



# Insurance Matters!

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

## Who's On First? Additional Insureds and Order of Coverage

By: Craig F. Stanovich, Austin & Stanovich Risk Managers, LLC, Holden, MA

### The Subcontract

In the written subcontract agreement between Whitin Electrical Contractors, Inc. (the Subcontractor) and Spartan General Contractors, Inc. (the Contractor), Whitin has agreed to include Spartan as an additional insured on Whitin's liability policies. The limit required of Whitin by Spartan for liability insurance is at least \$5 million, which may be satisfied by a combination of Commercial General Liability (CGL) coverage and excess or umbrella liability coverage.

Further, Spartan has made it clear to Whitin that *all \$5 million of Whitin's liability insurance* is to respond first (primary) to any claims against Spartan as an additional insured and that Whitin's liability insurance will not share (non-contributory)<sup>1</sup> with any insurance available to Spartan. Spartan's liability insurance (which includes a \$1 million each occurrence CGL and a \$25 million Umbrella) is to respond only *as excess* of the \$5 million of liability insurance available to Spartan as an additional insured on Whitin's policy.



See Order of Coverage, continued on Page 2

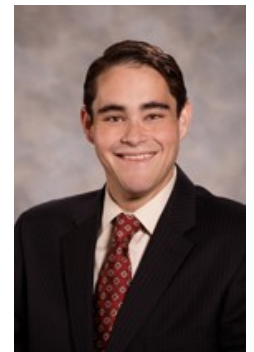
## Summary of the National Flood Insurance Program Extension and Reforms

By: Michael G. Meyer, Broad and Cassel, Orlando, FL

On July 6, 2012, the President signed H.R. 4348: Division F – Title II, known as the Biggert-Waters Flood Insurance Reform Act of 2012 (the "Act"), part of the Transportation bill, into law. As federal legislators refer to it, "the Agreement"<sup>1</sup> is the much anticipated extension and *reform* of the National Flood Insurance Program (NFIP) of 1968.<sup>2</sup> The NFIP would have expired July 31 of this year, but the Act provides for a 5 year extension of the NFIP to September 30, 2017. This "long term" reauthorization of the NFIP has been the top priority for all interested parties, because since just 2008, the program has been extended 17 times and has lapsed 4 times. This extension provides much needed certainty to more than 5.6 million home and business owners who rely on the NFIP for flood insurance, which is rarely offered in the private marketplace. Moreover, there are more than 2 million flood insurance policies in force in the State of Florida, according to the Florida Division of Emergency Management.

This long term extension, however, did not come without a price, because the Act makes several reforms to the Federal Emergency Management Agency's (FEMA) premium rate structure in an effort to curtail the NFIP's \$18 billion debt:

1. Adjusts the risk premium rate charged for flood insurance on such property to the accurate actuarial rate for any property, home or business, located in an area that is participating in the NFIP. To



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### Whitin's Insurance

Whitin has purchased a CGL policy with a \$1 million each occurrence limit as well as an umbrella policy with a \$5 million limit – both include Spartan as an additional insured. The CGL does this via an automatic or “blanket” additional insured endorsement. Whitin's umbrella expressly states that any insured in the underlying insurance will also be an insured in the umbrella, but the coverage provided to the insured in the umbrella will be no broader than the coverage provided to that insured in the underlying policy.

### Joe's Injury

Joe, a longtime employee of Whitin, is injured on the jobsite on which Spartan is the general contractor. Because Joe's injuries are severe, he brings a claim against Spartan, alleging in the lawsuit that Spartan failed to maintain a safe workplace. Spartan tenders the claim to Whitin's CGL insurer as an additional insured. Whitin's CGL insurer accepts the tender and begins to defend Spartan against Joe's claim. What becomes obvious almost immediately is that Spartan is likely partly at fault for Joe's injury and also that Joe's damages may far exceed the \$1 million limit provided by Spartan's CGL insurer (the case is valued at \$2 million).

### Settlement

After a long legal battle, the case is settled with Joe for \$1.5 million in damages. Whitin's CGL policy pays its full limit on behalf of Spartan - \$1 million.<sup>2</sup> However, Whitin's umbrella insurer refuses to pay the additional \$500,000 on behalf of Spartan. Whitin's umbrella insurer points to its “Other Insurance” condition, which states that Whitin's umbrella is excess of *any other insurance available*, unless that insurance is *specifically* written to be excess of Whitin's umbrella policy. As Spartan's CGL exists as other liability available to Spartan *and* Spartan's CGL was not specifically written to be excess of Whitin's umbrella, Whitin's umbrella insurer is demanding that Spartan's CGL policy *respond next* and pay the balance of the settlement - \$500,000. Whitin's umbrella insurer contends that it applies only as *excess* of Spartan's own CGL policy.

### Vertical and Horizontal Exhaustion

Whitin is quite disturbed by this turn of events as this is not what they have agreed upon with Spartan. Spartan's CGL was intended to apply only when all \$5 million of Whitin's liability insurance was exhausted. This arrangement is sometimes known as *vertical exhaustion*. Of course, this is not what is happening. The order of coverage now being imposed upon Spartan (and Whitin) is sometimes known as *horizontal exhaustion* – that is, all primary policies must be exhausted *before* any excess or umbrella policies will respond.

### Legal Opinion

Because Whitin has not complied with the subcontract agreement with respect to the order of coverage for Spartan, Whitin's attorney, Sarah, looks into whether Whitin's umbrella insurer is correctly interpreting the policy. She finds very little case law on the matter – and none that apply in her state. The case law she does find is mixed – some courts follow the wording of the umbrella policy (which is similar to Whitin's umbrella “other insurance” condition) and thus follow *horizontal* exhaustion. Other states look *outside* of the insurance policies to the indemnity agreement to determine the intent of the parties as to the order of coverage, and thus follow *vertical* exhaustion. Sarah cannot tell which would apply in her state but intends to litigate the matter, and the outcome is far from certain.

### Going Forward

Whitin's attorney, Sarah, does meet with Whitin's insurance broker Claire to discuss how this situation can be handled in the future. Claire makes inquiries and finds that some of her umbrella insurers will, on a select basis, change the umbrella's other insurance condition. These umbrella insurers will agree to expressly state that in situations such as these, the other insurance condition will be amended to state that it will apply to an additional insured (if agreed to in a written contract) *before* the additional insured's own primary CGL policy protecting it as a named insured.

### Conclusion

While a written subcontract usually prescribes the order of coverage (i.e., *all* of the subcontractor's liability insurance is to be primary to *any* of the general contractor's liability insurance), it is likely that any such agreement will be contrary to the standard “other insurance” wording found in the subcontractor's umbrella or excess liability policy. Because most damage awards or settlement amounts still fall within CGL policy limits, this coverage issue often does not arise until a serious claim occurs. However, when it does, knowing how an umbrella or excess liability policy will respond (i.e., the order in which coverage applies) is very important. Simply presuming that all umbrella or excess policies would “follow form” of the “other insurance” condition of a CGL policy or that “vertical exhaustion” will be adhered to is risky at best and usually in error.

Steps taken to amend the subcontractor's umbrella or excess liability “other insurance” condition are highly recommended to eliminate or at least minimize the problems resulting from horizontal exhaustion being imposed when

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## National Flood Insurance Program, continued from page 1

accomplish this adjustment, the limitation on annual premium increase is raised from 10% to 20%, and the adjustment is expected to occur over the next five years, except for second/vacation homes previously receiving a subsidy (Sec. 100205);

2. Ending NFIP subsidies for second and vacation homes (approved May 31, 2012, Public Law 112-123), which discontinues subsidies for about 355,000 policyholders, and seeks to also bring these premium rates up to the actuarial rate. This adjustment is expected to occur over the next four years with the limitation on annual premium increase raised to 25% (Sec. 100205);

3. Requires FEMA to include catastrophic loss years when assessing flood risks in order to set annual premium rates (Sec. 100211); and

4. Prohibits FEMA from charging discounted (“subsidy”) rates for new and lapsed policies (Sec. 100205).

Some additional reforms under the Act include: requiring FEMA to update maps according to recommendations made by a technical mapping advisory council composed of government and non-government experts; streamlining FEMA’s flood mitigation programs to make them more effective and reduce repetitive flood claims; establishing an independent scientific resolution panel to consider map appeals by communities; and requiring FEMA to establish an ongoing mapping program to review, update and maintain flood insurance rate maps and requiring that the most accurate data be used in mapping and maintenance. It is estimated by the Congressional Budget Office that these reforms will *generate* a \$2.7 billion increase in net income to the NFIP over the next 10 years (assuming of course that these reforms are extended again in 2017).

As mentioned above, the Agreement does not include Senate language that would have required FEMA to classify areas of residual risk as a special flood hazard area, which classification would have subjected residual risk areas to mandatory purchase of flood insurance. In addition, the Agreement does not include Senate language that would have required that communities to be notified when they are mapped into a 500-year floodplain and also would have required lenders to give notice to purchasers or lessees of property in the 500-year floodplain. The Act, however, does require FEMA to include areas of residual risk, including those behind levees and areas with the 500-year floodplain, on flood insurance rate maps.

Additionally, the Act also includes several new provisions: (1) requiring the Federal Insurance Office to carry out a study on natural catastrophes to assess the availability and affordability of all-peril insurance; (2) requiring the Undersecretary of Commerce for Oceans and Atmosphere to establish an alternate loss allocation system (i.e. COASTAL Formula) for determining and allocating wind losses and flood losses involving indeterminate losses caused by storms with maximum winds of 39 or more miles per hour;<sup>3</sup> (3) requiring FEMA to conduct an affordability study on flood insurance, on methods to educate consumers on flood risk, on methods for establishing an affordability framework for NFIP, and on methods to aid individuals to afford risk-based premiums under NFIP through targeted assistance; and (4) establishing a five-member Scientific Resolution Panel (“Panel”) to consider appeals filed within 60 days of a proposed determination of a flood elevation by a community and an owner or lessee. Moreover, the Panel’s appeal ruling must include recommendations for the base flood elevation determination or the designation of an area having special flood hazards, which designation shall be reflected in FEMA’s Flood Insurance Rate Maps. The initial rate for any property newly mapped or updated into a mandatory flood insurance purchase area would be subsidized (50 percent of actuarial) but then increase by 20 percent per year thereafter, until premiums reach the actuarial cost.

Currently, private sector flood insurance is not reasonably available or obtainable for many, especially homeowners. In addition to providing communities and homeowners adequate time to adjust to risk-based premiums by phasing in those rates over five years, the Act gives NFIP policyholders the flexibility to pay in installments instead of one lump sum. Similarly, for communities making adequate progress in the construction of their flood protection systems, the Act allows such communities to qualify for the lowest premiums for up to five years. Moreover, the Act also requires banks and other lenders to accept non-NFIP backed flood insurance coverage, if that coverage meets the same requirements as the NFIP’s flood insurance.

While Florida’s real estate market will benefit from the added certainty of the long term extension, and perhaps even from the Act’s attempt to gradually phase these rate increases onto the general public, Florida residents, commercial and residential alike, will experience dramatic premium increases over the next five years. A significant share of Florida’s real estate market consists of property intended as second homes or vacation homes, often waterfront property within mandatory purchase zones, and so the reforms passed in May eliminating the subsidies for such property will raise the costs of purchase and maintenance for these properties, possibly reducing the

*“While Florida’s real estate market will benefit from the added certainty of the long term extension, ... Florida residents, commercial and residential alike, will experience dramatic premium increases over the next five years. ”*

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“... a general contractor is also well advised to make certain the indemnity agreement in its subcontract is properly written and enforceable ...”

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vertical exhaustion was expected.

The general contractor in our illustration, Spartan, also has a strong interest in having this coverage issue properly handled. General contractors might consider inserting wording in the subcontract that if a subcontractor chooses to use a combination of CGL and excess liability to build up to the required \$5 million limit, any excess or umbrella policy that is purchased should also be amended to *expressly* have the umbrella or excess policy respond *before* any insurance available to the additional insured (such as the general contractor’s CGL and umbrella policies). Further, considering that some courts look to the indemnity agreement to determine the order in which coverage is intended to respond, a general contractor is also well advised to make certain the indemnity agreement in its subcontract is properly written and enforceable in the jurisdiction in which the subcontract will be enforced.

<sup>1</sup> For more on meaning and implications of primary and noncontributory, see the following <http://www.irmi.com/expert/articles/2012/stanovich03-cgl-general-liability-insurance.aspx>.

<sup>2</sup> This payment by Whitin’s CGL insurer presumes that the two CGL policies involved have been arranged so that Whitin’s CGL insurer will provide coverage to Spartan as an additional insured *first* and that Spartan’s own CGL (a CGL on which Spartan is a named insured) will respond to cover Spartan only as *excess* of Whitin’s CGL.

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Craig F. Stanovich is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based risk management, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at [estanovich@austinstanovich.com](mailto:estanovich@austinstanovich.com). Website [www.austinstanovich.com](http://www.austinstanovich.com). 

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market. Second, due to Florida’s relatively unique geography and topography, much of Florida’s land mass resides in various levels of flood zones. Accordingly, the Act’s elimination of discounted rates (rates below the actuarial risk rate), no matter how gradual the phase-in, will lead to significant increased flood insurance costs for most residents in the state. Ultimately, whether Florida residents experience any benefit from the projected \$2.7 billion increase in NFIP income (perhaps in the reduction of the national debt) is still to be seen.

For additional information, please follow these links:

<http://www.ksefocus.com/billdatabase/clientfiles/172/4/1583.pdf>

[http://www.floodsmart.gov/floodsmart/pages/about/nfip\\_overview.jsp](http://www.floodsmart.gov/floodsmart/pages/about/nfip_overview.jsp)


<http://www.gpo.gov/fdsys/pkg/BILLS-112hr4348enr/pdf/BILLS-112hr4348enr.pdf>

<http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t41t42+4722+1++%28%29%20%20A>

<http://www.iiaba.net/webfolder/sc/government%20affairs/nfipextension-highlights-62812.pdf>

<sup>1</sup> Federal legislators refer to this law as “the Agreement,” because it preserves the core elements of the House bill (H.R. 1309), which passed the House on July 12, 2011, by a vote of 406 to 22, but it did not include several Senate provisions concerning residual risk. The terms “Agreement” and “Act” are used interchangeably herein.

<sup>2</sup> Since standard homeowners insurance does not cover flooding, residential and commercial property owners in flood risk zones need to safeguard against losses and damage attributable to floods often associated with hurricanes, tropical storms, heavy rains and other conditions that impact the U.S. as a whole and Florida residents in particular. Moreover, flood insurance is required to obtain a mortgage in approximately 21,000 communities in the U.S. In 1968, Congress created the NFIP to help provide a means for property owners, commercial and residential, to financially protect themselves from what congress saw as potentially exorbitant flood insurance rates. The NFIP offers flood insurance to homeowners, renters, and business owners if their community participates in the NFIP. In return, participating communities agree to adopt and enforce ordinances that meet or exceed FEMA requirements to reduce the risk of flooding.

<sup>3</sup> The provision states that the COASTAL Formula shall not be used to pay flood claims from indeterminate losses until FEMA determines, based on report findings by the National Academy of Sciences, (a) that use of the COASTAL Formula will not have an adverse financial impact on the NFIP, and (b) that the COASTAL Formula is based on valid scientific assumptions. 

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## iPad for Lawyers


By: Dave Owen, ImageServe, Inc., Winter Park, FL



A little over two years ago, Steve Jobs introduced the iPad. Initially, many people weren't sure what to do with it other than the obvious, such as reading. However, it soon became apparent that the iPad has many benefits to professionals, including Lawyers. Three areas where an iPad can benefit Lawyers are Productivity Improvement, Research and Presentations.

1. Productivity Improvement – Going to a deposition can mean lugging lots of paper to the site. On an iPad, there are Apps that can help you prepare your deposition questions. Then, you can go to the deposition, ask your questions and record the answers in one of the many Word Processing Apps available. Then just email the text files back to your office for further processing.
2. Research - There is just about any Research App you can image on an iPad from the US Code to California Immigration Law. Accessing this research on the compact and portable iPad gives you information at your fingertips.
3. Presentations – It is easy to open your PowerPoint presentations on an iPad using Apple's Keynote Software. Just get the VGA Adapter Cable (available at Apple and other stores), connect it to the 30-pin dock on the iPad and connect to a VGA presentation system, which many courts have. An iPad offers a much more compact solution than the more bulky Laptop.

We invite you to attend the Construction Law Institute Conference on March 7-9, 2013 in Orlando Florida. There will be two sessions devoted to the iPad including Security, Tips and Tricks on iPad Use, Essential iPad Apps for the Construction Lawyer, and Advanced iPad Apps for use in Depositions, Hearings and Trials. We hope to see you there.

Dave Owen is president of ImageServe, a company that helps businesses with their technology needs. He has been helping organizations achieve their goals through technology for over 28 years. For more information about ImageServe's iPad offerings, visit [www.imageserve.com](http://www.imageserve.com). Email at [Dave@imageserve.com](mailto:Dave@imageserve.com). 

**Save the date!**

### The 6th Annual


Florida Bar Real Property, Probate & Trust Law Section

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### 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>

## 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@carltonfields.com)  
 Co-Chair - Frederick R. ("Fred") Dudley (fred.dudley@hklaw.com)  
 Secretary & Newsletter - Scott P. Pence (spence@carltonfields.com)  
 Website - Christine M. Hoke (cmhoke@caseyciklin.com)  
 CLE - Michael G. Meyer (mmeyer@broadandcassel.com)  
 Legislative Liaison - Louis E. "Trey" Goldman (tre yg@floridarealtors.org)

## 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.  
 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.

### Upcoming Committee Meetings:

Date	Speaker	Topic
September 17, 2012	Rich Scislowski	Everything You Ever Wanted to Know About Certificates of Insurance
October 15, 2012	Louis "Trey" Goldman and Michael Meyer	Recent Developments in Government Insurance Programs
November 20, 2012	Patrick O'Connor	Business Interruption Insurance

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

November 15-18, 2012  
 Executive Council Meeting  
 (Out of State)  
 The Inn on Biltmore Estates  
 Asheville, North Carolina

February 7-10, 2013  
 Executive Council Meeting  
 Hotel Duval  
 Tallahassee, Florida

May 23-26, 2013  
 Executive Council Meeting/  
 RPPTL Convention  
 The Vinoy  
 St. Petersburg, Florida

## Committee Members

Adele I. Stone  
 Arthur J. Menor  
 Andrea Northrop  
 Brian A. Wolf  
 Ben Dachevall  
 Beth-Ann Schulman  
 Brian Cross  
 Bruce Alexander  
 Bruce Partington  
 Christine Hoke  
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