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:

Separate and Not Equal: Insurance Severability Clauses and Additional Insureds

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

Most insurance policies insure multiple parties. For example, Directors & Officers insurance typically insures a company (the named insured), its subsidiaries, and its directors, officers, and employees (individual insureds). General liability policies also typically insure multiple corporate entities as well as employees, and also often insure additional insured parties that are unaffiliated with the named insured (such as lessors, property owners, contractors, and vendors).

When a loss occurs, insurers often have to sort out which parties are potentially insured, and which policy provisions and exclusions are applicable to each. This task can be particularly complicated when multiple insureds are named in a lawsuit.

Most insurance policies contain severability clauses (also called "Separation of Insureds" clauses in general liability policies). The purpose of the severability clause is to separate insureds for purposes of applying coverage terms. This can become an issue when a claim is asserted against multiple insureds, some of whom allegedly committed an intentional or fraudulent act, and some of whom that are "innocent" insureds. The severability issue also frequently arises with respect to claims that involve an employment relationship, where an employer is sued alongside third parties.

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Triggering Rip and Tear Coverage

By: J. Derek Kantaskas, Esq. and Erin E. Banks, Esq., Carlton Fields, Tampa, FL

Another step toward recognizing "injury-in-fact" as the appropriate trigger for determining property damage is illustrated by the Eleventh Circuit Court of Appeals' important opinion in *Carithers v. Mid-Continent Casualty Company*, 782 F. 3d 1240 (11th Cir. 2015), in which the Court determined the scope of coverage available under a post-1986 CGL policy issued by Mid-Continent Casualty Company ("Mid-Continent") to a homebuilder, Cronk Duch. Homeowners, the Carithers, filed suit against Cronk Duch for construction defects in the Carithers' home relating to improperly installed tile, faulty electrical systems, incorrect application of exterior brick coatings, and a faulty balcony that permitted extensive water intrusion. Mid-Continent refused to defend Cronk Duch. As a result, Carithers and Cronk Duch entered into a consent judgment, which judgment assigned Cronk Duch's rights to Carithers so the homeowners could pursue the judgment amount from Mid-Continent.

In Carithers' direct action against Mid-Continent, both parties ultimately filed cross-motions for summary judgment on the issue of whether

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"When a claim is asserted by an employee, general liability insurers frequently invoke employment-related exclusions to deny coverage."

Types of Severability Clauses

There are two types of severability clauses found in insurance policies. The first, "application severability", is typically found in a Directors & Officers policy. This type of severability clause states that an insured will not lose its coverage under the policy, even if there are misrepresentations made in the application, if the insured was not aware of the misrepresentations. The purpose of "application severability" is to preserve coverage for "innocent" insureds that had nothing to do with the application, even if coverage may be lost for insureds with knowledge of the misrepresentation.

The second type of severability clause is an "exclusion severability" clause. This type of clause is typically found in general liability policies and also some Directors & Officers policies. The exclusion severability clause states that coverages and exclusions apply separately as to each insured. In Directors & Officers policies, certain exclusions may apply to exclude coverage for the company but not individual insureds. General liability policies typically have broad severability clauses that state coverage under the policy applies separately to each insured, and so the applicability of an exclusion to one insured has no impact on whether the exclusion also applies to a different insured.

Severability and Employment Exclusions

In addition to claims involving "innocent" insureds, severability frequently becomes an issue with claims that involve employment relationships. Most general liability policies exclude coverage for employment-related claims, such as discrimination, sexual harassment, and wage and hour claims. General liability policies also typically contain employer's liability exclusions that exclude coverage for claims asserted against an insured by one of its employees, under the rationale that such claims are covered by worker's compensation and employer's liability insurance.

Disputes arise in several contexts. For example, some employment-related claims also assert bodily injury or personal injury claims separate and apart from the employment claims. Examples are claims for defamation, retaliation, false imprisonment, and negligent infliction of emotional distress. Such claims may be made against the claimant's employer or against third-parties such as contractors, supervisors, and co-employees.

Another context, which is common in the construction industry in particular, involves injured worker claims against third parties. When a subcontractor employee is injured on the job, he is prevented by the worker's compensation bar from suing his employer directly. However, the claimant can sue the general contractor and owner of the project. The claimant also may sue individually a fellow employee whose negligence contributed to the injury.

When a claim is asserted by an employee, general liability insurers frequently invoke employment-related exclusions to deny coverage. Compounding the problem is that many companies do not purchase employment practices liability insurance, and, even for those companies that do purchase such insurance, many employee claims are not covered by employment practice insurance, such as claims for bodily injury and personal injury referenced above.

Florida Caselaw Addressing Severability

Recent Florida caselaw has clarified the impact of severability clauses in the context of employee claims. In *Taylor v. Admiral Ins. Co*., Case No. 3D14-720 (Fla. 3d DCA Feb. 10, 2016), the Third District Court of Appeals addressed a claim asserted by a party who was injured at Vizcaya Museum & Gardens in Miami. The claimant was attending a function sponsored by her company when she was injured. She sued her employer as well as Vizcaya and Miami-Dade County, which owns and operates Vizcaya. Vizcaya and Miami-Dade County were additional insureds on the employer's policy and sought coverage under that policy. The insurer denied coverage for all insureds under the employer's liability exclusion, which excluded coverage for any claims arising out of bodily injury to "any insured." The trial court entered summary judgment in favor of the insurer on the employer's liability exclusion.

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The 3rd DCA reversed the trial court's decision. The appellate court held that, while coverage was excluded for the claimant's employer, such was not the case for Vizcaya and Miami-Dade County, as neither of these defendants employed the claimant. The court held that the "Separation of Insureds" provision meant that coverage applied to each insured as if it was the only insured under the policy. Therefore, the employer's liability exclusion was not applicable to non-employer insureds.

The 3rd DCA cited extensively to the recent decision of the Eleventh Circuit Court of Appeals in *Evanston Ins. Co. v. Design Build Interamerican, Inc*., 569 Fed. Appx. 739 (11th Cir. 2014). In *Design Build Interamerican,* a subcontractor employee was injured while working on a construction site. The injured worker sued co-employees who he alleged were negligent. The insurer denied coverage to these co-employees on the basis of the employer's liability exclusion. The 11th Circuit ultimately held that the co-employees were covered due to the severability clause, since none of the co-employees were the injured worker's employer. Although coverage was excluded for the injured worker's employer, coverage existed for defendants who did not have an employment relationship with the claimant.

Conclusion

Counsel should be mindful of severability clauses when assessing the availability of coverage for claims involving multiple defendants, particularly those claims asserted by an employee of the named insured. It is not necessarily the case that an exclusion applies across the board to all insureds under the same policy, and coverage should be analyzed for each insured separately as if it were the only insured. IM

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Mid-Continent owed a duty to defend Cronk Duch in the underlying, initial litigation. The Middle District of Florida granted summary judgment in favor of Carithers, finding that the proper "trigger" for determining if property damage "occurred" during the policy period is the date of the *actual* damage ("injury-in-fact"), rather than when the damage is discovered or could have been discovered by reasonable inspection ("manifestation"), as argued by Mid-Continent. The question of the proper "trigger" on coverage, however, appears to still be in doubt in Florida as the Eleventh Circuit limited its decision "to the facts of this case, and express[ed] no opinion on what the trigger should be where it is difficult (or impossible) to determine when the property was damaged." Simply put, the Court held the Middle District "did not err in applying the injury-in-fact trigger in this case."

After the duty to defend determination, the coverage issue was decided following a bench trial. The trial court found that, among other things, Mid-Continent was liable for the "rip and tear" costs to repair a defectively installed balcony (which was not property damage because it was the defective work of a subcontractor) because the balcony had to be replaced in order to repair damage to the garage (which was property damage). The "rip and tear" damages are also commonly referred to as the "get to" damages associated with *getting to* the underlying defect. Essentially, the Carithers were entitled to the "rip and tear" damage of the balcony to get to the underlying property damage.

The Eleventh Circuit held that the district court did not err in awarding damages for the cost of repairing the balcony, finding that under Florida law Carithers had a right to "the costs of repairing damage caused by the defective work . . . ." (*Citing United States Fire Insurance Co. v. J.S.U.B.*, 979 So.2d 871 (Fla. 2008)). The Eleventh Circuit was not persuaded by Mid-Continent's contention that the Carithers should not be able to recover for any defective work, even where repairing that work is a necessary cost of repairing work for which there is coverage.

While *Carithers* is another decision pointing toward injury-in-fact trigger analysis, it remains to be seen whether a Florida court will definitely answer the question. 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, Secretary & Newsletter - Scott P. Pence (spence@cfjblaw.com.com)
Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
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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?

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: **7854216320#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-50 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 1-5, 2016
Executive Council Meeting/
RPPTL Convention
Loews Portofino Bay Hotel
Orlando, Florida

July 28–31, 2016
Executive Council Meeting &
Legislative Update
The Breakers
Palm Beach, Florida

October 5-9, 2016
Executive Council Meeting
The Walt Disney Work Board-Walk Inn
Lake Buena Vista, 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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