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THERE'S NOTHING WRONG WITH THE CONSTRUCTION, BUT IT'S STILL YOUR FAULT!

The following discussion focuses on recent legal developments in Florida and overcoming challenges to claim resolution in a comparative fault state while navigating contractual indemnity and additional insured risk amid anti-indemnity and anti-contribution legislation. The advanced roundtable panelists will discuss recent legal developments and trends pertaining to claim resolution from the varying perspectives of the developer, general contractor, subcontractors and insurance industry. This diverse, often adverse, group will share their insights regarding what is working in defense and pursuit of these claims as well as strategies to resolve claims of both named and additional insureds, including avoiding pitfalls in partial or "late" resolution. The speakers will share their ideas leading to successful pre-suit resolution, the woes and wins of assignment of claims and debate the pros and cons of traditional litigation versus alternative dispute resolution.

I. Parties are often forced to pursue and defend cases before facts are developed

For General Contractors and subcontractors who do not self-perform all work, risk transfer evaluation must happen immediately, even if it appears claim is weak.

The challenges in defending against claims and pursuing risk transfer during the Chapter 558 Process

Chapter 558 of the Florida Statutes was enacted by the legislature as an alternative form of dispute resolution for certain construction defect cases in an effort to reduce litigation. Fla. Stat. § 558.001. Chapter 558 creates a notice and repair process whereby notice of a claim is filed with the "contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect." *Id.* Notice of the claim "should provide the contractor, subcontractor, supplier, or design professional, and the insurer[s] an opportunity to resolve the claim through confidential settlement negotiations." *Id.*

Chapter 558 provides that a claimant alleging construction defects shall "serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable," with the notice referring to Chapter 558. Fla. Stat. § 558.004(1)(a). Notice must be made "at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels." *Id.* Additionally, if the work was performed pursuant to a contract, the claimant must serve written notice on the contractor. *Id.* "The notice of claim must describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect." Fla. Stat. § 558.004(1)(b). The claimant is required to "identify the location of each alleged construction defect

sufficiently to enable the responding parties to locate the alleged defect without undue burden." *Id.* Destructive testing is not required at this stage; however, the claim must be "[b]ased upon at least a visual inspection by the claimant or its agents." *Id.*

While the law requires that the Notice of Claim set forth in "reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defects" the recipients of the Notice are forced to defend the case before the facts are actually developed. This places general contractors and subcontractors who do not self-perform all work in the difficult position of having to conduct a risk transfer evaluation immediately; even if it appears the claim is without merit. The question then becomes whether or not you should hold off on pursuing risk transfer efforts until you have more facts or whether you should secure indemnity rights before facts are further developed?

The importance of tendering early to secure a defense

In order to secure a defense from its insurer, an insured must tender to its primary carrier. There are different types of policies that may cover a contractor or subcontractor. They include: wrap policies; project specific policies; and direct policies. There are two types of wrap policies; they are contractor controlled insurance policies (CCIP) and owner controlled insurance policies (OCIP). Both types of wrap policies generally cover the owner, contractor and various subcontractors who are enrolled. Wrap policies are also generally project specific. Project specific polices are just that, project specific. Direct policies generally covered the insured for a specific period of time, regardless of the project.

Contractual Indemnity Tenders

While it is important to tender pursuant to an additional insured status or endorsement, it is equally important to tender pursuant to an indemnity provision in a contract. In Florida, many indemnity provisions in contracts provide for the indemnitor to "defend and indemnify" the indemnitee. The requirement to provide a defense pursuant to an indemnity provision is distinct from the requirement to provide a defense from an additional insured provision or endorsement. However, how the indemnity provision containing the obligation to defend is drafted may affect the obligation to defend and whether it is severable from the duty to indemnify. *Barton Malow Co. v. Grunau Co.*, 835 So. 2d 1164 (Fla. 2d DCA 2002).

Additional Insured Tenders-Carrier Considerations and Right to Contribution

An insurance carrier's duty to defend is triggered when a complaint contains allegations "within the general coverage provisions of the policy" and the allegations are not within the policy exclusions. *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 812 (Fla. 1st DCA 1985). The Chapter 558 process creates an alternative to litigation, and there is not a complaint filed during this process, but rather a Notice of Claim sent to insurance carriers. The United States District Court for the Southern District of Florida, sitting in diversity, has held "the Chapter 558 mechanism does not constitute a 'civil proceeding', it is not a 'suit' under the [insurance policy provisions]. Therefore, [the insurance carrier] had no obligation under the terms of the insurance policies at issue to defend or indemnify." *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 124 F. Supp. 3d 1272, 1282 (S.D. Fla. 2015). However, the rule enunciated in *Altman* is subject to change. *Altman* is on appeal and the United States Court of Appeals for the Eleventh Circuit has certified the question for the Supreme Court of Florida as to whether the Chapter 558 Notice of Claim triggers an insurance carrier's duty to defend. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 832 F.3d 1318, 1326 (11th Cir. 2016).

In Florida an insurance carrier does not have a right of contribution against another carrier. *Argonaut Ins. Co. v. Maryland Cas. Co.*, 372 So. 2d 960, 963 (Fla. 3d DCA 1979). In *Argonaut* the plaintiff, an insurance company, brought an action against other insurers for costs incurred in the defense of a mutual insured. *Id.* at 962. The Third District Court of Appeals held "[c]ontribution is not allowed between insurers for expenses incurred in defense of a mutual insured." *Id.* at 963. (citing *Fidelity & Guaranty Company v. Tri-State Ins. Company*, 285 F.2d 579 (10th Cir. 1960)). Additionally, the court stated "[t]he duty of each insurer to defend its insured is personal and cannot inure to the benefit of another insurer." *Id.* (citing *Thurston National Insurance Company v. Zurich Insurance* Company, 296 F.Supp. 619 (W.D. Okl. 1968)).

An insured may permit the participating carrier to pursue recalcitrant carriers in its name; however, the defending carrier will not be able to recover defense costs if the defending carrier had a duty to defend. *Pennsylvania Lumbermens Mut. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co.,* 43 So. 3d 182, 188 (Fla. 4th DCA 2010). In *Pennsylvania Lumbermens*, the defendant insurance carrier did not defend or participate in the settlement of a prior construction defect case where the plaintiff insurance carrier settled with the plaintiff of the prior litigation. *Id.* at 184. The insured of the prior litigation assigned its cause of action to the plaintiff insurance carrier to seek reimbursement from other carriers. *Id.* The plaintiff insurance carrier was able to recover the indemnity costs from the previous settlement, but was unable to recover defense costs because the plaintiff insurance carrier had a duty to defend. *Id.* at 188. In light of the *Argonaut* decision, the question becomes whether the insured will pursue other additional insured carriers or authorize the participating carrier to pursue recalcitrant carriers in its name?

Deductible and self-insured retention considerations

For the insured client both the deductible and self-insured retention considerations emphasize the need to trigger the contractual and additional insured obligations. That is because both require the insured to pay out of pocket funds before the insurance policy kicks in and begins paying for the defense of the claim, typically.

The Next Hurdle: Stepping out and filing suit.

While it is preferable to wait for a clearer picture of actual liability prior to filing suit to secure risk transfer, there are cases where you cannot afford to wait until the facts are further developed. The decision of whether to wait for the claimant to file suit to initiate pass through claims via a third party complaint or independently file suit against third parties potentially implicated by the defect claims rests on the timing requirements set forth under Florida's statute of repose.

Florida's statute of Repose: Section 95.11(3)(c) Florida Statutes is a statute of repose that terminates a cause of "action founded on the design, planning or construction of an improvement to real property" when certain criteria are met. Under Section 95.11(3)(c) there are four dates necessary to determine when the statute of repose clock starts: (1) the date of actual possession by the owner, (2) the date of the issuance of a certificate of occupancy, (3) the date of abandonment of construction if not completed, or (4) the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest. If the action does not involve a latent defect, a claimant has four years to bring their claim from the latest date of the aforementioned dates. *Id.* If the action involves latent defects, "the action must be commenced within 10 years" from the latest date of the aforementioned dates. *Id.* In litigation, the date of actual possession by the owner and the date of completion of the contract are highly contested. Actual

possession can be difficult to determine and claimants may argue actual possession is physically living at the property not actual ownership of the property.

The date of completion of the contract is also highly contested in litigation, with some claimants arguing the date of completion means all outstanding contracts related to the property. In a case where the date of completion of the contract was argued, the court held "[c]ompletion of the contract is completion of performance by both sides of the contract, not merely performance by the contractor." *Cypress Fairway Condo. v. Bergeron Const. Co. Inc.*, 164 So. 3d 706, 708 (Fla. 5th DCA 2015). The court in *Cypress* found the date construction had finished by the contractor and a "Final Application for Payment" had been made was not the date of completion of the contract. *Id.* Instead the court held the final payment on the contract was the date of completion. *Id.* The courts holding resulted in a later date starting the statute of repose clock which allowed the plaintiffs cause of action, because the date of final payment on the contract was within the repose period. *Id.* Very recently the Fifth District Court of Appeals reversed an order granting a motion to dismiss with prejudice because it was "not conclusively establish[ed] that the contract was completed at closing." *Busch v. Lennar Homes, LLC*, 5D16-1626, 2017 WL 1372085, at *2 (Fla. 5th DCA Apr. 13, 2017). In *Busch*, the contract contained language where the seller agreed to make repairs requested by the buyer "at Seller's sole cost and expense prior to closing or at Seller's option within a reasonable time after closing." *Id.* The court held "[b]ecause the contract expressly contemplated that closing could occur even if work required by the contract remained incomplete, and the complaint did not allege that no work was completed after closing, the allegations of the complaint d[id] not conclusively establish that the contract was completed upon closing." *Id.*

Statute of Repose and Indemnity Claims: There is a conflict in case law regarding the pursuit of indemnity claims that will eventually need to be resolved by the courts. The Second District Court of Appeal has held, "[t]he statute of limitations for an action seeking indemnity does not begin running until litigation against the third-party plaintiff has ended or the liability, if any, has been settled or discharged by payment." *Castle Const. Co. v. Huttig Sash & Door Co.*, 425 So. 2d 573, 575 (Fla. 2d DCA 1982). *Castle* essentially holds that the statute of limitations for indemnity does not run until an action for indemnity accrues. However, The Third District Court of Appeal has held, "the plain language of the statute . . . clearly applies to *all* actions 'founded on the design, planning, or construction of an improvement to real property.'" *State, Dept. of Transp. v. Echeverri*, 736 So. 2d 791, 792 (Fla. 3d DCA 1999) (emphasis in original). In *Echeverri*, the plaintiff brought an action for wrongful death against several defendants involved in the construction of an exit ramp. *Id.* at 791. One of the defendants asserted a cross-claim seeking indemnity from the general contractor and designer-architect. *Id.* The defendant seeking indemnity argued 95.11(3)(c) "d[id] not apply to actions for indemnity." *Id.* at 792. However, the court found that 95.11(3)(c) applied to "*all* actions 'founded on the design, planning, or construction of an improvement to real property.'" *Id.*

The ruling in *Echeverri* can have a harsh result where a claimant brings an action at the end of the statute of repose and the defendant will not be able to seek indemnity from those responsible for injury and/or damage caused. The Colorado Supreme Court may have devised a better rule that Florida courts may adopt in the future. In Colorado, "third-party claims are timely irrespective of both the two-year statute of limitations and the six-year statute of repose so long as the claims are brought during the construction defect litigation or within ninety days following the date of judgment or settlement." *Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, 402 (Colo. 2017). As such, you may be forced to secure indemnity rights even before you know if there is an indemnity damage to pursue.

II. The Legal Framework for Risk Transfer

The typical causes of action in a construction defect case where risk transfer is sought include: negligence; building code violations; express and implied warranties; contractual indemnity; and common law indemnity.

Common law causes of action

Of the causes of action listed above, three are common law causes of action. They include negligence, building code violations and common law indemnity.

Negligence: In many states the risk transfer through a negligence cause of action is unlikely because of the economic loss rule. The economic loss rule prohibits a plaintiff/third party plaintiff from recovering tort damages for purely economic damages. *Casa Clara Condominium Association, Inc. v. Charlie Topino & Sons, Inc,* 588 So. 2d 631 (Fla. 3d DCA 1991).

Building Code Violations: If a building code violation is found to exist, it may not automatically be construed as an admission of fault, thus transferring the risk. In Florida, § 553.84, Fla. Stat. provides a cause of action for violation of the building code. However, if certain conditions are met under § 553.84, (i.e. the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections) then risk cannot be transferred unless the party knew or should have known of the violation. Fla. Stat. § 553.84. Depending on the circumstances and the specific defect alleged to exist, this can sometimes be difficult.

Common Law Indemnity: "The common law right of indemnity generally arises out contract, express or implied." *City of Clearwater v. L.M. Duncan and Sons, Inc.,* 466 So. 2d. 1116, 1118 (Fla. 2d DCA 1985). In some states, such as Florida, risk transfer pursuant to common law indemnity is difficult. In Florida, in order to prevail on a claim for common law indemnity the indemnitee must prove (1) a special relationship exists between it and the indemnitor such that the indemnitee is vicariously, technically or derivatively liable for the acts or omissions of the indemnitor; (2) that it is free from all fault; and (3) the indemnitor is solely at fault. *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979).

Contractual and statutory based causes of action

The remaining causes of action that are typically asserted in order to transfer risk include contractual indemnity claims and warranty claims, which include both express and implied warranties.

Contractual Indemnity: In order to transfer risk via an indemnification provision in a contract or vendor agreement, the provision must be valid and binding. Some states, such as Florida, have an anti-indemnity statute. Florida Statute § 725.06 provides in part that an indemnity agreement "shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any." However, Fla. Stat. § 725.06 only applies if the indemnitee is seeking indemnification for its own negligence or wrong doing, even in part, in addition to that of the indemnitor. If an indemnity provision is valid and enforceable, risk will generally be transferred to the indemnitor. In addition, indemnity provisions often include recovery for attorneys' fees and costs. Many times, subcontractor and/or vendor agreements also have stand-alone attorney fee provisions that must also be taken into consideration.

Express/Statutory Warranties: An express warranty is just that, one that is expressly provided, typically through a written instrument, such as a contract. Many, if not most, contracts between a contractor and general contractor contain an express warranty, whereby the subcontractor warrants that its work and materials are free from defect and have been installed in a good and workmanlike manner. Statutory warranties are similar in that they are expressly provided by statute. In Florida, the most common statutory warranties that are dealt with in construction litigation include the warranties provided under Chapter 720 and Chapter 718. Florida Statute § 718.203(1) is the warranty from the developer to the purchaser of a condominium unit. Pursuant to § 718.203, "the developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended…" Florida Statute § 718.203(2) is the statutory warranty provided by the contractor and subcontractors to the developer and purchaser of a condominium unit. Pursuant to § 718.203(2), "the contractor, and all subcontractors and suppliers, grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied…"

Implied Warranties: Unlike express warranties, implied warranties are not expressly provided by a party; rather they are implied in law. The law over the years related to the purchase of real property has evolved, going from a "caveat emptor" attitude to the judicial creation of implied warranties. It was in *Gable v. Silver*, 258 So. 2d 11 (Fla. 4th DCA 1972) where the "modern view" was first adopted in Florida and thus the implied warranties of fitness and merchantability were created for purchasers of new homes.

Potential liability where facts are not fully developed or party fails to participate

There are different scenarios in which a party may still be liable if they fail to participate and/or defend a claim or the facts do not fully support a finding of liability. One such way is through "vouching in." In Florida, the courts have consistently held that where an indemnitor has notice of the claim or suit against the indemnitee and is afforded an opportunity to appear and defend the claim or suit, a judgment rendered against the indemnitee is conclusive against the indemnitor as to all material questions determined by the judgment. *Hoskins v. Midland Ins. Co.*, 395 So. 2d 1159 (Fla. 3d DCA 1981). However, the judgment must be rendered without fraud or collusion. *Id.* The courts often refer to the effect of this rule as "vouching in" the indemnitor. *Hull & Co., Inc. v. McGetrick*, 414 So. 2d 243 (Fla. 3d DCA 1982). In Georgia, the vouching statute provides that a defendant who may have a remedy over against another person can vouch the person into court merely by giving notice of the pendency of the action. It is a substantive and evidentiary law which makes the judgment rendered in the action against the defendant, conclusive and binding upon the vouchee as to the amount and right of the plaintiff to recover. *Hardee v. Allied Steel Bldg., Inc.*, 182 Ga. App. 587 (1987).

Another way a defendant can still be liable if the facts do not completely support liability is through the application of the Substantial Contributing Factor Doctrine. While joint and several liability as to negligence claims has been abolished in Florida, courts have applied a similar approach holding parties jointly liable for damages of which they were a "substantial contributing factor" in causing damage with the other party(ies). The substantial contributing factor doctrine has been applied in breach of contract or tort cases to determine liability where multiple factors may have united in producing the plaintiff's total injury. *Tuttle White Constructors, Inc. v. Montgomery Elevator Co.*, 385 So. 2d 98 (Fla. 5th DCA 1980) (quoting *Corbin on Contracts*; *Cedar Hills Properties Corp. v. Eastern Federal Corp*., 575 So. 2d 673 (Fla. 1st DCA 1991)). Thus, even if other parties or non-parties are partially at fault, it is possible the court may not require a plaintiff to separate jointly caused damages if they find the particular defendant's work was a substantial contributing factor in causing the alleged damages. The likelihood of the application of the substantial contributing factor test often depends on the specific causes of action alleged by the Plaintiff.

One reason to provide notice to parties and allow participation, even if potential liability is undetermined is to avoid a spoliation defense. The doctrine of spoliation arises when it is alleged that a crucial piece of evidence is unavailable because of the actions of one of the parties. *Vega v. CSCS International, N.V.*, 795 So.2d 164 (Fla. 3d DCA 2001). Spoliation of evidence may be pled as an affirmative defense. *Derosier v. Cooper Tire & Rubber Company*, 819 So.2d 143 (Fla. 4th DCA 2002). Thus for instance, if destructive testing is performed without a party having notice and an opportunity to participate and inspect because they are not provided notice of a claim, they may have a spoliation defense.

Repairs are another non-monetary reason to provide a party notice. If repairs are made prior to a party being provided notice, not only may they have a spoliation defense but it will be more difficult to prove their work is faulty.

III. Alternatives to Traditional Litigation

Chapter 558 pre-suit notice

Chapter 558 is intended to serve as a pre-suit mechanism to resolve construction defect claims without the need for protracted and costly litigation; however, the statutory framework set forth is impractical by setting insufficient time to actually resolve claims. Under Fla. Stat. Chapter 558 the person served with the notice of the claim is able to inspect the property to assess the alleged defects "[w]ithin 30 days after service of the notice of claim, or within 50 days after service of the notice of claim involving an association representing more than 20 parcels." "Within 45 days after service of the notice of claim, or within 75 days after service of a copy of the notice of claim involving an association representing more than 20 parcels, the person who was served the notice . . . must serve a written response to the claimant." *Id.*

While this framework may allow you sufficient time to evaluate whether to make an offer of repair there is not enough time to meaningfully involve the trades who actually performed the work which may result in spoliation claims by implicated parties if a repair of their work is undertaken and they did not timely receive the opportunity to inspect and/or repair. The general contractor or subcontractors who did not self-perform all work are then left with the decision to pay and/or repair and then initiate risk transfer efforts. Consequently, carrier will argue that the payment was made voluntarily. Likewise, implicated subcontractors will argue the same while disclaiming liability and refusing to indemnify. Moreover, this process does not take into account the coverage issues without commencement of an action.

Tolling Agreements between the General Contractor and Subcontractors

One question to consider is whether a repose date can be tolled by agreement of the parties. In Florida, the legal framework suggests the repose date cannot be tolled for any reason, including by a tolling agreement. In *Bauld v. J.A. Construction Company*, 357 So. 2d 401, 402 (Fla. 1978), the Florida Supreme Court reiterated the fundamental difference in character between the statute of repose and statute of limitations, emphasizing the statute of repose cuts off the right of action after a specified time, regardless of the time of accrual of the cause of action or of notice of the invasion of a legal right. The Florida Supreme Court again emphasized the distinction in *University of Miami v. Bogorff,* 583 So. 2d 1000 (Fla. 1991). Because the courts have made it clear that the purpose of the statute of repose is to cut off the right of an action so that there is a definitive end to a potential cause of action, it is unlikely a tolling agreement would toll the statute of repose.

Defense Funding Agreements

In construction defect litigation, a joint defense agreement between the general contractor and subcontractors may provide for a strong defense against a claimant. A joint defense agreement allows for a united front among the defendants, instead of the typical cross-claims among co-defendants which plays right into the claimant's hands. A joint defense agreement allows for more accurate fact gathering by allowing for the defendants to share facts among themselves. A joint defense agreement can also allocate costs by including language that if the defendant loses, the party not vouching in would pay a smaller sum rather than a large indemnity clause.

The Second District Court of Appeal recently dealt with the issue of attorney-client privilege when there is a joint defense agreement, finding there was not a requirement that the joint defense agreement be in writing. *AG Beaumont 1, LLC v. Wells Fargo Bank, N.A.,* 160 So. 3d 510, 512 (Fla. 2d DCA 2015). The court held, "[g]enerally, the attorney-client privilege is waived when one holding the privilege makes a voluntary disclosure to a third party. But an exception to the waiver rule permits litigants who share unified interests in litigation to exchange privileged information in order to adequately prepare their cases without losing the protection afforded by the privilege." *Id.* (citing *Visual Scene, Inc. v. Pilkington Bros.,* 508 So.2d 437, 440 (Fla. 3d DCA 1987)). In *Visual Scene*, "the party claiming privilege produced 'an affidavit attesting to a before-the-exchange agreement stating their intention to maintain confidentiality and to use the information only in preparation for trial on those issues common to both.'" *Id.* (citing *Visual Scene*, 508 So.2d at 441).

Proceeding with filing a third party complaint

Because the statute of repose bars actions by setting a time limit within which an action must be filed, in Florida, it is better to proceed with filing a third party action to preserve a claim and then subsequently stay the litigation or enter a tolling agreement. Florida courts make clear that statutes of repose are "legislative determination[s] that there must be an outer limit beyond which [claims] may not be instituted." *Hess v. Philip Morris USA, Inc.,* 175 So. 3d 687 (Fla. 2015).

Filing standalone complaint

Another option is to defend against the complaint and/or arbitration demand without filing a third party complaint and/or joinder and then filing a standalone complaint and/or arbitration demand trailing the underlying plaintiff's action. However, rather than pursuing the action you would agree to enter into a tolling agreement or defense funding agreement.

Mediation

Timing: Pre-suit may be too soon to conduct mediation as the facts have not been fully developed; however, conducting mediation before engaging in litigation is cost-effective. The need for facts versus costs to obtain the facts that add to claim exposure and overall litigation expense further complicates the resolution process.

Global Resolution: Contractual indemnity and additional insured claims become the focus of mediation and often impede on the resolution of the underlying claim. In a multi-party case, it only takes one bad actor to prevent global resolution. Moreover, in a global resolution no one is released until a complete resolution can be achieved.

General Contractor's Approach: The general contractor can choose to pursue different options when evaluating how best to settle a claim. The general contractor can carve out a settlement for itself leaving the plaintiff to pursue the third parties to resolve the entire claim. It can also stay in the case for all claims and carve out settlements with those third parties that are willing to resolve the indemnity claims against them and then continue to defend those issues on their behalf.

The general contractor may opt to pay a reduced amount based perhaps on its fault and non-delegable duties and assign its risk transfer rights to the plaintiff. "All contractual rights are assignable unless the contract prohibits assignment, the contract involves obligations of a personal nature, or public policy dictates against assignment." *Kohl v. Blue Cross & Blue Shield of Fla., Inc.,* 988 So.2d 654, 658 (Fla. 4th DCA 2008). The assignment of risk transfer rights from a general contractor to the plaintiff permits the plaintiff to pursue third parties directly for the indemnity provisions that were part of the agreements between the general contractor and the third parties. "Even when an insurance policy contains a provision barring assignment of the policy, an insured may assign a post-loss claim." *One Call Prop. Services Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 753 (Fla. 4th DCA 2015) (citing *W. Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 210–11 (Fla. 1917)). In some instances, a subcontractor may prefer the approach where the general contractor pays/settles with a plaintiff and then assigns its rights against the subcontractor. One reason a subcontractor may prefer this approach is because its potential share of liability has been reduced by the general contractors "admission" of its own liability, rather than the contractor trying to pass all of the liability on to the subcontractor.

Plaintiff's Approach: The plaintiff may be willing to only settle some of the claims. In this scenario, the question becomes whether subcontractors will pay to resolve the issues implicating their trade in exchange for a scope of work release for the benefit of both the general contractor and subcontractor.