LOCKE LORD® QUICKStudy
Insurance: Litigation and Counseling Practice
February 27, 2014

Yes, SIR

Florida Supreme Court Says Third-Party Payments Can Satisfy Self-Insured Retention

By: Mark A. Deptula, Elizabeth J. Campbell and Molly McGinnis Stine

In *Intervest Construction of Jax, Inc. v. General Fidelity Ins. Co.*, So.3d, 2014 WL 463309 (Fla. Feb. 6, 2014), the Florida Supreme Court ruled that third-party payments by a sub-contractor to the contractor could be used to satisfy the contractor's self-insured retention (SIR). Like many other jurisdictions, Florida had no controlling law that addressed this issue.

Background

ICI Homes, Inc. (ICI– the contractor) contracted with Custom Cutting, Inc. (CCI – the subcontractor) to install attic stairs in a residence ICI was building. The contract required CCI to indemnify ICI for any damages resulting from CCI's negligence. After the owner of the home (Ferrin) later fell from the attic stairs and sued ICI, ICI sought indemnification from CCI under the terms of their contract. At the time of Ferrin's fall, CCI was insured by North Point Insurance Company; however, ICI was not named as an additional insured under the CCI policy. ICI had its own insurance with General Fidelity but the ICI policy included a $1 million SIR which specified that the "retained limit" was only reduced by payments "made by the insured," and that the insurer had no duty to defend or indemnify the insured until the retained limit is "exhausted by payment… by [the insured]."

The underlying lawsuit settled for $1.6 million. CCI's insurer agreed to pay ICI $1 million to settle ICI's indemnification claim against CCI, and ICI, in turn, paid that $1 million to Ferrin. ICI and General Fidelity equally contributed to fund the remaining $600,000 paid to Ferrin, but thereafter pursued reimbursement from each other for their respective settlement contributions. ICI ultimately sued General Fidelity to determine whether ICI or General Fidelity was responsible for payment of the $600,000 above the $1 million paid by ICI with funds from CCI's insurer. The United States District Court for the Middle District of Florida, relying on several California cases, granted summary judgment for General Fidelity, finding that the language in the SIR provision required ICI to pay the "retained limit" such that it could not use the $1 million payment from the third party to satisfy the SIR. ICI appealed the ruling to the Eleventh Circuit Court of Appeals, which certified certain questions to the Florida Supreme Court, including whether an insured can use payments from a third party to satisfy the SIR.

The Florida Supreme Court held that the General Fidelity policy allowed ICI to apply indemnification payments received from a third party to the SIR. The court distinguished the California authority relied on by the trial court and found that the SIR provisions in those cases were different because the insured was required to satisfy the SIR "from its own account," or the policy terms specified that the named insured "make actual payment" and excluded "payments from others, including but not limited to additional insureds or insurers," or the relevant provision stated that regardless of other insurance, the insured would continue to be responsible for the full SIR. Unlike the SIR provisions in the California cases, the Florida Supreme Court found that nothing in the General Fidelity policy specified "where those funds must originate" and the absence of such language made the General Fidelity policy "materially different" from the California cases.

Commentary

SIRs are frequently used across a variety of industries in structuring insurance programs. For both insureds and insurers, the *General Fidelity* case highlights the importance of policy language and the governing state law in determining SIR application and exhaustion issues. Parties to an insurance contract or proposed contract will want to closely analyze the SIR provision and its language addressing the source of funds that can be used to satisfy the SIR. Additionally, the interplay between the policy language, indemnification contracts, additional insureds or other insurance available to the insured must be assessed. Particular attention should also be paid to a policy's choice of law provision. The decision also implicates possible bankruptcy and subrogation issues, including Florida's made-whole doctrine, which merit analysis but are not discussed here. Even with these considerations, other important questions remain. For example, would the result be different if CCI had also been named as a defendant in the lawsuit brought by Ferrin such that the $1 million would have been paid by CCI's insurer directly to Ferrin and not from ICI? Or, if ICI were an additional insured under the CCI policy, would the payment by CCI's insurer erode the SIR under ICI's policy with General Fidelity? Regardless, *General Fidelity* demonstrates the significance that policy language and applicable law can have on SIR exhaustion.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

Mark A. Deptula | 312-443-1728 | mdeptula@lockelord.com

Elizabeth J. Campbell (*licensed in Florida*) | 404-870-4679 | ecampbell@lockelord.com

Molly McGinnis Stine | 312-443-0327 | mmstine@lockelord.com