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FAPIA SPRING CONFERENCE
BURDENS OF PROOF

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LATE NOTICE

Two-step analysis

The question of whether an insured's untimely reporting of loss is sufficient to result in the denial of recovery under the policy implicates a two-step analysis. The first step in the analysis is to determine whether or not the notice was timely given. If the notice was untimely, then prejudice to the insurer is presumed. However, the presumption of prejudice to the insurer "may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice."

LATE NOTICE

In the second step, the insured must overcome the presumption by proving that the insurer was not prejudiced by noncompliance with the condition of timely notice. The burden of overcoming the presumption of prejudice is on the insured. If the insured is unable to overcome the presumption of prejudice, then the insurer will prevail on a defense of untimely notice.

How do you overcome prejudice?

- **Did the insurance company create its own prejudice?**

- **Was there an investigation by another insurance company?**

How do you overcome prejudice?

- **Does the insurance company have access to "substantial information" provided by the insured?**

- **Was there an investigation by a competent individual?**

EXCLUSIONS TO COVERAGE AND BURDENS OF PROOF

Castillo v. State Farm Fla. Ins. Co., 971 So. 2d 820, 824 (Fla. 3d DCA 2007).

> Once the insured establishes a loss apparently within the terms of an **all-risk policy**, the burden shifts to the insurer to prove that the loss arose from a cause which is excepted.

INTERPRETATION OF EXCLUSIONARY PROVISONS

Fayad v. Clarendon Nat. Ins. Co., 899 So. 2d 1082, 1086 (Fla. 2005)

- We begin with the guiding principle that insurance contracts are construed in accordance with "the plain language of the polic[y] as bargained for by the parties." Auto-Owners Ins. Co. v. Anderson, 756 So.2d 29, 33 (Fla.2000) (quoting Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So.2d 467, 470 (Fla.1993)) (alteration in original).

- However, if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous. See Anderson, 756 So.2d at 34; Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So.2d 161, 165 (Fla.2003). Ambiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured. See Anderson, 756 So.2d at 34; State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So.2d 1072, 1076 (Fla.1998); Deni Assocs. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1138 (Fla.1998).

INTERPRETATION OF EXCLUSIONARY PROVISONS

Fayad v. Clarendon Nat. Ins. Co., 899 So. 2d 1082, 1086 (Fla. 2005)

- Further, ambiguous "exclusionary clauses are construed even more strictly against the insurer than coverage clauses." Anderson, 756 So.2d at 34; see also Demshar v. AAACon Auto Transport, Inc., 337 So.2d 963, 965 (Fla.1976) ("Exclusionary clauses in liability insurance policies are always strictly construed.").

- Thus, the insurer is held responsible for clearly setting forth what damages are excluded from coverage under the terms of the policy.

INTERPRETATION OF EXCLUSIONARY PROVISONS

Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003)

- "[E]xclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured, since it is the insurer who usually drafts the policy."

- However, "[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite. It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties."

ENSUING LOSS

Divine Motel Group, LLC v. Rockhill Ins. Co., 2015 WL 4095449 (M.D. Fla. 2015)

Although the insured bears the burden of proving that a claim is covered by the insurance policy, the "burden of proving an exclusion to coverage is ... on the insurer." *LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511, 1516 (11th Cir.1997). However, if there is an exception to the exclusion, "the burden returns to the insured to prove the exception and show coverage." *See Mid–Continent Cas. Co. v. Frank Casserino Constr., Inc.*, 721 F.Supp.2d 1209, 1215 (M.D.Fla.2010); *see also LaFarge Corp.*, 118 F.3d at 1516; *E. Fla. Hauling, Inc. v. Lexington Ins. Co.*, 913 So.2d 673, 678 (Fla.3d Dist.Ct.App.2005).

ANTI-CONCURRENT LANGUAGE

Wallach v. Rosenberg, 527 So. 2d 1386, 1388 (Fla. 3d DCA 1988)

- Where weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage. There is no contention here that the policy contains a provision which specifically excludes coverage where a covered and an excluded cause combine to produce a loss.

ANTI-CONCURRENT LANGUAGE IN THE AFTERMATH OF SEBO

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Practical application of trying to determine what caused the loss:

- Independent adjusters
- Engineers
- Appraisers
- Umpires

EXCEPTIONS TO EXCLUSIONS
(Generally)

LaFarge Corp. v. Travelers Indem. Co., 118 F.3d 1511, 1516 (11th Cir. 1997)

> Neither the Florida Supreme Court nor this court appears to have addressed the question of which party bears the burden of proving an *exception* to an *exclusion*, such as the "sudden and accidental" exception to the pollution exclusion clause at issue in this case. In Hudson Insurance Co. v. Double D Management Co., Inc., 768 F.Supp. 1542 (M.D.Fla.1991), however, the United States District Court for the Middle District of Florida concluded that the burden was on the insured. Id. This appears to be the majority view. See Aeroquip Corp. v. Aetna Casualty and Surety Co., Inc., 26 F.3d 893, 894–95 (9th Cir.1994).

EXCEPTIONS TO EXCLUSIONS
(Wind Created Opening)

EXCEPTIONS TO EXCLUSIONS
(Wind Created Opening)

Florida Windstorm Underwriting v. Gajwani, 934 So. 2d 501, 505-06 (Fla. 3d DCA 2005)

> "We will not pay for loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sleet, sand or dust whether driven by windstorm or not, unless the direct force of Hurricane, other Wind, or Hail damages the building or structure causing an opening in the roof or wall and the rain, snow, sleet, sand or dust enters through this opening."

Practical application of trying to determine the wind created opening:

- What is sufficient to be deemed a wind created opening?
- Independent adjuster investigation
- Engineers

EXCEPTIONS TO EXCLUSIONS
(Constant Repeated Seepage)

COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES
We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property." We do not insure, however, for loss:

2. Caused by:
e. Any of the following:

(9) Constant or repeated seepage or leakage of water or the presence or condensation of humidity, moisture or vapor, over a period of weeks, months or years; **unless:**

(a) Such seepage or leakage of water or the presence or condensation of humidity, moisture or vapor and the resulting damage is unknown to all "insureds"; and
(b) Is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.

EXCEPTIONS TO EXCLUSIONS
(Constant Repeated Seepage-Case Law)

Hoey v. State Farm Florida Ins. Co., 988 So. 2d 99 (Fla. 4th DCA 2008)
The court held as follows regarding a toilet supply line leak:

The insured testified that he believed the damage was caused by "a continuous leakage from that toilet pipe, for a course of three weeks or so" and by a "sudden accidental discharge of water.“

At the trial, an expert testified on behalf of State Farm that the leakage had resulted from the failure of a nylon fitting in a toilet supply line, and that the water bills demonstrated that water usage had increased gradually from zero to twenty six gallons a day in September, two hundred forty gallons a day in October, and four hundred twenty gallons a day in November.

EXCEPTIONS TO EXCLUSIONS
(Constant Repeated Seepage-Case Law)

Hoey v. State Farm Florida Ins. Co., 988 So. 2d 99 (Fla. 4th DCA 2008)

This was an ongoing increase from a drip to a major failure of the fitting. The leak could have started as early as July, because rot in the wood near the fitting, and mold in the nearby drywall was consistent with leakage over a period longer than a few weeks.

The trial court found that the leak began sometime during the August -- September billing period and continued until it was discovered in mid-November, and this finding was the basis for the conclusion that this loss occurred over a period of time. Appellant's argument that this finding is not supported by the evidence is utterly without merit.

Practical applications:

- Duration of loss
- Evidence of long term leakage
- Investigation of a water loss

ENSUING LOSS

Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 167-68 (Fla. 2003)

Swire's sole claim here is an attempt to recover the expenses incurred in repairing a design defect.

No ensuing loss resulted to invoke the exception to the exclusionary provision.

Under the precise terms of this Builder's Risk Policy, the expenses claimed are clearly excluded under the first provision of the design defect exclusion clause, which states the policy does not cover "[l]oss or damage caused by fault, defect, error or omission in design, plan or specification."

ENSUING LOSS

Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 167-68 (Fla. 2003)

> No loss separate from, or as a result of, the design defect occurred. Therefore, we conclude that under the clear contractual provisions along with the authority of the numerous courts noted above, which we find persuasive, Swire is not entitled to recover the expenses associated with repairing the design defect.
>
> To hold otherwise would be to allow the ensuing loss provision to completely eviscerate and consume the design defect exclusion.
>
> The first certified question is, therefore, answered in the affirmative-the insurance policy's design defect exclusion clause bars coverage for the cost of repairing the structural deficiencies in the condominium building.

Practical applications:

- Investigation
- Engineers?
- Adjusters

ENSUING LOSS

Bartram, LLC v. Landmark American Ins. Co., 864 F.Supp. 1229 (N.D. Fla. 2012)

> "The Swire court did not apply a requirement that the chain of proximate cause be broken for the ensuing loss exception to apply. Only that the ensuing loss "occur[ ] subsequent to, and as a result of, a design defect."
>
> "This means that ensuing losses, if they resulted from a covered cause, are covered under the policy regardless of whether the loss was naturally set in motion by an excluded cause of loss. Given the plain meaning of the policy language, if the faulty workmanship resulted in water intrusion that subsequently resulted in ensuing losses, the cost to repair the faulty workmanship is excluded but the ensuing losses from the water intrusion are covered."

ENSUING LOSS

Pavarini Construction Co. Inc. et al. v. Ace American Insurance Co., 2015 WL 9686009 (S.D. Fla October 2015)

Federal court sitting in Florida ruled that ACE American Insurance Co. owes $23 million in indemnification to a Florida construction company for repairs the construction company made to fix deficient subcontractor work at a Miami high-rise condominium, saying coverage is required since the repairs addressed ongoing damage to nondefective property.

In a ruling that partially granted summary judgment to Pavarini Construction Co., the Court held that ACE is contractually required to reimburse Pavarini for the costs it incurred to remediate a 63-story luxury condominium tower after construction flaws caused damage to the stucco and led to leaking in a penthouse enclosure, among other problems.

The Court found that even though the policy does not provide coverage for the repair of defective subcontractor work itself, it does require coverage for repairs if the work causes damage to an otherwise non-defective completed property, which was evident in this case. (Ensuing loss)

ENSUING LOSS

Pavarini Construction Co. Inc. et al. v. Ace American Insurance Co., 2015 WL 9686009 (S.D. Fla October 2015)

> "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 nondefective property, e.g. damage to stucco, penthouse enclosure, and critical concrete structural elements," the opinion said." Thus, the ACE policy provides for complete indemnification."

> "In order to understand the scope of coverage under the ACE policy, it must be read together with the American Home policy, which the ACE policy incorporates by reference…The American Home policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which [the] insurance applies."…The American Home policy defines "property damage" as "all physical injury to tangible property, including all resulting loss of use of that property" and includes "[l]oss of use of tangible property that is not physically injured."

ENSUING LOSS

Pavarini Construction Co. Inc. et al. v. Ace American Insurance Co., 2015 WL 9686009 (S.D. Fla October 2015)

> The American Home policy excludes from coverage " '[p]roperty damage to 'your work' arising out of it or any part of it and included in the products-completed operations hazard."…This exclusion is known as the "your work" exclusion. However, the "your work" exclusion does not apply "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."…Thus, the ACE Policy provides coverage for damage to the completed project caused by a subcontractor's negligent work, but does not provide coverage for the repair of the defective subcontractor work itself. There is no dispute that the subcontractors' defective work was an "occurrence" under the Policy; the question is whether it caused covered "property damage."

THANK YOU!

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