



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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Insurance in Leases

By: Richard D. Eckhard and Lisa G. Gilleland, Holland & Knight LLP, Tampa, FL

Risk allocation in leases is accomplished through insurance, exculpation and waivers, and indemnification. While the drafting and negotiation of a lease requires integration of all of these concepts, the insurance provision is too frequently given a cursory review. However, the best leasing practice involves reading and analyzing the applicable insurance policies and endorsements and working with the client's insurance adviser to ensure proper risk allocation between the parties is achieved. For a leasing lawyer, this process starts with a basic understanding of the insurance types and forms available.



PROPERTY INSURANCE

Property Insurance is "first-party" insurance covering the party incurring the loss. Property insurance is purchased either for replacement cost of the insured asset or its actual cash value. There are various types of property insurance coverage, the most common forms being: (i) ISO Basic Form, covering only specifically identified perils, also known as "standard fire and extended coverage", (ii) ISO Broad Form, which expands Basic Form coverage to include additional perils; and (iii) ISO Special Form, which provides the most comprehensive coverage, protecting

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Insurance Disclosures Under Fla. Stat. § 627.4137: Failure to Comply Can Have Dire Consequences

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

627.4137 Overview

Fla. Stat. § 627.4137 is an important tool for plaintiff's counsel in construction litigation. The statute requires defendants, upon receiving a 627.4137 demand, to disclose the identity of its insurers to the plaintiff and to forward the request to its insurers. Each insurer then has 30 days to provide a sworn statement setting forth its policy limits and coverage defenses, and to provide the plaintiff with a copy of its policy. The statute also provides that the 627.4137 disclosure shall be amended immediately if new information is discovered. There is no specific penalty provision in the statute that applies if the defendant or its insurer fails to fully or timely comply with the request.

Because a 627.4137 request is made pre-suit, it is often one of the first discovery tools that a plaintiff uses in construction litigation. Although the request itself is simple, and most lawyers send a form 627.4137 letter as a matter of course at the beginning of the dispute, the 627.4137 disclosure process is a process that is fraught with compliance issues that impact both plaintiffs and defendants.

Division of Disclosure Responsibility under 627.4137

The statute places disclosure responsibilities on both defendants and their insurers. Defendants must be diligent to identify all insurers, including their direct insurers (primary and excess) for all lines of



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against all perils except those expressly excluded. Special Form exclusions typically include earthquake, flood, windstorm, boiler explosion, war and nuclear reaction, costs resulting from ordinance or legal requirements, and electronic data processing damages.

LIABILITY INSURANCE

Liability is "third party" insurance, which compensates a party injured by the act or omission of the insured. Liability insurance indemnifies the insured against claims it is legally obligated to pay to a third party as a result of "bodily injury", "personal injury (including 'advertising injury')" and "property damage". "Bodily injury" is physical harm to individuals resulting from an occurrence. "Property damage" is physical harm to tangible property resulting from an occurrence. "Personal injury" is injury other than bodily injury, arising out of one or more of the following offenses: false imprisonment, malicious prosecution, wrongful eviction, or slander or libel that tarnish a person's products or services or right of privacy. "Advertising injury" includes misappropriation of advertising styles or ideas, or copyright infringement. Exclusions under a Commercial General Liability policy ("CGL") generally include pollution; care, custody and control; personal injury liability assumed under an indemnity agreement; and intentional acts.

The most prevalent form of liability insurance is ISO CGL policy CG 00 01. Other liability policies include automotive liability; workers' compensation; and employee's liability.

The ISO CGL policy is written on an "occurrence" basis, covering injuries and damage occurring during the effective period of the policy. The alternative, which is rare in the context of a leasing transaction, is "claims made" coverage, under which coverage is provided against claims actually made when the policy is in effect, without regard to when the injury or damage occurred. CGL policies contain six limits in coverage: exhaustion of that limit terminates the insurer's obligations under the policy, including the obligation to defend. The most important limits are general aggregate limit; products-completed operations aggregate limit; and personal injury and advertising liability limit. If the party has a blanket policy, the policy may include a designated locations general aggregate endorsement that sets the aggregate limits of the policy as to each location.

A party may also obtain an umbrella policy that provides additional coverage for liability beyond the primary CGL policy. As umbrella coverage is a separate policy, it may initially be inconsistent with the CGL policy creating gaps in coverage, but can be endorsed to avoid such inconsistencies.

The CGL policy can be endorsed to name a third party as an "additional insured". It is common for a landlord to require a tenant to name landlord as an additional insured on its CGL policy. There are over thirty different forms of additional insured endorsements, so the endorsement language must be carefully reviewed to understand the coverage afforded.

SUBROGATION

Subrogation is an equitable doctrine under which one creditor is substituted for another. In the context of a lease, this comes into play when one party causes damage to the property of the other, and the owner of the damaged property is compensated by its insurer. In that event, the insurer takes over the claim of the property owner against the party responsible for the property damage. Most well negotiated leases contain a waiver of subrogation as property insurance is priced without regard to the possibility of a subrogation claim, and it is not in the interest of the parties to a lease to permit their respective insurers to sue the other party. Additionally, the tenant typically contributes towards the cost of landlord's property policy and thus should receive the benefit of the purchased coverage.

RISK ANALYSIS

To effectively represent a client, a leasing lawyer must understand the risks to the property and to the parties in the transaction, determine who is best situated to efficiently insure for the identified risks (rather than just allocating risk to the party at fault) and draft the insurance provisions accordingly. A lawyer's basic knowledge pertaining to the forms of insurance is just the first part of any effective representation with respect to insurance in leases. 

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>

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potentially responsible coverage, as well as insurers that may provide additional insured coverage. The additional insured coverage can be difficult to identify. In construction matters, the additional insured coverage usually flows up the chain from subcontractors and suppliers to the general contractor to the owner and architect.

Under the statute, the defendant is required to pass along the 627.4137 demand to its insurers. Each insurer is responsible to provide a statement of its policy limits and coverage defenses. Although the defendant is not responsible for its insurer's compliance with the statute, some defendants take it upon themselves to provide this information directly to the plaintiff. Some defendants provide the plaintiff with a copy of the policies they have in their file, or provide copies of their insurer's disclaimer or reservation of rights letter, disclosures that are not required by the statute. It is unclear whether a defendant could expose itself to liability for failure to accurately provide information regarding policy limits or coverage defenses, but strict compliance with 627.4137, and not overcompliance, is advisable.

Plaintiffs must be diligent to ensure that the 627.4137 request is fulfilled promptly and completely. The information received from the 627.4137 request can have a significant impact on the direction of the litigation. The availability and limits of insurance coverage can influence which defendants a plaintiff decides to pursue, and which a plaintiff chooses to let out with early settlements. A plaintiff that relies on inaccurate or incomplete insurance information can find itself deep into a litigation that is completely off track from a recovery standpoint, and may wind up with a judgment that it cannot collect.

Oceanside 932 Condominium Assoc., Inc. v. Landsouth Construction, LLC

This is exactly what happened in an important unreported decision out of the Fourth Judicial Circuit in Duval County titled *Oceanside 932 Condominium Assoc., Inc. v. Landsouth Construction, LLC*, Case No. 16-2009-CA-007958 (January 6, 2012) ("*Oceanside 932*"). *Oceanside 932* demonstrates the dangers to both plaintiffs and defendants of parties' failure to properly comply with 627.4137.¹

In *Oceanside 932*, the plaintiff condominium association sued several parties, including its general contractor, Landsouth Construction, for property damage caused by Tropical Storm Faye. The plaintiff made a 627.4137 pre-suit request as well as discovery requests seeking insurance information. The contractor produced two policies which provided coverage during the period July 2006 to July 2008. This posed a problem for the plaintiff, since the plaintiff alleged that significant new and additional property damage was caused by Tropical Storm Faye in August 2008. The plaintiff therefore went through great efforts to develop facts that would plead its damages within the period of coverage.

Two years into the case, and a month before trial, defense counsel produced several additional policies providing coverage in later years, as well as new reservation of rights letters and reports that supported a claim for damages during the term of these later policies. Two days before the insurance disclosure was made, the defendant's liability carrier, Crum & Forster, filed a declaratory judgment action seeking a declaration that coverage did not exist for the plaintiff's claims because plaintiff's allegations did not trigger the relevant period of coverage.

Plaintiff's counsel sought sanctions due to the improper conduct of defense counsel and the defendant's carrier. The court agreed with the plaintiff that defense counsel's conduct was improper, and as a penalty it struck defendant's pleadings, entered a default judgment as to defendant's liability, and ordered the case to trial on damages. The court's drastic sanctions were premised on the court's conclusion that the defendant's intentional withholding of insurance information severely prejudiced the plaintiff's ability to develop its case and to pursue a fair settlement of the claims. Because of the late disclosures, the plaintiff had essentially been led down the wrong path the entire case, and the court felt the only appropriate sanction was to strip the defendant of its defenses.

Lessons From *Oceanside 932*

Landsouth appealed the court's decision and the claims were settled before the First District Court of Appeal could rule on the issue. A reported appellate court decision would have provided helpful guidance, but the lessons of *Oceanside 932* are clear: although 627.4137 may not have a statutory penalty provision, failure to produce complete copies of policies and to make full disclosure of insurers' coverage positions can have severe consequences for a defendant and its insurer. It is a warning to defense counsel to pay closer attention to 627.4137 requests to make sure that all potentially applicable insurance coverage is disclosed. Defense counsel who take this task lightly do so at their own peril.

¹ A copy of the unreported decision in *Oceanside 932* can be found at friedmanpa.com/wp-content/uploads/2012/02/Oceanside-932.pdf. 



“Plaintiffs must be diligent to ensure that the 627.4137 request is fulfilled promptly and completely. The information received from the 627.4137 request can have a significant impact on the direction of the litigation.”

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@hkllaw.com)
 Secretary & Newsletter Editor - Scott P. Pence (spence@carltonfields.com)
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 CLE - Michael G. Meyer (mmeyer@shutts.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.
 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
February 18, 2013	Mark Boyle	Axis Surplus Insurance Co. v. Contravest Construction Co. and related issues pertaining to preserving construction insurance coverage.
March 18, 2013	Christine Hoke	The differences between Additional Named Insureds and Additional Insureds and the difficulties that arise in obtaining their correct Endorsements.
April 15, 2013	Gregory Podolak	Recent changes to ISO's Commercial General Liability and Additional Insured Endorsement Forms

If you, or someone you know, might be interested in presenting at an upcoming meeting, please contact Michael Meyer at mmeyer@shutts.com.

Schedule of Upcoming RPPTL Section Meetings

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

July 24-28, 2013
 Executive Council Meeting
 & Legislative Update
 The Breakers
 Palm Beach, Florida

SAVE THE DATES:

Insurance Coverage for Construction Defects

May 1, 2013

A special RPPTL Section-wide webinar presented by **Mark Boyle** on behalf of the Insurance and Surety Committee

6th Annual Construction Law Institute and Construction Law Certification Review Course

March 7-9, 2013

Rosen Shingle Creek
 Orlando, Florida

Presented by the RPPTL Section of the Florida Bar

Check the RPPTL Section's web page for more details about these programs.

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@carltonfields.com.