) Inc. v. ACE American Ins. Co., Case No. 14-cv-20524, 2015 WL 845581 (S.D.Fla. February 25, 2015).

  - Gap in coverage periods provided by CGL and extension endorsement raised by insurer in MSJ.

  - Court found there was issue of material fact as to when operations were completed and denied MSJ.

- Change to Florida's statute of repose for CD claims – defines when contract is considered completed.

Apartment to Condo Conversion

- Converting apartments to condos post-completion is common and changes liability exposure

- Colony Ins. Co. v. Montecita Renaissance, Inc., Case No. 8:09-cv-1469-T-30MAP, 2011 WL 4529948 (M.D.Fla. September 30, 2011) – "Designated Work Exclusion" excluded coverage for "all construction operations pertaining to apartment to condominium conversion".

- Managing risk is unique to each situation

- Possible solutions:

  - Contract language restrictions with owner and developer

  - Contingent insurance

  - Deed restrictions