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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To Notice or Not To Notice: That is the Question [The Interplay Between 558.004(13) and *Altman Construction*]

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Introduction:

Effective October 1, 2015, Chapter 558, commonly known as the notice and opportunity to cure statute for claims on construction defects, is amended in several respects. While some of those changes will impact the specificity of the Notice of Claim, the "driving force" behind this revision is the impact such notices may have on triggering an insurer's duty to defend under a commercial liability policy for construction defects claims.

Until October 1, 2015, section 558.004(13) provided the following on this point:

> (13) This section does not relieve the person who is served a notice of claim under subsection (1) from complying with all contractual provisions of any liability insurance policy as a condition precedent to coverage for any claim under this section. However, notwithstanding the foregoing or any contractual provision, ***the providing of a copy of such notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes.*** Nothing in this section shall be construed to impair technical notice provisions or requirements of the liability policy or alter, amend, or change existing Florida law relating to rights between insureds and insurers except as otherwise specifically provided herein.
>
> [Emphasis added]

See 558 and Altman, continued on Page 2

Concurrent Proceedings – Staying of Litigation Pending Arbitration

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

When a subcontractor and a general contractor have an agreement to arbitrate, can the subcontractor still proceed against the bonding company on a conditional payment bond prior to resolving the arbitration?

A recent United States District Court ruling says no. This article summarizes the recent court ruling in *Hofer, Inc. v. Fidelity and Deposit Company of Maryland* [1] that addressed whether a subcontractor could proceed forward with a law suit against a bonding company while arbitration was pending between the subcontractor and the general contractor.

The Court in *Hofer* held that a the subcontractor's law suit to recover against the bonding company on a conditional payment bond would be stayed pending arbitration between the subcontractor and the general contractor even though the conditional payment bond did

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However, effective October 1, 2015, the following additional phrase was added by section 3, 2015-165, Laws of Florida, following the emphasized language above:

…***unless the terms of the policy specify otherwise.***

"Unless and until such a policy change occurs, Altman stands for the legal principle that providing a copy of the Notice of Claim will remain a non-triggering event to a carrier's duty to defend"

History of Legislative Changes:

Associated General Contractors ("AGC") proposed and supported House Bill 87, sponsored during the 2015 regular state legislative session by Representative Kathleen Passidomo (R - Collier County), which incorporated these changes to Chapter 558, Florida Statutes. Originally, the lobbyist for AGC stressed the importance of this bill in terms of making the Notice of Claim more specific, thus giving better notice and opportunity to the recipient of the Notice (i.e., the contractor); the exact example used was a notice that alleged there were "cracks in the sidewalk" of a large condominium project that had lots of sidewalk.

However, it became very clear as this bill progressed that it was primarily motivated by the then-pending federal court case in the Southern District of Florida, *Altman Construction v. Crum & Forster Specialty Insurance Company*, Case No. 13-80831, Federal District Court for the Southern District of Florida ("*Altman*" herein).

The "Altman" Decision:

In *Altman* the general contractor was served by a condominium association with several Notices of Claim pursuant to Chapter 558, Florida Statutes. *Altman* addressed a number of the alleged construction defects, but made a claim for reimbursement of the costs of doing so, and to provide for the remaining costs to complete, by providing a copy of the Notice of Claim to its liability insurance carrier, *Crum & Forster*. When the carrier refused to provide a defense to the construction defect claims, *Altman* sued the carrier, seeking a determination that the Notice provided to the carrier triggered the carrier's duty to defend.

While oral arguments on competing Motions of Summary Judgment were presented in this case in February, a final order was not issued in until June 4, 2015…many weeks after House Bill 87 was passed on April 24, 2015. This bill was presented to the Governor on June 11, 2015, and signed it into law on June 16, 2015. Interestingly, then, before the bill was even sent to the Governor for final action, the court recognized this new provision of House Bill 87 as an amendment that "provides insight into the legislative intent" of this subsection.[1]

In summary, the *Altman* court held that:

> Section 558.004(13) does not preclude the contractor's claim, if made in accordance with the terms of the liability policy; and,
>
> Chapter 558 is not a "civil proceeding" as required by the terms of the liability policy in order to trigger the duty to defend.

Conclusion:

Current liability insurance policies do not provide that a Notice of Claim under Chapter 558 triggers the carrier's duty to defend. Since the terms and conditions of general liability insurance policies are proposed to each state by the Insurance Service Office ("ISO"), a national organization of insurance carriers, any change in this area will most likely have to come from the insurance industry itself, which does not seem likely to want any earlier trigger its duty to defend.

Accordingly, while AGC was successful in changing these statutory provisions, changing the terms of liability insurance policies in Florida appears unlikely. Unless and until such a policy change occurs, *Altman* stands for the legal principle that providing a copy of the Notice of Claim will remain a non-triggering event to a carrier's duty to defend, and the statutory change will be rendered meaningless. Conversely, the failure to provide the carrier of a 558 notice should not result in a denial of liability by the carrier based on a lack of timely notice of the claim.

General contractors, many of whom don't want a 558 notice to constitute a claim under their liability policies, will be able to continue to either respond by taking the opportunity to inspect and correct alleged construction defects on a pre-suit basis, as they see fit, or by ignoring and defending any resulting litigation over construction defects through their liability insurance carrier.

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[1] See footnote 3 of the court's opinion.

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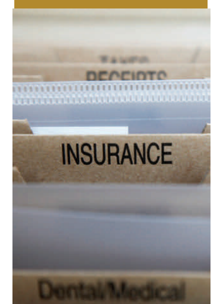
not contain an agreement to arbitrate when the subcontract between the general contractor and the subcontract contained an arbitration clause.

The underlying facts in this case are as follows:

The dispute emanated out of the construction of an apartment complex. The parties of interest for this discussion are the general contractor, the subcontractor and the bonding company. The bonding company had issued a conditional payment bond.

The dispute arose between the general contractor and the subcontractor out of the subcontractor's claims of non-payment for work performed. The general contractor claimed that the subcontractor's work was defective. The subcontract between the general contractor and the subcontractor contained an arbitration clause. The general contractor demanded arbitration pursuant to the subcontract. Prior to the demand for arbitration filed by the general contractor, the subcontractor filed a law suit against the bonding company. The conditional payment bond did not contain an arbitration provision, and it did not incorporate by reference the terms for arbitration contained in the subcontract. The Court noted that because there was no arbitration clause in the bond, the subcontractor was not "obligated to arbitrate" with the bonding company.[2]



The bonding company petitioned the court to stay the law suit pending the conclusion of the arbitration between the general contractor and the subcontractor. The Court recognized that there is a split among the courts on this issue. Some of the courts have held that a stay in similar instances is discretionary, not mandatory,[3] while other courts have held that § 3 of the Federal Arbitration Act authorizes a stay of "*any* suit" for "*any* issue referable to arbitration", even if the parties in the suit did not agree to arbitrate.[4]

The Court noted that "at the very least, a stay may be entered as a matter of discretion (*citations omitted*)… Courts generally apply a 'heavy presumption' that litigation and arbitration can proceed jointly, at least over non-arbitrable claims" (*citations omitted*) and went on to state, "[b]ut if arbitrable claims predominate over nonarbitrable ones, or if arbitrable issues are crucial for the determination of nonarbitrable claims, a court has the discretion to stay the litigation." (*citations omitted*).

The Court noted that the obligation of the bonding company is limited to the extent of the obligation of the general contractor; if the general contractor is not liable to the Subcontractor, neither is its bonding company. The Court reasoned that since the general contractor and the subcontractor agreed to arbitrate pursuant to the provisions contained in the subcontract, it was logical for the dispute between the general contractor and the subcontractor to be determined in the arbitration and that the resolution of that arbitration may resolve any pending issues as between the subcontractor and the bonding company.

The Court considered two arguments advanced by the subcontractor. The first argument was that the conditional payment bond obligated the bonding company only "to the extent that the [general contractor] has been paid for the labor, service, or materials provided by" the subcontractor. However the Court rejected that argument based on the record and the fact that the bonding company did not assert a defense to the subcontractor's claims based on that clause. The Court further stated the dispositive issue on the subcontractor's claims against the bonding company was whether the general contractor paid the subcontractor and that was the exact issue in the arbitration. The Court also rejected the subcontractor's second argument that arbitration is less efficient and consistent than litigation, basically stating that the parties agreed to arbitrate and the issue between the subcontractor and the bonding company should await the outcome of the underlying arbitration.

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[1] Case No. 2014 WL 644598 (N.D. Fla. Feb. 16, 2014).

[2] 2014 WL 644598.

[3] AgGrow Oils LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa 242 F. 3d 777, 782 (8th Cir. 2001) and IDS Life Ins. v. SunAmerica, Inc., 103 F.3d 524, 530 (7th Cir. 1996).

[4] Contracting NW, Inc. v. City of Fredericksburg, Iowa, 713 F.2d 382, 386-87 (8th Cir. 1983), emphasis by the Eighth Circuit. Note that other courts have held that § 3 of the Federal Arbitration Act requires a stay over third party claims based on "considerations of judicial economy and avoidance of confusion and possible inconsistent results." Am. Home Assurance Co, v. Vecco Concrete Constr. Co. 629 F.2d 961, 963-64 (4th Cir. 1980).

"… the obligation of the bonding company is limited to the extent of the obligation of the general contractor; if the general contractor is not liable to the Subcontractor, neither is its bonding company."

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, Secretary & Newsletter - Scott P. Pence (spence@cfjblaw.com.com)
Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
Co-Vice-Chair and CLE - Michael G. Meyer (michael@jrtampalaw.com)
Legislative Subcommittee - Sanjay Kurian (skurian@becker-poliakoff.com
Legislative Liaison - Louis E. "Trey" Goldman (treyg@floridarealtors.org)
Website - ***Open***
Membership - ***Open***

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?

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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

February 25 - 28, 2016
Executive Council Meeting
Marriott Tampa Waterside
Tampa, Florida

June 1-5, 2015
Executive Council Meeting/
RPPTL Convention
Loews Portofino Bay Hotel
Orlando, Florida

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.

We Need You!

We are in need of persons to chair our website and membership subcommittees. Please contact us if you would like to get 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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