CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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Our Coverage Issues are Hotter than Yours: Case Law Updates and Trends

I. CGL POLICIES: THE INSURING AGREEMENT (5 minutes)

Commercial General Liability ("CGL") policies are designed to protect the insured from liability arising out of its business operations. CGL policies cover sums the insured is legally obligated to pay because of "bodily injury" or "property damage" if the "bodily injury" or "property damage" happens during the policy period and is caused by an "occurrence". The insurer has the right and duty to defend the insured against "suits" seeking damages to which the policy applies.

An "occurrence" is an accident. Whether construction defect claims constitute an occurrence to fall within the insuring agreement of the CGL policy is an unsettled question. Faulty work itself is not "property damage" caused by an "occurrence". *Owners Ins. Co. v. Jim Carr Homebuilder, LLC,* 157 So. 3d 148, 156 (Ala. 2014), *reh'g denied* (June 27, 2014). A subcontractor's defective work that results in damage to the completed project can constitute an "occurrence" [under a general contractor's CGL policy]. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So. 2d 871, 887 (Fla. 2007). However, a claim limited to replacement of a defective component or correction of faulty installation is not "property damage". *Amerisure Mutual Ins. Co. v. Auchter Co.,* 673 F.3d 1294 (11th Cir. 2012).

CGL policies provide coverage for claims which fall within the insuring agreement and are not otherwise excluded. Not all CGL policies are created equal. Although there are standard commercial general liability coverage forms created by the Insurance Services Office, the number and scope of the exclusions and endorsements included within the policy effect the scope of coverage as well as the premium cost of the policy.

II. TRIGGER OF COVERAGE (10 minutes)

Trigger is a term of art used to indicate the event that requires a particular policy to respond to a claim, i.e., when the potentially covered "bodily injury" or "property damage" happened. There are four general accepted trigger theories. Exposure, Manifestation, Injury-in-Fact and Continuous Trigger.

The manifestation theory implicates the policy in effect when the damage was, or should have been, discovered. Injury-in-fact or actual injury implicates the policy in effect when the damage actually

occurred. *See Axis Surplus Ins. Co. v. Contravest Construction Co.,* 921 F. Supp. 2d 1338, 1348 (M.D. Fla 2012). Application of the continuous trigger implicates all of the policies in effect between the time of the underlying injury causing event until the damage is complete. *Crossman Communities of North Carolina v. Harleysville Mut. Ins. Co.,* 717 S.E.2d 589 (S.C. 2011).

III. DEFENSE AND INDEMNITY (10 minutes)

The duty to defend is broader than the duty to indemnify. Carriers have the duty to defend "suits" seeking damages potentially covered by the policy. However, unsupported and conclusory buzz words in the complaint are insufficient to trigger coverage. *Auto-Owners Ins. Co. v. Elite Homes, Inc.*, 2016 WL 409577 (M.D. Fla. Feb. 3, 2016). Indisputable facts outside of the complaint can preclude a duty to defend. *Composite Structures, Inc. v. Cont'l Ins. Co.,* 560 Fed. Appx. 861 (11th Cir. 2014).

A right to repair notice is not a "suit" for which a defense is required. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.,* 124 F. Supp. 3d 1272 (S.D. Fla. 2015).

IV. POLICY ENDORSEMENTS/EXCLUSIONS (15 minutes)

A. Contractual Liability

Under the contractual liability exclusion, there is no coverage for liability assumed by the insured in a contract unless it is an "insured contract". The standard definition of "insured contract" includes contracts pertaining to the insured's business. This exclusion only applies to claims where the insured agreed to indemnify another party – not to all claims for failing to perform under a contract. *Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. Catherine of Siena Par.,* 790 F.3d 1173 (11th Cir. 2015)

Supplementary payments provisions provide a defense for the insured's contractual indemnitee if certain conditions are met, one of which is that the contract is an "insured contract." However, insurers are endorsing off the policy the subparagraph of the definition that includes all contracts pertaining to the insured's business within the definition of "insured contract."

B. Your Work

CGL policies exclude coverage for "property damage" to the insured's completed work unless the work was performed by a subcontractor. *U.S. Fire Ins. Co. v. J.S.U.B.,* 979 So. 2d 871 (Fla. 2007). Insurers are similarly endorsing off the subcontractor exception to the exclusion. Allegations of damage to the insured's work itself is excluded pursuant to the "your work" exclusion. *Auto-Owners Ins. Co. v. Elite Homes, Inc.*, 2016 WL 409577 (M.D. Fla. Feb. 3, 2016).

Case study: *Carithers v. Mid-Continent Cas. Co.,* 782 F.3d 1240 (11th Cir. 2015)

1. Brick –The Homeowners alleged a clear sealant applied to the brick caused damage to the brick. The Trial Court agreed and found that as a result, there was coverage. However, the Appellate Court disagreed and ruled that as there was no evidence at trial to determine which contractor installed the clear sealant there was no coverage. If the coating was installed by the brick mason, there would be no

coverage due to the "Your Work" Exclusion. *If* the clear sealant had been installed by a separate subcontractor, there may have been coverage. The Court also noted that as the homeowners were seeking coverage they had the duty to present evidence as to who performed the work.

2. Tile/Mortar – The Homeowners alleged the mortar installation caused damage to the tile. Mid-Continent argued the tile, even though purchased separately by the Homeowners, was part of the entire tile system which included the mortar and should therefore be excluded under the "Your Work" Exclusion. The Trial Court found there was coverage for the tile but the Appellate Court disagreed and ruled there was no coverage for the tile as no evidence was presented as to whether the same subcontractor installed the tile and the mortar and thus the "Your Work" exclusion applied.

V. ADDITIONAL TRENDING CONCEPTS (20 minutes)

A. Rip and Tear

Whether an insurer is obligated to pay for the removal and replacement of defective work incidental to the repair of covered property damage is an open question. In *Carithers*, *supra,* the Court ruled that where a defective balcony was causing damage to the adjacent garage, the cost to replace the balcony was covered because the replacement of the balcony was required to repair the covered "property damage". *See also Mid-Continent Cas. Co. v. Treace,* 186 So. 3d 11 (Fla. 5th DCA 2015) (upholding damages awarded for the cost to access and repair water damage caused by faulty construction). *Contra Auto Owners Ins. Co. v. Newman,* 684 S.E.2d 541 (S.C. 2009)(the cost of repairing and replacing the defective stucco – even when the replacement was incidental to the repair of covered property damage – was not covered due to exclusion n).

In *Pavarini Constr. Co. (SE) v. Ace Am. Ins. Co.,* 2015 WL 9686009 (S.D. Fla. Oct. 29, 2015), the Court found coverage under a CGL Policy to repair defective structural work, which was causing ongoing damage to the stucco, resulting in water intrusion. The Court held, "even if the predominant objective of the repair effort was to fix the instability caused by the defective subcontractor work, it is undisputed that the same effort was required to put an end to ongoing damage to otherwise non-defective property, e.g. damage to stucco, penthouse enclosure, and critical concrete structural elements. Thus, the ACE policy provides for complete indemnification." *Id.* at *14.

B. Costs

1. Pretender Defense Costs

Where the duty to defend arises upon the happening of the insured event, the insurer can be liable for pre-tender defense costs if the event is covered under the policy. *See Sherwood Brands, Inc. v. Hartford Accident and Indemnity Co.,* 698 A. 2d 1078 (Md. Ct. App. 1997). When an insurer fails to defend due to the insured's late notice, absent substantial prejudice, an insurer will be liable for reasonable costs of defense incurred both before and after notice. *Episcopal Church in S. Carolina v. Church Ins. Co. of Vermont,* 53 F. Supp. 3d 816, 830 (D.S.C. 2014). *Contra Hanover Ins. Co. v. Anova*

Food, LLC, 2016 WL 1170941, *14-15 (D. HI Mar. 24, 2016)(applying Florida law, the court held that pre-tender defense costs were not recoverable because the insurer offered to defend under a reservation of rights and post-tender independent counsel fees were not recoverable unless the actions of the insurer forced the insured to retain its own counsel or the insurer failed to provide an adequate defense).

2. Attorney Fees

In Treace, supra, the court held that attorney's fees awarded against Mid-Continent's insured were covered under the supplementary payment provisions in the CGL policy which provided that Mid-Continent will pay "with respect to any claim it investigates or settles or any suit it defends … all costs taxed against the insured in the 'suit'". *Treace* at 12. In so holding, the court noted that "all court costs" could be read to include attorney's fees because it was undefined in the policy. Further, the insurer could have defined "court costs" to specifically exclude attorney's fees. *Id.* (citations omitted).

C. Additional Insured

Contracts often require subcontractors to include the general contractor (and owner and developer) as additional insureds under their general liability policies. These contracts have varying requirements for coverage limits, duration and terms. Other than specifically named insured endorsements, blanket additional insured endorsements are the most common and confer additional insured status as required by written contract.

Case study: *Travelers Prop. Cas. Co. of America v. Amerisure Ins. Co.,* 2015 WL 5769247 (N.D. Fla Sept. 30, 2015)

The General Contractor hired a stucco subcontractor on a condominium project. The GC had liability insurance through Travelers. The stucco sub obtained liability insurance through Amerisure. The Subcontract required the stucco subcontractor to name the GC as an Additional Insured under the Policy. The Prime Contract between the GC and Owner also contained insurance requirements, such as limits of insurance, which was incorporated into the subcontract. The GC tendered its defense as an Additional Insured, which was denied by Amerisure.

The Court found that under the Blanket Additional Insured Endorsement, the GC was an Additional Insured under the stucco subcontractor's insurance policy with Amerisure because there was a written subcontract that required the stucco subcontractor to name the GC as an Additional Insured. The Court noted this analysis also required the Court to look to the terms of the subcontract, as well as the Prime Contract, since it was incorporated. *Travelers* at *3. Accordingly, Travelers recovered both the fees incurred for the defense of the GC as well as the cost of prosecuting the GC's Third Party Claims. *Id.* at *4.

Similarly, in *Core Constr. Services Se., Inc. v. Crum & Forster Specialty Ins. Co.,* 2016 WL 374940 (M.D. Fla. Feb 1, 2016), the court considered whether payments by the putative additional insured general contractor could satisfy the $250,000 Self-Insured Retention and trigger a defense of the GC

under the subcontractor's insurance policy. Although the court held that the SIR could be satisfied by third-parties, it could not determine whether the amounts in excess of $300,000 "spent by the other insurers was paid toward items that would have been covered by the [window installer's] CGL Policy but for the application of the Self-Insured Retention" rather than the additional non-window claims asserted against the general contractor. *Core* at *6. *Core* makes no mention of the character of the other insurers paying Core's defense costs but does imply that additional insured defense costs must be allocated in accordance with the coverage provided by the subcontractor's policy.

D. Contribution among Co-Primary Insurers

Florida and South Carolina are the last two states expressly prohibiting one primary carrier from recovering the costs of defending its mutual insured from another primary carrier. "There is no right of reimbursement to defense costs between primary insurers of a common insured." *Pa. Lumbermens Mutual Ins. Co. v. Indiana Mutual Ins. Co.,* 43 So. 3d 182, 186 (Fla. 4th DCA 2010).

This rule is almost universally reviled. "[T]he failure to allow equitable subrogation … awards shirkers and lag-behinds" and penalizes the more responsible insurer. *Cont'l Cas. Co. v. United Pac. Ins. Co.,* 637 So. 2d 270, 277 (Fla. 5th DCA 1994)(Sharp, J., dissenting). *Amerisure Mutual Ins. Co. v. Crum & Forster Specialty Ins. Co.,* 2014 WL 1689275 (M.D. Fla. April 29, 2014)(entertaining the possibility of a cause of action against a non-defending carrier); *Nat'l Fire Ins. Co. of Hartford v. FCCI Commercial Ins. Co.,* 2016 WL 501943 (M.D. Fla. Feb 9, 2016)(dismissing a claim for equitable subrogation but allowing a claim of equitable contribution to survive dismissal with respect to a settlement payment on behalf of a mutual insured).