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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Invisible Exclusions, Part I

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Many insurance policies today include "invisible" exclusions – exclusions that may not be brought to the attention of the insurance buyer and that will not be declared on a certificate of insurance. This article will address three of the more dangerous such exclusions in a construction context and what to do about them.

But first, a little background: Construction agreements include provisions requiring indemnification of the upstream party (the party requiring the coverage). In Florida, it remains permissible to require indemnification for the upstream party's joint, concurrent and/or sole negligence, so long as the indemnification provision complies with Section 725.06, Florida Statutes.

General liability insurance customarily provides "contractual liability" coverage applicable to such provisions, covering liability for bodily injury and physical injury to tangible property arising from a contractual assumption of these exposures. Beware: This contractual liability coverage is being deleted or eroded in a variety of manners that are sometimes difficult to recognize.

See Invisible Exclusions, continued on Page 2

New Supplementary Arbitration Rules: Good News for Sureties?

By: Giselle Leonardo, Esq. Arbitrator and Civil Engineer. Giselle Leonardo P.A., Ft. Lauderdale, FL

In June 2014, the American Arbitration Association ("AAA"), in response to feedback from its users, issued the New Supplementary Rules for Fixed Time and Cost Construction Arbitrations ("Supplementary Rules"). The new Rules were developed and promulgated in response to users in the marketplace perceptions that arbitration has become too expensive, too time consuming and too unpredictable in terms of time and cost. The goal of the new Rules is to provide an arbitration process that will be predictable in terms of total time and cost. The Supplementary Rules are most appropriate for cases that have specific and discrete issues that would benefit from limited discovery and document exchange. Additionally, the Supplementary Rules contemplate that the parties and counsel will work in a cooperative fashion to advance the case consistent with the established timeframes. The Supplementary Rules are designed to be in addition to, on an optional basis by its users, the existing Construction Arbitration Rules.

The time to complete the arbitration and the cost of the arbitration including AAA fees and arbitrator costs will be according to the Time/Cost Schedules and based on the larger of the amount

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ISO Endorsement Form CG 21 39 10 93, Contractual Liability Limitation Endorsement. Contractual liability coverage is provided in a general liability policy through a series of six definitions of an "insured contract". These definitions are applicable to an exception to an exclusion of the coverage provision. Confusing, right? What's critical to know is that the sixth definition is the one that provides coverage for liability assumed in an indemnification agreement. The Contractual Liability Limitation Endorsement deletes that sixth definition, completely eliminating insurance funding for that indemnity, and should be avoided at all cost.

"Discuss these exclusionary endorsements with your insurance broker, and verify that they are not included in your insurance program."

ISO Endorsement Form CG 24 26 07 04, Amendment of Insured Contract Definition. This endorsement modifies that sixth definition, eliminating claims based upon allegations of the sole negligence of the Indemnitee (the upstream party). This is problematic for two reasons:

1. As stated above, some indemnification provisions may require that the upstream party be held harmless for at least some portion, if not all, of its sole negligence. The downstream party will be held responsible for such protection, whether funded by insurance or not.

2. The most common type of claim arising from ongoing work is what attorney's refer to as a "third party over action." This occurs when an employee of a downstream party is injured on the job. That employee can make a workers' compensation claim against his employer, but also retains the right to bring litigation for that injury. That said, he cannot sue his employer due to the exclusive remedy rule of workers' compensation, so suit is brought solely against the upstream contractor or owner, who then demands protection from the downstream party under the indemnification agreement. That type of claim is usually funded by general liability insurance, but this endorsement eliminates coverage for the assumption of another party's sole negligence.

Modification of the Employer's Liability Exclusion. Another way that insurance companies eliminate coverage for suits brought by employees of a downstream party is to change the wording of the Employer's Liability exclusion. This provision, part of every general liability policy, excludes coverage for injury to an employee of the insured, but has an exception stating that the exclusion does not apply to liability assumed by the insured under an "insured contract." Some insurance companies delete the exception to this exclusion, thereby eliminating the very provision that would otherwise provide coverage.

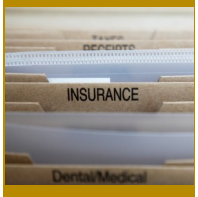
Discuss these exclusionary endorsements with your insurance broker, and verify that they are not included in your insurance program. But what if you are the upstream party depending on a certificate of insurance? Two steps can be taken:

1. In your insurance requirements, state that these endorsements are prohibited on the downstream party's insurance program; and

2. Require a copy of the Schedule of Forms and Endorsements page verifying that they haven't been included in the underlying insurance program. IM

Legislative Update of Insurance Related Bills

By: Frederick ("Fred") R. Dudley, Esq.,[1] Dudley, Sellers & Healy, P.L., Tallahassee, FL



The 2015 regular legislative session began on Tuesday, March 3rd, for 60 calendar days; it is scheduled to "sine die" (adjourn without day) on Friday, May 1st (Law Day USA). The Section's Insurance and Surety Committee makes an effort to monitor, and in some cases to prepare position papers on, bills with the potential to impact commercial liability insurance policies and surety bonds, including terms, conditions, coverages and exemptions, and this year's session is no exception.

While there are many insurance-type bills filed for consideration during this current session, there are two (2) that have gotten lots of attention from the Construction Law Bar, as follows:

House Bill 501, by Representative Jay Fant (R-Jacksonville), and it's Senate "companion" bill, **Senate Bill 1158**, by Senator Kelli Stargel (R-Lakeland), is strongly supported by Associated Builders and Contractors ("ABC") and would amend Section 95.11(3)(c) to reduce the Statute of Repose for design, planning or construction defects from TEN (10)

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years to SEVEN (7) years. This was last amended in 2006 to reduce the Statute of Repose from the then-15 year period to the current 10 year period, and was based primarily on (1) the majority of states (which are still at 10 years) and (2) lack of availability of such coverage for that period of time (which no longer appears to be a problem). The Statute of Repose BARS any legal action for HIDDEN (latent) defects, notwithstanding that the injury is not discovered; in fact, two (2) well-respected engineers who represent both contractors and owners in such cases testified at the first (and so far, the only) committee hearing on this bill that the vast majority of these defects are discovered between years 7 to 10 after completion of construction (the main "trigger" for the Statutes of Limitations). This testimony, and the adverse impact of this bill on "public" projects (such as schools, hospitals, bridges, etc.) almost killed the bill; it was passed by the Civil Justice Subcommittee by a vote of only 7 to 6, and is now waiting to be heard in the Judiciary Committee (chaired by Rep. Charles McBurney, R-Duval). As expected, the insurance industry lobbyists are working hard in favor of this bill, since it gets their clients "off the hook" for many lawsuits to defend and policy holders to indemnify.

House Bill 87 by Rep. Kathleen Passidomo (R-Naples), and it's Senate companion bill, **Senate Bill 418** by Senator Garrett Richter (R-Naples), is being strongly pushed by Associated General Contractors ("AGC") South Florida Chapter, and would amend Chapter 558 (Notice and Opportunity to Cure) to turn it into a substantive requirement and adverse proceeding by making the contents of the required Notice of Claim so onerous that most owners could not comply, thus allowing contractors to stay litigation in order to contest the sufficiency of the notice. As originally filed, this bill would also provide for an award of attorney fees pursuant to section 57.105 TO THE CONTRACTOR; fortunately, that provision should be removed, perhaps in favor of a "prevailing party" provision that would allow EITHER PARTY to seek recovery of Chapter 558 fees, costs and expenses IF they prevail in the subsequent litigation. This bill has already passed two of its three committees of reference, and should be heard by the House Judiciary Committee in the next week (chaired by Rep. McBurney as noted above). IM

[1] Mr. Dudley has been retained to lobby against the bills described in this article.

Supplementary Arbitration Rules, continued from page 1

of the claim or counterclaim. However, modifications to the schedule may be permitted at the discretion of the AAA and may result in the case being handled under the Regular track or the Large Complex Case track, in which case those fees would apply. Also, the arbitrator, upon good cause, may grant requests for additional hearing days beyond those in the schedule or may grant extensions of timeframes for completion of the arbitration.

There are limitations on Discovery and Document Exchange. Some of the highlights include:

1. Specified time for completion of all discovery
2. Deadline for discovery requests to be submitted to the Arbitrator
3. Limits on the amount of discovery including

    a. whether or not depositions will be taken;
    b. the extent to which documents or categories of documents are "presumptively discoverable", based on relevance or whether they are in the control of a party, are not privileged, or are unreasonably burdensome;
    c. deadlines for the exchange of all evidence; and
    d. the format in which evidence will be presented at the hearing is to be delivered to the parties.

Aside from limitations on discovery and the number of hearing days, there are rules governing the award. The award shall be issued within twenty (20) days of the close of the hearings and the award shall be no longer than three (3) pages in length.

The AAA shall exclusively administer arbitration under the Supplementary Rules, and all arbitrators appointed pursuant to the Supplementary Rules, including arbitrators appointed by the parties shall be members of the AAA Roster of Construction Neutrals. The Supplementary Rules only apply in cases whether there are two parties, however, the limitation does not apply to a surety if the surety is represented by the same counsel as its principal and has not asserted an independent claim in the arbitration against its principal or the other party. IM

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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)
Vice-Chair and CLE - Michael G. Meyer (mgmeyer83@gmail.com)
Vice-Chair, Secretary & Newsletter - Scott P. Pence (spence@cfjblaw.com.com)
Legislative Subcommittee—Sanjay Kurian (skurian@becker-poliakoff.com
Website - *Position Open*
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

June 4-7, 2015
Executive Council Meeting/
RPPTL Convention
Fontainebleau Florida Hotel
Miami Beach, Florida

July 30-August 1, 2015
Executive Council Meeting &
Legislative Update
The Breakers
Palm Beach, Florida

September 30-Octobier 4, 2015
Out-of-State Executive
Council Meeting
The Ritz Carlton
Berlin, Germany

Scott P. Pence
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 me at spence@cfjblaw.com.

UPCOMING CLE:

Save the Date:
July 15, 2015

A special RPPTL Section-wide CLE presentation on behalf of the Insurance and Surety Committee, entitled:

Cyber and Data Risks and Related Insurance Issues

to be presented by:

Richard "Rick" Betterley, CMC
Jeremy R. Henley, CHPC
Roberta D. Anderson, Esq.

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://

http://www.rpptl.org