Insurance Matters!

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of the Real Property Probate and Trust Law Section of The Florida Bar

Scott Pence, Tampa
Chair

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To Defend or Not to Defend: There Shouldn't Be Any Question

By: Melissa C. Lesmes and Alex J. Lathrop, Pillsbury, Washington D.C.

Sometimes a phrase is repeated so often that we forget what it meant in the first place. Perhaps that is the case with the phrase "the duty to defend is broader than the duty to indemnify." This principle has been frequently repeated by courts over at least the past 50 years in virtually every case in which an insurer has sought to avoid defending its policyholder against a lawsuit or other third-party liability. Yet insurers continue to confuse the scope of their duty to defend with the scope of their duty to indemnify. The basic distinction is this—an insurer owes a duty to defend when its policyholder faces allegations that could potentially result in liability covered by the policy; an insurer owes a duty to indemnify when a policyholder's actual liability falls within the coverage provided by the policy.

While it may seem counterintuitive, an insurer may have to defend its insured against an action that results in a liability that is not covered—because the duty to defend is broader than the duty to indemnify. And an insurer often will have to defend its insured against an action that results in no liability at all, such as when a meritless claim is brought against the insured. In either event, the insurers' duty to defend does not depend upon the outcome of the case. So long as the allegations against the insured create a potential that the

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Altman Contractors Inc. v. Crum & Forster Specialty Ins. Co.: Balancing the Interests Surrounding Potential Insurance Coverage for 558 Claims

By: Reese J. Henderson, Esq. B.C.S., Gray | Robinson, Jacksonville, FL

Chapter 558, Florida Statutes was enacted by the Legislature in 2003 to provide "an alternative method to resolve construction disputes" between owners and contractors. Chapter 558 requires a "claimant" to serve a "written notice of claim" on the contractor describing, in reasonable detail, the nature of any construction defects, the resulting damage (if known) and the location of each defect. Last December, the Florida Supreme Court addressed, for the first time since Chapter 558 was enacted, whether a "written notice of claim" constitutes a "suit" within the meaning of a commercial general liability (CGL) insurance policy issued to a general contractor.

The case of *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 2017 WL 6379535 (Fla. December 14, 2017), originated in the district court for the Southern District of Florida, which granted summary judgment for Crum & Forster, finding "no ambiguity" in the relevant policy provisions. The policy required the insurer to provide a defense against a "suit" which was defined, in part, as a "civil proceeding." The district judge concluded that Chapter 558 did not create

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policyholder may face liability covered by the policy, the insurer must defend.

To use just one example, if a policyholder is alleged to have assaulted the defendant (an intentional tort), and the insurance policy excludes coverage for bodily injury caused intentionally, the insurer still owes a duty to defend because the policyholder may ultimately be found liable for mere negligence. As two recent cases illustrate, many insurers continue to misunderstand this bedrock principle.

"[W]hile the duty to defend is broad, it is triggered by allegations and theories that support the possibility of coverage; it is not triggered by a theory that has not been plead."

First, in *Dowson v. Scottsdale Insurance Company*, Montana Pride Builders LLC was sued for construction defects and resulting damage to a home that it had built. Case No.: 4:12-cv-00015-SHE (March 23, 2016). Scottsdale Insurance Company issued a policy to Montana Pride that was cancelled the same month that the home was completed. When Montana Pride tendered the construction defects lawsuit to Scottsdale and requested a defense, Scottsdale refused based on an "owned property" exclusion in the policy. A Montana federal district court found that Scottsdale breached its duty to defend and awarded the full amount of defense and settlement costs incurred by Montana Pride, as well as the attorney's fees incurred to prove that the insurer breached its duty to defend. The Ninth Circuit Court of Appeals upheld the trial court's ruling, as "the mere existence of the exclusion in Scottsdale's policy does not establish an unequivocal demonstration that the claim does not fall within the insurance policy's coverage." Does an exclusion in the policy that *may* apply to the underlying claim relieve an insurer of its obligation to defend its insured? No, because the duty to defend is broader than the duty to indemnify, and the duty to defend is triggered by the mere possibility that coverage exists.

Second, in *Hanover Insurance Company v. Superior Labor Services, Inc.*, the policyholder, a sandblasting company, sought a defense from Hanover for two personal injury lawsuits filed by residents of a community alleging that the policyholder's sandblasting activities at a neighboring shipyard caused silica dust to permeate their neighborhood. Case No.: 2:2011cv02375 (E.D. La 2017). Hanover refused to defend on the ground that the complaints in the personal injury lawsuits did not specifically allege bodily injury during Hanover's policy period. However, the complaints alleged that the sandblasting activities occurred continuously over many years, including during the Hanover policy periods. As the Louisiana federal court found, "[a]lthough the state-court [complaints] do not identify a precise time period during which the plaintiffs were exposed to the hazardous substances causing bodily injury and property damage, a review of the [complaints] and the policies does not unambiguously preclude a finding that the exposure occurred during the policy periods. An insurer's duty to defend arises whenever the pleadings against the insured disclose even a possibility of liability under the policy." Can an insurer avoid its obligation to defend its insured on the grounds that the complaint does not allege bodily injury or property damage during the insurer's policy period? Not if the alleged bodily injury or property damage may have taken place during the policy period—because the duty to defend is broader than the duty to indemnify.

This broad defense obligation is not, however, unbounded. The recent decision of *Selective Insurance Company of the Southeast v. William P. White Racing Stables, Inc.* is illustrative. --- Fed.Appx. ----, 2017 WL 6368843 (11th Cir. 2017). There, a jockey was severely injured when the horse he was riding collapsed on top of him. The jockey sued the race track, and several veterinarians alleging that each negligently hid the fact that the horse was injured with steroids and medications. The jockey also sued White Racing Stables alleging that it (i) failed to preserve the horse's remains so that it could be tested for performance-enhancing drugs (spoliation of evidence), and (ii) failed to cooperate in investigating and prosecuting his claims against the other tortfeasors. Selective Insurance denied White Racing a defense arguing that neither claim alleged damages for property damage or bodily injury, but rather were claims for economic losses only. The district court disagreed and found the duty to defend was triggered because the jockey ultimately could have made a claim against White Racing Stables for his injuries. On appeal, the Eleventh Circuit reversed the finding holding that the critical inquiry is whether the complaint seeks recovery for the type of damages covered by the policy in question. Here, the spoliation and failure to cooperate claims, were claims that, even if proven, would not have resulted in damages that would have been covered by the policy and therefore the insurer was not obligated to defend. In short, while the duty to defend is broad, it is triggered by allegations and theories that support the possibility of coverage; it is not triggered by a theory that has not been plead.

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The breadth of the duty to defend makes perfect sense. To be sure, companies and individuals buy liability insurance to provide coverage when they unexpectedly cause third party property damage or bodily injury. But companies also buy insurance to provide protection against the enormous costs of defending against lawsuits, including lawsuits that may not result in liability. The risk insured against in these instances is the cost of defense, not the cost of liability. This "litigation insurance" is what the duty to defend provides, and it is at least as important – if not more important – to policyholders as the duty to indemnify. Policyholders expect – and courts require – their insurers to defend them when they face the type of claims for which they bought insurance. The question that insurers must ask when a policyholder seeks a defense is not "could this claim fall outside the coverage of the policy," but "could this claim possibly result in liability that is covered under the policy?" If the answer is "yes," the insurer must defend. IM

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a "proceeding" of any kind, much less a "civil proceeding", but instead established a "mechanism" meant to facilitate discussions between the parties about a potential resolution of their disputes and thereby avoid litigation.

Altman appealed to the Eleventh Circuit. The Eleventh Circuit panel expressed reservations about whether the terms "suit" and "civil proceeding" were ambiguous. The court observed there were "reasonable arguments presented by both sides" regarding the policy's meaning. Concerned about the practical and policy implications of a decision in this area, for which there was no guidance from the Florida courts, the Eleventh Circuit panel certified to the Florida Supreme Court the question of whether the notice and repair process in Chapter 558 was a "suit" within the meaning of Crum & Forster's CGL policy issued to Altman.

The Florida Supreme Court responded in the affirmative, finding that the Chapter 558 notice and repair process fell within the portion of the definition of "suit" in the policy which encompasses "[a]ny other alternative dispute resolution proceeding in which [covered] damages are claimed and to which the insured submits with [the insurer's] consent." The court noted that the Florida Legislature itself, in its legislative findings and declaration, had described the notice and repair process enacted in Chapter 558 as an "alternative dispute resolution mechanism" and further found that the Chapter 558 process was analogous to a mediation in that, even though it is not "adjudicatory" in nature, it is nevertheless a procedure for resolving a dispute by means other than litigation, the very definition of an "alternative dispute resolution proceeding."

The Supreme Court's conclusion did not end the case in Altman's favor, however. Under the language of the policy, "other alternative dispute resolution proceeding[s]" (i.e., other than arbitration) are covered "suits" only if the insurer consents to the insured's participation. The Supreme Court sent the case back to the Eleventh Circuit for determination of whether Altman's participation in the Chapter 558 process was done with Crum & Forster's consent, an issue that was disputed by the parties.

Although neither side achieved a definitive ruling for or against coverage for Chapter 558 notices of claim, the Supreme Court's ruling found a suitable middle ground. Because the insurer can control when it participates in a Chapter 558 process, there should be little concern that the full blown "insurance crisis" predicted by Crum & Forster from a ruling in favor of coverage will materialize. Moreover, the ruling encourages insurers to participate in a Chapter 558 process on a case-by-case basis by removing any concern for creating a precedent that would lock them into coverage for future notices of claim. Though not the victory the building industry sought, the Supreme Court's decision is sound and preserves the right of the parties to control their risk through the negotiated language of the policy. IM

"The Florida Supreme Court [found] that the Chapter 558 notice and repair process fell within the portion of the definition of "suit" in the policy ..."

Fundamentals of Insurance Speaker Series: The Fundamentals of Insurance speaker series is a series of basic level presentations designed to educate practitioners on the more common types of insurance products associated with real estate and other commercial transactions and litigation – a sort of "Insurance 101" series. Each month, our speakers will provide an overview of one of the following different insurance products, discussing such things as the structure of the policy, the types of risk covered by that policy and contract drafting tips, when applicable:

12/18/17 - Commercial General Liability (CGL)
1/22/18 - Property Insurance (including Builders' Risk)
2/26/18 - Professional Liability
3/19/18 - Environmental Liability
4/16/18 - Umbrella/Excess Liability
5/21/18 - Workers' Compensation & Employer's Liability

http://www.rpptl.org

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. IM

Leadership & Subcommittees

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

Chair & Newsletter - Scott P. Pence (spence@carltonfields.com)
Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
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Co-Editor of Newsletter - Mariela Malfeld (mmalfeld@watttieder.com)
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Secretary & Membership - Katherine "Katie" L. Heckert (kheckert@carltonfields.com)
Website - Derrick M. Valkenburg (dvalkenburg@shutts.com)

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: **7854216320#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-50 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

May 31-June 3, 2018
Executive Council Meeting & Convention
Tradewinds Island Resort on St. Pete Beach
St. Pete Beach, FL

July 25-28, 2018
Executive Council Meeting & Legislative Update
The Breakers
Palm Beach, FL

September 26-30, 2018
Executive Council Meeting, Out of State
The Westin Excelsior, Rome
Rome, Italy (with pre-event in Florence, Italy – TBA)

Mariela Malfeld
Co-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 Mariela Malfeld at mmalfeld@watttieder.com

We Need You!

We are in need of persons to assist in leading various subcommittees. Please contact us if you would like to become more involved.

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.

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