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Construction Law Committee Newsletter, a committee of the Florida Bar Real Property, Probate & Trust Law Section

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Contribution Among Insurance Carriers: Florida's Legislature Steps in to Override Florida's Longstanding Rule of Law

By J. Matthew Belcastro, Henderson Franklin, P.A., Fort Myers, FL

Governor DeSantis recently signed into law the new Section 624.1055, Florida Statutes, which is a part of the recent Omnibus Insurance Bill, HB 301. The new legislation creates a right to contribution among insurance carriers for defense costs.

This article will discuss the longstanding common law rule in Florida which prohibited this right of contribution, the rationale for that long standing rule as discussed in several factual scenarios and the potential impact of the new legislation as it relates to the relationship between insurance companies and their insureds.

The longstanding rule of law in Florida has been that there is no right of contribution among insurance carriers for attorney fees incurred in defending a mutual insured. The rationale has historically been that each carrier owes a complete and independent obligation to provide a defense under the insuring policy, such that, by issuing the policy, the carrier did so without contemplation that it would be entitled to recover payment from another carrier for such defense costs. The Florida Supreme Court described the rationale for the current rule in the case of Argonaut Ins. Co. v. Maryland Cas. Co., 372 So.2d 960, 964 (Fla. 1979) as follows:

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Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: tderr@rumberger.com.

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> The Legislature has not seen fit to allow contribution for costs or attorney's fees between insurance companies. If contribution for costs were allowed between insurance companies, there would be multiple claims and law suits. The insurance companies would have no incentive to settle and protect the interest of the insured, since another law suit would be forthcoming to resolve the coverage dispute between the insurance companies. This is contrary to public policy, particularly since the insured has been afforded legal protection and has not had to personally pay any attorney's fees.

To many observers, the rule of law seemed unjust. After all, if two (or more) insurers, each owe a duty to defend, why should they not both (or all) bear the burden of the expense associated with providing a defense? The Court in *Argonaut* appeared to be concerned about the impact that allowing contribution might have on the insured.

Argonaut Revisited: Continental Casualty Company v. United Pacific Insurance

The rule of law set forth in *Argonaut* was revisited by the Fifth District Court of Appeal, sitting *en banc*, in the case of Continental Cas. Co. v. United Pacific Ins. Co., 637 So.2d 270 (5th DCA 1994). The facts of *Continental* were slightly different than the facts of *Argonaut* because the insurance company seeking contribution had provided a defense to an entity that was an additional insured under the liability policy of Continental's named insured. Continental sought contribution from the carrier that insured its additional insured. Nevertheless, the *Continental* court declined to depart from the rationale of *Argonaut* and expanded on the rationale by expressing concerns about the potential burden that a right of contribution might impose upon insureds:

> By creating this right of contribution between insurers, the insured finds itself placed precariously in the middle. It is only a matter of time . . . . that anything the insured does (or fails to do) that jeopardizes an insurer's contribution "rights" will be the basis of a defense to coverage or even a claim against the insured for interfering with, or failing to protect, these rights.

The majority's decision in *Continental*, was met with a thorough dissent from Judge Sharp who presented "the other point of view" as follows:

> Under Argonaut, insurers play the game of "chicken," forcing the other equally obligated insurer to undertake the defense first, while flirting around the edges of bad faith breach of their duty to defend. The insurer who is the most responsible and undertakes the defense is penalized by being forced to bear

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> all the costs, expenses and attorney's fees for discharging not only its own contract to defend, but the co-primary insurer's obligation, as well.

The Legislature Intervenes: Section 624.055

It has been 40 years since the Florida Supreme Court's decision in *Argonaut* but the legislature has finally seen fit to make a change by allowing contribution among co-primary insurers. The new legislation changes the longstanding rule of law by providing that:

> A liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit or other action, provided that contribution may not be sought from any liability insurer for defense costs that are incurred before the liability insurer's receipt of notice of the claim, suit or other action.

There are a few additional interesting aspects of the new legislation. For example, for purposes of allocating obligations, the statute directs the court to "allocate defense costs . . . in accordance with the terms of the liability insurance policies. The court may use such equitable factors as the court determines are appropriate in making such allocation." Further, the legislation applies to "policies issued for delivery in this state, or liability insurance policies under which an insurer has a duty to defend an insured against claims asserted or suits or actions filed in this state." By its terms, the legislation does not apply to motor vehicle liability insurance or medical professional liability insurance.

It obviously remains to be seen as to whether the new legislation will lead to additional litigation or create additional burdens owed by insureds to their insurers, but the legislation appears to have been motivated by a desire to encourage insurers to more readily accept a defense obligation, knowing that they may be entitled to recover a portion of their fees and expenses from another insurer. It should be noted that the right to contribution does not begin until notice has been provided, so insurance carriers wishing to take advantage of this right of contribution are well advised to put other potential carriers on notice as soon as possible.

Section 624.1055 applies to claims, suits or other actions initiated after January 1, 2020.

"It has been 40 years since the Florida Supreme Court's decision in *Argonaut* but the legislature has finally seen fit to make a change by allowing contribution among co-primary insurers."

"Section 642.1055 applies to claims, suit or other actions initiated after January 1, 2020."

Interested in joining the Construction Law Committee?

It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.

2. Join the Real Property Probate and Trust Law Section.

3. Email Reese Henderson at reese.henderson@gray-robinson.com advising you would like to join the CLC and provide your contact information.

Case Law Update

By: Robert S. Tanner,
the Law Office
of Robert S. Tanner
Fort Lauderdale, Florida

In Concrete Works & Paving, Inc. v. Great Midwest Ins. Co., No. 19-60312-CIV, 2019 WL 2994236 (S.D. Fla. July 9, 2019), the court denied the surety's motion to dismiss which argued that a subcontractor's complaint on a §255.05 payment bond was deficient for failing to include allegations of what labor or materials the subcontractor furnished or when, the terms of the agreement giving rise to a subcontract agreement, when payment was demanded and due from the bonded contractor, and when the owner accepted the work. The court determined that those allegations were not necessary to survive the motion to dismiss.

In Fernandez v. Manning Bldg. Supplies, Inc., Case No. 1D18-4819, 2019 WL 4655988 (Fla. 3d DCA Sept. 25, 2019), the appellate court determined that the meaning of "finance charge", for which recovery is permitted in § 713.06(1), is the cost of credit, to be distinguished from the cost of paying late, which often is referred to as a delinquency charge. Thus, the appellate court reversed the award of interest to the supplier at the rate of 18% per year based upon the supplier's contract which provided that "I/We understand that a delinquent account will cause credit to be suspended and a 1-1/2% monthly delinquent charge to be added . . . ."

In Gen. Prop. Constr. Co. v. Empire Office, Inc., Case No. CV 18-23688-CIV, 2019 WL 4193901 (S.D. Fla. Sept. 4, 2019), a subcontractor moved for summary judgment against a sub-subcontractor arguing, among other things, that the sub-subcontractor could not recover because it had failed to reach substantial completion. The trial court rejected the argument, noting that the sub-subcontractor was not claiming entitlement to the total amount of the sub-subcontract and that under Florida law a proper measure of damages for breach of a partially performed construction contract is lost profit together with the reasonable cost of labor and materials incurred in good faith.

Case Law Update

In Grace & Naeem Uddin, Inc. v. Singer Architects, Inc., 278 So. 3d 89 (Fla. 4th DCA 2019), the owner terminated the general contractor. The general contractor sued the architect who admitted recommending that the owner terminate the contractor. The trial court entered summary judgment in favor of the architect, finding that the architect, acting only as the owner's consultant, did not owe a duty of care in tort to the contractor. The appellate court reversed, finding the architect's supervisory duties and its nexus with the contractor were sufficient to establish a duty.

In Harrell v. Ryland Grp., 277 So. 3d 292 (Fla. 1st DCA 2019), the plaintiff was injured due to the collapse of an attic ladder. The trial court entered summary judgment in favor of the developer based on the statute of repose in § 95.11(3)(c). The appellate court determined that the attic ladder was an "improvement" because it was installed as part of the construction of the home, required labor and money, made the property more useful/valuable, was not mere replacement or repair, was affixed to the attic, and was an integral part of the home. The court further found that the injury claim was founded on the construction of improvement to real property because the plaintiffs claim was that the defendant negligently performed the installation. As a result, section 95.11(3)(c) applied. Finally, the court found that there was no record evidence to indicate that the attic ladder had been installed after the date the certificate of occupancy issued, which was more than 10 years before the plaintiff filed suit against the developer and, therefore, the claim was barred by the statute of repose.

In KB Home Jacksonville LLC v. Liberty Mut. Fire Ins. Co., No. 3:18-CV-371-J-34MCR, 2019 WL 4247269 (M.D. Fla. Sept. 5, 2019), Liberty Mutual Fire Insurance Company ("Liberty") sought summary judgment declaring that it was no longer under a duty to defend and indemnify KB Home in numerous lawsuits pending in Florida. Liberty argued that its duty ended based on the policy provision stating that Liberty's "right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements . . . ." Liberty argued that the provision was satisfied when it committed the policy limits to settle other litigation pending in South Carolina. The court denied Liberty's motion, ruling that offering policy limits, or even being legally obligated to pay the policy limits at a later date, is not synonymous with "payment of judgments or settlements."

Case Law Update

SUBMISSIONS

Do you have an article, case update, or topic you would like to see in CONSTRUCTive Talk? Submit your article, note, or idea to: tderr@rumberger.com

Editor's Corner:

Tyler J. Derr
Editor—Tampa

In MBlock Investors, LLC, v. Bovis Lend Lease, Inc., 274 So.3d 504 (Fla. 3d DCA June 5, 2019), after construction was completed, the developer ("Developer") transferred the property to another entity ("Owner"). The general contractor ("GC") sued Developer and Owner for over $3 million owed for work on the project. In a Close Out Agreement resolving the lawsuit, Developer gave GC a release of all claims known to Developer and its successors "as of the Effective Date" of the Agreement. Subsequently, Owner defaulted on its loan and conveyed the property to the lender ("Lender"). Approximately 2 years later, Lender sued GC, claiming negligent construction and violations of the Florida Building Code. Both Lender and GC moved for summary judgment on GC's affirmative defense that Lender's claims were barred by Developer's release in the Close Out Agreement. The court found that Lender was Developer's successor for purposes of the settlement agreement and, further, given that the dismissal with prejudice in the original lawsuit operated an adjudication on the merits, that Lender met the privity requirement for the doctrine of res judicata to apply. Finally, the court further found that because the release barred claims that were known as of the Effective Date of the Close Out Agreement, it did not affect Lender's claims for latent defects not known at that time.

In Mt. Hawley Ins. Co. v. Adams Homes of Northwest Fla., Inc., Case No. 8:19-cv-1069-T-24 JSS (M.D. Fla. Aug. 15, 2019), an insurer ("Insurer") sued for declaratory judgment that it had no duty to defend or indemnify Adams Homes in a state court case filed by a homeowner for building code violations and negligent construction. Adams Homes moved to dismiss, arguing that the $75,000 threshold for diversity jurisdiction was not met because the owner in the underlying case estimated the cost to repair at just over $55,000. To determine the amount in controversy, the court looked to (1) the coverage limits under the insurance policy; (2) the amount of damages sought in the underlying lawsuit; and (3) the pecuniary value of the obligation to defend the insured in the underlying lawsuit. Because the coverage limits were $1 million per occurrence and because Insurer submitted an affidavit which estimated that defense costs in the underlying action would be at least $20,250, the Court found that Insurer met the jurisdictional threshold.

Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include 1 hour of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 3532412014# when prompted. **Please note the new Pin Number**.

Info & Upcoming Events

Subcommittee Practice-Get On Board

Interested in getting involved? Contact one of the persons listed below.

ABA Forum Liaison - Cary Wright (cwright@carltonfields.com)

ADR - Deborah Mastin (deboarhmastin@gmail.com)

Certification Exam - Bruce Partington (aespino@tevtlaw.com)

Certification Review Course - Mindy Gentile (mgentile@pecklaw.com) and Elizabeth Ferguson (ebferguson@mdwcg.com)

Construction Law Institute - Jason Quintero (jquintero@carltonfields.com)

Construction Litigation - Brett Henson (bhenson@slk-law.com) and Natalie Yello (natalie.yello@gray-robinson.com)

Construction Regulation - Fred Dudley (dudley@mylicenselaw.com) and Steve Sellers (steve@dssattorneys.com)

Construction Transactions - Claramargaret Groover (cgroover@bplegal.com)

Contractor's University - Lee Weintraub (lweintraub@bplegal.com) and Cary Wright (cwright@cfjblaw.com)

Legislative Subcommittee - Sean Mickley (smickley@gouldcooksey.com)

Membership Subcommittee - David Zulian (dazulian@napleslaw.com)

Newsletter - Tyler Derr (tderr@rumberger.com) and Lindy Keown (lkeown@rumberger.com)

Publications Subcommittee - Kellie Humphries (khumphries@gunster.com) and Brett Moritz (bmoritz@lee-lawfirm.com)

Small Business Programs - Lisa Colon Heron (lcolon@smithcurrier.com)

Website - Hardy Roberts (hroberts@caryomalley.com)

Happy Holidays!

We want to wish all CLC members a very Happy Holidays!