Construction Defect Litigation Changes Again, Is Your Insurance Program Responding?

Recent Changes in Florida Statute of Repose may affect your Business

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Sometimes the simplest questions asked about commercial insurance coverage are the most difficult ones to answer. If you asked 10 different insurance brokers in Florida what "triggers" a commercial general liability (CGL) policy to respond, you may find yourself with 10 different answers. The reason for this is because the policies themselves are structured to include vague language and are entwined with specific exclusions to avoid responding to coverage. This structure poses litigation issues with respect to FL Statute 558 notices and construction defect actions. On Sept. 12, 2018, Florida's Fourth District Court of Appeal rendered its opinion in *Gindel v. Centex Homes, et al.*, which will impact construction defect litigation, insurance coverage, and particularly the application of the 10-year statute of repose to construction defect cases.

The insuring agreement may be the most important part of a commercial insurance policy and it is the section least likely to be read by brokers and owners. This is where the carriers specifically outline how coverage is to be determined. Business owners need to review the insuring agreement located in the back of a CGL. The agreement specifically states that "bodily injury" or "property damage" must occur for any type of response from the insurance carrier.

The potential for coverage is triggered when an "occurrence" results in "property damage" or "bodily Injury." This still doesn't answer the question of what "triggers" coverage.

There are four theories that cause a trigger of coverage: injury-in-fact, manifestation, exposure and continuous. Yet, there is no requirement that the damages "manifest" themselves during the policy period.

Creating a timeline becomes very important and difficult to manage when a neglected act causes property damage. An accurate timeline from the moment the property damage occurs is the most important document to help ensure insurance coverage will respond to the covered peril. It will help prove if the negligent act occurred during the current policy period or if the damage manifested over time. The damage itself must occur during the policy period for coverage to be effective. It was the Eleventh Circuit that adopted the Injury-in-fact trigger and rejects the manifestation trigger. This decision left the door open for a continuous trigger where it is difficult or impossible to determine when the property was damaged; stating there is no requirement that damages "manifest" themselves during the policy period. Rather, it is the damage itself that must occur during the period of coverage to be effective (*Trizec Properties, Inc. v. Biltmore Const. Co.*, 767 F.2d 810, 813 (11th Cir. 1985). This adds more complexity to the original question of what triggers a commercial insurance policy.

Not understanding what specifically triggers insurance coverage can cause contractual issues when it comes to one of the most controversial Florida statutes in the construction industry, FL 558 Statute. The 558 Statute applies to business entities including owners, builders, architects, interior designers, landscape architects, engineers, surveyors and geologists. A 558 Notice does not constitute a "suit" for Florida insurance terms. These include notice of the alleged defects with detail sufficient to allow the recipient to determine the general nature of the claim and a description of the alleged resulting damage or loss. The 558 Notice is a pre-requisite to an owner's suit and provides parameters for pre-suit inspections and the opportunity to potentially cure the issues without litigation. However, the recent ruling suggests that a notification is considered an "action" under Florida law.

The history of the 558 Statue began in 2006, when homeowners began to file litigation over construction defect issues. By 2015, the statute had evolved to include the requests for information including maintenance records and other documents relating to discovery, investigation, causation and extent of alleged defect, and the resulting damage. The action is any civil action or arbitration proceeding for damages to or loss of real or personal property caused by alleged construction defects. It is important to note that this doesn't include personal injury, and a 558 Notice is not considered a claim unless your insurance policy specifically states otherwise.

"What was intended as an effort by the Florida legislature to minimize litigation has evolved into an industry-wide pathway to more litigation due to the decisions by the court to expand the intent of the Statute," says Daniel Whiteman, Ph.D., vice chairman of Coastal Construction Company.

The court in *Altman Contractors Gindel v. Centex Homes, Inc. v. Crum & Forster Specialty Ins. Co.* ruled that a 558 claim notice is a form of Alternative Dispute Resolution. The effect of that ruling is that so long as the policy language at issue has similar terms, a 558 Notice does not trigger the insurance carrier's obligation to defend and indemnify an insured. However, under the terms of many policies, this does not relieve the carrier of the obligation to investigate the claims being made. Therefore, despite the ruling in *Altman*, it is still in the best interest of the carrier and the insured for the carrier to retain counsel, even during the early stages of a 558 Notice. This allows for an effective investigation, which the carrier is obligated to perform under many policies (*Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 2015 U.S. Dist. LEXIS 72466).

> An "action" or "trigger" have become actions that continue to evolve as new cases are brought to light. Understanding that legal rulings will continue to evolve, it is just as important to understand what triggers an insurance policy; where 558 notices come into play; and where to fill the gap past a 10-year limitation.

Owners, developers, construction managers and general contractors face a host of insurance uncertainties with every project. While no silver bullets can eliminate every uncertainty, a controlled insurance program (CIP) can improve coverage by consolidating into one program for all parties involved in the project, including all of the involved contractors and subcontractors. Also known as a wrap-up, a CIP can be sponsored by a project owner, developer, construction manager or general contractor. These programs have historically included Workers' Compensation, Employers Liability, General Liability and Excess Liability. Many CIPs today are commonly designed to include only General and Excess Liability.

One of the main benefits of the Owner Controlled Insurance Programs (OCIPs), or Contractor Controlled Insurance Programs (CCIPs), is that they provide continuous coverage for the duration of the statute of repose, which is 10 years; thereby allowing the various parties to have protection from these types of claims for construction defect with their work.

This provides some degree of certainty that there would not be damages paid by the company after every 558 Claim for defective work. The CGL policy also has standard "wrap up" or "OCIP/CCIP" exclusions listed in their policy.

It has reached the point where this statute has become weaponized against contractors. To make this more complex, the degree of certainty for the statute of repose no longer exists. On Sept. 12, 2018, the Fourth District Court of Appeal ruled that a Chapter 558 Notice of defect can be considered the "commencement" of a construction defect action (*Robert Gindel, et al. v. Centex Homes, et al.*, 2018 WL 4362058 (Fla. 4th DCA Sept. 12, 2018). The Fourth District found that the definitions are separate and distinct, and that an "action" under the statute of repose includes pre-suit proceedings under Chapter 558. This created uncertainty on what warranted an "action" in the court's eyes. Generally, prior to *Gindel*, most lawyers would have said an action isn't commenced until the filing of a lawsuit. The *Gindel* decision changes that notion, at least in the context of construction defect litigation. In effect, this ruling has allowed an extension to the 10-year limitation after a completed contract.

"The recent rulings create an opportunity for Insurance Brokers to work with their customers to assure that the carriers agree to include provisions within their policies to assure that the entire period of the statute of repose is adequately covered," adds Whiteman.

This extension in extreme cases can exceed over a one-year period. This additional time brings up valid concerns for all builders, developers and contractors of all trades. The extension is to allow additional time for active settlement negotiations, investigations and remedial work. The notice of 558 does not trigger a policy, and the standard commercial general liability policy has "wrap up" exclusion. More importantly, insurance carriers may not be required to pay settlements after the 10-year period, thereby leaving the parties to the policy without coverage for the potential losses. This is where both owners and contractors need a broker to negotiate specific endorsement to fill this gap in coverage.

An "action" or "trigger" have become actions that continue to evolve as new cases are brought to light. Understanding that legal rulings will continue to evolve, it is just as important to understand what triggers an insurance policy; where a 558 Notice comes into play; and where to fill the gap past a 10-year limitation.

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