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

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In This Issue:

J.B.D. Constr., Inc. v Mid-Continent Cas. Co, 2014: *Construction Defects, Coverage Considerations, and Practice Points*

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

The Eleventh Circuit Court of Appeals in its unpublished July 11, 2014, construction defect case: *J.B.D. Constr., Inc. v. Mid-Continent Cas. Co*., 2014 WL 3377690 (C.A. 11 (Fla.)) interpreted a standard form Commercial General Liability ("CGL") insurance policy to deny coverage for property damage. The court upheld the Middle District of Florida's grant of summary judgment for the insurer as to its duty to indemnify but reversed as to the insurer's duty to defend and the validity of the insurer's right to accord and satisfaction for its partial payment for Contractor's attorney's fees and costs. The appellate court held:

(1) That the insurer did not breached its duty to indemnify the Contractor because the policy's "Your Work" exclusion barred coverage under paragraph 2(l) in the standard form policy because the exception for work performed on the Contractor's behalf by others, *i.e.*, the exception for work "performed on your behalf by a subcontractor", had been removed by Endorsement Number CG 22 94 101 01, precluding recovery for property damage resulting from the Contractor's work;

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Accrual of a Negligence Claim Against an Insurance Broker

By: Robert H. Friedman, Friedman, P.A., Palm Beach, FL

Accrual of a Negligence Claim Against an Insurance Broker

Insurance coverage disputes often call into question the actions of insurance brokers. Disputed coverage issues such as the adequacy of coverages or limits, failure to procure named insured or additional insured coverage, late notice, or ambiguities regarding policy terms or endorsements are examples of such disputes. Insurance brokers typically side with their policyholders during coverage disputes with their insurers, and may provide crucial testimony and documentary evidence to support the policyholder's claims. But sometimes a policyholder is faced with the prospect of having to sue its broker when coverage is unavailable.

The Tiara Decision

It has been a little over a year since the Florida Supreme Court decided *Tiara Condominium Association Inc. v. Marsh & McLennan Companies*, 110 So.3d 399 (Fla. 2013). The *Tiara* decision was groundbreaking because it abolished in Florida the economic loss rule in all contexts except product liability cases. But it also was an important broker malpractice case. The dissent in *Tiara* warned that the decision would lead to a flood of negligence and fraud claims being attached to breach of contract claims. Although that dire prediction has proven unfounded, the Tiara decision did have the effect of raising the profile of insurance broker malpractice claims.

Insurance Broker Duty of Care

Florida courts have long held that insurance brokers are required to use reasonable skill and diligence,

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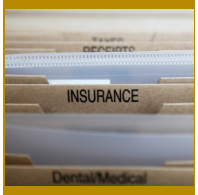
and liability may result from a broker's negligent failure to obtain coverage which is specifically requested or clearly warranted by a policyholder's expressed needs. See Warehouse Foods, Inc. v. Corporate Risk Management, 530 So.2d 422 (Fla. 1st DCA 1988). An insurance broker has a duty to obtain insurance within a reasonable time and must notify the policyholder if it is unable to timely procure insurance. See DeMarlor v. Foley Carter Ins. Co., 386 So.2d 22 (Fla. 2d DCA 1980). An insurance broker that fails to procure adequate insurance is liable to the policyholder up to the amount of insurance that should have been procured. See First Natl lns. Agency, Inc. v. Leesburg Transfer & Storage, Inc., 139 So. 2d 476 (Fla. 2d DCA 1962); Mondesir v. Delva, 851 So.2d 187 (Fla. 3d DCA 2003).



Although in Tiara the Florida Supreme Court did not discuss an insurance broker's duty of care to its policyholder, the trial court decision from the Southern District of Florida discussed the circumstances under which a "special relationship" may exist between a broker and policyholder that creates a "duty to advise" on the procurement of insurance coverage. See Tiara Condo. Ass'n v. Marsh, USA, Inc., 2014 U.S. Dist. LEXIS 3677 (S.D. Fla. Jan. 13, 2014). The Tiara trial court discussed several factual scenarios that can create a special relationship, including where the broker holds itself out as an expert in a given field of insurance, or voluntarily assumes the responsibility of selecting appropriate insurance, as opposed to merely assuming the role of an order taker.

Accrual of a Broker Malpractice Claim

In general, a policyholder that suspects its broker has committed malpractice cannot pursue a negligence claim against the broker until the disputed coverage issues with the insurer are resolved. See Blumberg v. USAA Cas. Ins. Co., 790 So.2d 1061 (Fla. 2001); Mt. Hawley Ins. Co. v. Sarasota Residences, LLC, 714 F.Supp.2d 1176 (M.D. Fla. 2010). In other words, a policyholder cannot assert a claim for broker negligence at the same time that it is claiming policy coverage. If the policyholder loses the coverage case, then its broker malpractice claim becomes ripe.

"In general, a policyholder that suspects its broker has committed malpractice cannot pursue a negligence claim against the broker until the disputed coverage issues with the insurer are resolved."

It is not clear whether a policyholder needs to litigate the coverage action to a final, negative conclusion before pursuing a broker malpractice action. In Mazzola v. Brown & Brown, Inc., No. 8:13-cv-1127-T-24-TBM (M.D. Fla. Aug. 27 2013), the policyholder sued its insurer but subsequently accepted a nuisance-value settlement offer to resolve the coverage litigation. The policyholder then sued its broker for negligence. The court denied the insurance broker's motion to dismiss on the ground that it was not necessary for the policyholder to obtain a final judgment of no coverage, since the acceptance of a nominal settlement offer was essentially an admission that the coverage action was unsuccessful.

Insurance Broker Malpractice Statute of Limitations

Because the policyholder's broker malpractice claim does not accrue until the coverage dispute is resolved, the statute of limitations on this claim does not begin to run until the coverage action is completed. See Blumberg, 790 So.2d at 1065. The Florida Supreme Court previously determined that an insurance broker is not a "professional" for purposes of triggering the two-year professional malpractice statute of limitations. See Pierce v. AALL Insurance Inc., 531 So. 2d 84 (Fla. 1988). Therefore, the four-year negligence statute of limitations applies, and under Florida Statute § 95.11(3)(a), the four-year statute of limitations begins to run "when the last element of the cause of action occurs."

The 4th DCA's Opinion in *Medical Data Systems*

Florida's Fourth District Court of Appeal recently had occasion to discuss the accrual of a broker malpractice claim in Medical Data Systems, Inc. v. Coastal Ins. Group, Inc., 2014 WL 2101238 (Fla. 4th DCA May 21, 2014) ("Medical Data Systems"). The policyholder in Medical Data Systems was a medical debt collection agency that

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Legislative Update of Insurance Related Bills

By: Fred Dudley, Dudley, Sellers & Healy, P.L., Tallahassee, FL

House Bill 271- *Workers Compensation Insurance*: Requires Stop Work Orders to be posted on the division's website "for at least 5 years," and provides for a new method of calculating the assessment rate payable by each carrier and self-insurers. This bill has been signed (see Chapter 2014-109, Laws of Florida).

Senate Bill 708 – *Property Insurance*: Prohibits cancellation or termination of a residential policy or denial of a claim more than 90 days after policy has been in effect based on credit information that was available from public records. This bill has been signed (see Chapter 2014-86, Laws of Florida).

Also **creates new provision to allow a residential insurer to challenge the estimate or evaluation of loss by an impartial umpire based** on specific criteria, and amends the definition of a "neutral evaluator" to include an engineer licensed under Chapter 471 who has experience and expertise in the identification of sinkhole activity and in

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http://www.rpptl.org

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hired defense counsel in June 2006 to defend it against a lawsuit alleging violations of the Fair Debt Collection Practices Act. Its liability insurer denied coverage because the policy did not cover liability arising out of debt collection activities. The underlying lawsuit was settled in June 2008.

Unlike the situation in *Blumberg*, the policyholder did not file a coverage action to challenge its insurer's denial, but instead sued its insurance broker for improper procurement of a policy that did not cover the central activity of the business. The policyholder sued its retail broker in 2009, but the decision focusses on the claims asserted against the wholesale broker in August 2010, since those claims were asserted more than four years after the underlying lawsuit was filed and the policyholder began incurring defense costs.

The wholesale broker moved to dismiss on statute of limitation grounds, arguing that the four-year statute of limitations began to run in June 2006 when the policyholder began incurring defense fees. The trial court agreed and dismissed the claims against the wholesale broker.

The appellate court reversed. The Fourth DCA held that the negligence claim against the broker did not accrue until June 2008 when the underlying lawsuit was settled. Although the policyholder had incurred damages in June 2006 when it began incurring defense costs, the court cited *Blumberg* for the proposition that the cause of action against an insurance broker does not begin to accrue until the conclusion of the "'related or underlying judicial proceedings or, if there are no related or underlying judicial proceedings, when the client's right to sue in the related or underlying proceeding expires.'" *Medical Data Systems* slip op. at 3 (quoting *Blumberg*, 790 So. 2d at 1065).

Lessons from Medical Data Systems (And Open Questions Regarding Broker Claim Accrual)

The Fourth DCA determined that the underlying action against Medical Data Systems constituted the "underlying judicial proceedings," and therefore the broker malpractice claim did not begin to accrue until June 2008. But *Blumberg* seemed to have in mind the coverage action as the "underlying proceedings". Presumably, if the policyholder in *Medical Data Systems* had filed coverage litigation against its insurance company, and the coverage action continued after the underlying action was settled, the statute of limitations on the broker claim would not begin to accrue until the coverage action was complete. Medical Data Systems did not sue its insurer, but it had until June 2013 to do so if it wished. See State Farm Mutual Automobile Ins. Co. v. Lee, 678 So.2d 818 (Fla. 1996) (discussing accrual of a claim against an insurer for breach of contract).

The Fourth DCA did not need to find that Medical Data Systems had until June 2017 to file suit against its insurance broker, although such a ruling would seem to be the natural extension of Blumberg in situations where a policyholder does not sue its insurer. Otherwise, it would be possible for a policyholder to have its broker claim time-barred while its coverage claim is not. Whether a policyholder could "revive" its broker malpractice claim in such a situation by unsuccessfully pursuing coverage litigation is an open question. But, as can be seen from the caselaw, policyholders need to be aware of several important timing issues when they are faced with a disputed insurance claim and they suspect their broker may be at fault for the lack of coverage. IM

"policyholders need to be aware of several important timing issues when they are faced with a disputed insurance claim and they suspect their broker may be at fault for the lack of coverage ."

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other potential causes of structural claims. Amends alternative procedures for resolution of disputed sinkhole claims by allowing the department to deny, suspend or revoke its certification of a neutral evaluator on specific ground (with rulemaking authority for such proceedings).

Creates a Home **Owner Bill of Rights** for a personal lines residential property insurance policyholder who files a claim of loss, but restricts failure to give notice thereof to administrative remedies only and makes that failure inadmissible in a civil action against the insurer. **EDITOR'S NOTE:** Interestingly, the statutory form notice of rights "advises" the policyholder to: contact the insurance company before entering into any contacts for repairs in order to confirm any managed repair policy provisions or optional preferred vendors; carefully read any contract that requires payment of out-of-pocket expenses or a fee based on a percentage of the insurance proceeds; to confirm that the contractor is licensed; and, to require proof of insurance before beginning repairs.

Senate Bill 1672 – *Property Insurance*: While this bill primarily deals with the licensing and regulation of agents, as well as some of the internal problems experienced lately by Citizens Property Insurance Corporation, it has several provisions that directly impact the construction industry. This bill has been signed (see Chapter 2014-104, Laws of Florida).

First, it **adds to the prohibitions imposed on public insurance adjusters** by disallowing them to enter into a contract or accept a power of attorney that vests in the public adjuster the effective authority to choose the contractor to perform repair work in a property insurance claim.

Second, it adds, **AS A 3RD DEGREE FELON, a contractor** who, knowingly and willfully and with intent to injure, defraud or deceive, pays, waives or rebates all or part of an insurance deductible payable to the contractor for repairs to property covered by a property insurance policy. IM

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(2) That the insurer had a duty to defend because the complaint made a case for breach of contract, statutory liability under §553.84 for violation of a building code, and negligent performance by the contractor, J.B.D. The court remanded for further consideration of the "consequential damages" alleged as part of the Contractor's defense costs;

(3) That the fact that the insurer had mailed a check to reimburse a portion of the insured's attorney's total fee did not constitute accord and satisfaction of the full obligation to defend.

Construction defect facts - no evidence of covered property damages

Sun City, the building owner, contracted with the insured and bonded general contractor to construct a pre-fabricated fitness center as an addition to an existing atrium-style building. Each and every building component of the fitness center was pre-fab: building shell, slab concrete, building block, and rubber flooring. However, the fitness equipment, furniture, and furnishings were provided by others. The pre-fab fitness center was connected to the existing structure at the roof line. From contract to completion, the project took two and one-half years.

Soon after completion but before the Owner made final payment under the contract, the fitness center began experiencing water intrusion. The offending condition, as reported by the Owner's expert, occurred at the roof line connections. The expert witness report also identified water intrusion through the center's roof, windows, and doors, although the court considered that the report did not specifically identify the damages caused by the water intrusion. Specifically, the steel rusted, the paint peeled, and the stucco blistered and became discolored.

"The Florida Supreme Court has been clear that the cost of removing or repairing defective work does not qualify as a claim for "property damage."

The Owner withheld final payment. The parties were not able to resolve the payment claim or the construction defects claim. To move the matter forward, now almost 2 years later, the Contractor sued in state court for payment due under the contract. Predictably, the Contractor's suit for payment drew the Owner's counterclaim for damages against the Contractor for breach of contract, statutory liability under §553.84, and negligence. The Owner's counterclaim alleged "damages to the interior of the property, other building components and materials, and other, consequential and resulting damages" along with "damage to other property."

The Contractor tendered the counterclaim to the insurer to defend and indemnify. The insurer reserved its rights in writing under the policy within days after tender. The Contractor's second request to defend received only a response from the insurer that its investigation was "in process" with no further response on the issue. Two months later, the Owner and Contractor settled the construction contract claims brought in state court for $181,750.94, which was less than Owner's demand. Again, the Contractor demanded that the insurer pay its attorney's fees and costs along with damages specifically settled.

At this point, the Contractor's counsel had requested that the insurer defend and indemnify at least five (5) times when finally the insurer forwarded a check for $5,717.77, deducting $5,000.00 as allowed under the policy for a total claim of $10,717.77. Thereafter, the Contractor requested full reimbursement again, filed a Civil Remedy Notice, and advised the insurer of its intention to pursue appropriate legal remedies against the insurer. Receiving no response, the Contractor brought its action in state court for declaratory judgment against Mid-Continent Casualty Co., for the insurer's failure to defend and indemnify under the CGL insurance policy. The insurer removed to federal court on diversity jurisdiction.

Coverage considerations – no duty to indemnify, no breach

The policy insuring agreement recited the insurer's obligation to pay "those sums that the insured becomes legally obligated to pay as damages because of…'property damage' to which this insurance applies." The insurance is deemed to apply to "property damage" caused by an occurrence. Citing U.S. Fire Ins. Co. v J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007) and Auto Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008), the J.B.D. court announced that, "The Florida Supreme Court has been clear that the cost of removing or repairing defective work does not qualify as a claim for "property damage."

The analysis then moved to whether the cost to repair any of the defective work was covered. The court held that no coverage existed for the damages presented. Even though the court declined to extend its earlier split decision in *Amerisure Mutual Insurance Co. v Auchter Co*., 673 F.3d 1284 (11th Cir. 2012) as limiting the definition of property damage, the court reviewed the *Auchter* construction facts as similar to those presented in J.B.D. Specifically, the *Auchter* court decided whether dislodged individual roof tiles, which damaged other portions of the same roof system, caused property damage to the work itself and, therefore was not covered, or was the cost to repair "property damage" to "other property", which would be covered. Accordingly, the *Auchter* insurance policy, although allowing coverage for property damage resulting from the subcontractor's defect work, did not provide coverage for property damage to replace the individual tiles because the individual tiles were an interlocking part of the entire roof system. The entire roof system was the subcontractor's work.

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The Eleventh Circuit, however, reasoned that the outcome of *J.B.D.* did not depend upon extending *Auchter* because *J.B.D.'s* policy language, which differed from the *Auchter* policy, precluded coverage by virtue of Endorsement 22 94 101 01.

The fitness facility leaked. The expert reported that the water intrusion occurred around the fitness center's connections to the existing structure. However, the court concluded that it had insufficient evidence that covered property damages, unconvinced that the experts had properly outlined and documented covered property damage:

> *...engineering reports J.B.D. directs the court to vaguely speak of water intrusion points, not water damage. Absent evidence of actual damage to the Atrium building, the engineering reports themselves are insufficient to create a genuine dispute that J.B.D.'s work caused damage to some property other than the fitness center.*

As to the covered losses articulated in the settlement agreement, the Contractor argued that the settlement agreement was based upon estimates of the cost to repair "other property", specifically and presumably damages caused by the water intrusion into the fitness facility and the atrium building at the connection points. However, the court rejected this point and stated that the settlement value was not covered under the policy and that the insurer had no duty to indemnify the portion of the settlement for legal fees and costs.

Practice points

The *J.B.D.* court provides insight into requirements for contracting, use of experts, pleading and documenting settlements, and for selection of judicial forum. The case suggests the following conclusions:

Practice Tip No. 1 – Pleading: *The Owner alleged that the Contractor breached the contract by failing to provide labor, services, and materials in a workmanlike manner; breached its duty of care; violated the minimum building codes; and that the defects and deficiencies caused "damages to the interior of the property, other building components and materials, and other, consequential and resulting damages" and "damage to other property." The allegations triggered the duty to defend, even though the court later concluded, somewhat contradictory to its holding, that the insurer was not obligated to pay attorney's fees and costs for defense of the Owner's claims made necessary by the insurer's failure to assign defense counsel. Black letter insurance law is that the duty to defend is broader than the duty to indemnify. The court cited Jones v Fla. Ins. Guar. Ass'n, 908 So. 2d 435 (Fla. 2005) stating that even allegations which are factually incorrect or meritless will trigger the duty to defend. This emphasis on the scope of the duty to defend does not, however, constitute a grant of immunity for unethical pleading.*

Practice Tip No. 2 – Jurisdiction: *As the pursuit to persuade the courts that certain property damage, colloquially known as "rip and tear" damages, is covered under the standard form CGL policy CG 00 01 and why such property damage does not squarely fall within the "business risk" exclusion, this case is instructive of the federal court's analyses of standard insurance policy language as applied to certain construction facts and conditions. Compare and contrast the court's handling of the insurance policy and construction defects in J.S.U.B. and Pozzi with Auchter cited in this article.*

Practice Tip No. 3 – Experts: *Your expert must report not only the broad causes of damage but also the specific results of damage. For example, the J.B.D. court accused the expert report of speaking only vaguely of "water intrusion points" without tying the water intrusion to "property damage" caused by the water intrusion. Without specifics the court considered it needed as to exactly what property was fatally impacted by the water intrusion, the court did not consider that it had the evidence of actual damages and the genuine dispute that the Contractor's work caused damage "to some property other than the fitness center."*

Practice Tip No. 4 – Contract Drafting: *In contracting for coverage, call out specific endorsements to the CGL policy which are unacceptable because they exclude coverage for property damage. Endorsement Number CG 22 94 101 01 is one example of an unacceptable endorsement, particularly since most contractors perform the actual trade work entirely using subcontractors and tradesmen.*

Practice Tip No. 5 – Affirmative Defenses: *Anticipating a third party's defense of accord and satisfaction in a contract settlement as here with the insurer requires care and precision when accepting a check for partial payment of the claim. Here, contractor's counsel wisely requested in writing whether J.B.D. could negotiate the check without risk of waiver and, although unstated, without the risk of facing accord and satisfaction, as a defense. No doubt insurers in the future will be careful not to confirm in writing, as the insurer here did, that it consents to the Contractor's unfettered privilege to negotiate the partial payment. In this case, the insurer's defense to the declaratory action failed.* IM

"In contracting for coverage, call out specific endorsements to the CGL policy which are unacceptable because they exclude coverage for property damage."

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:

Co-Chair - Wm. Cary Wright (cwright@cfjblaw.com.com)
Co-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
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Legislative Subcommittee—Sanjay Kurian (skurian@becker-poliakoff.com
Website - Timothy P. Lewis (tlewis@milbermakris.com)
Legislative Liaison - Louis E. "Trey" Goldman (treyg@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, 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

September 18-21, 2014
Executive Council Meeting
(Out of State Meeting)
Sofitel Chicago Water Tower
Chicago, Illinois

November 13-16, 2014
Executive Council Meeting
Waldorf Astoria Naples
Naples, Florida

March 19 - 22, 2015
Executive Council Meeting
Ritz Carlton Grande Lakes
Orlando, Florida

UPCOMING CLE:

A special RPPTL Section-wide CLE presentation by **Bruce Partington** on behalf of the Insurance and Surety Committee.

Practical Advice for Clients on Development and Construction Insurance Issues and Claims

Date: TBD

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.

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

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