FLORIDA – 2014 UPDATE

Florida continues to be a hotbed for extra-contractual exposure to insurers, not to mention a jurisdiction known for liberal awards of economic and non-damages in personal injury trials. As a result, Florida has again received recognition as a "judicial hellhole." With respect to extra-contractual exposure, commonly referred to as "bad faith" conduct by insurers, unless the Florida legislature or the Florida Supreme Court steps in soon, the ever growing cadré of claimants' attorneys, who specialize in setting up insurers for payments well beyond policy limits, will continue to exploit insurers' profit margins. Unfortunately, 2014 does not portend the sort of judicial intervention that would be required of the current Florida Supreme Court. Similarly, the legislature seems intent on addressing other issues besides the overall impact this sort of litigation is having on the average Florida insured (i.e. – increased premiums) and the insurers who cover risks here (i.e. – decreased profits). As for distended economic damage awards at trial, Florida's current Rules of Evidence often times restrict a defendant from countering much of the claimant's evidence regarding the full extent of damages actually incurred or to be incurred. Legislation is being considered, however, that would allow defendants more leeway in presenting a more truthful picture of economic losses which are related to a particular incident. But, we must remember that 2014 is an election year in Florida and, therefore, it remains to be seen as to how much legislative change will actually be implemented. In short, Florida's moniker as a "judicial hellhole" is probably well deserved for 2014. As proof that this title is appropriate, consider the recent $26 Billion Dollar – yes, "Billion" – punitive damages award in July of this year against R. J. Reynolds for a single claimant.

Another issue of considerable note includes the application of prejudgment interest awards for liquidated damages in the context of construction defect claims. For purposes of awarding prejudgment interest, Florida Courts have deemed the date of loss as being the date the project was turned over to the owner as opposed to the date the damage was actually repaired. This means, for example, the owner of a building constructed with a defective roof twenty (20) years ago, even though the owner did not incur any costs to repair the roof until five (5) years ago, may be entitled to an award of prejudgment interest dating back fifteen (15) years before any money was actually spent to repair the problem. This sort of judicial logic can result in an interest award greater than the actual repair cost.

On the insurance coverage front, case law has recently suggested a new requirement for the insurer in preserving its rights to avoid payment of uncovered damages in claims involving losses which fall partially within and partially outside the policy's coverage. In years past, in any post-trial coverage litigation with the insurer, the insured had the burden of proof to establish covered damages after a general verdict had been entered in the underlying matter. It was the insured's burden to show how the underlying damage award should be allocated among the covered and uncovered losses. Now, however, there is case law suggesting, in no uncertain terms, that the insured may be relieved of this burden if the insurer fails to advise the insured, in writing prior to the jury's award in the underlying matter, that there is a "divergence of interests" between the insured and the insurer regarding the allocation of damages among the claimed covered and uncovered losses. The case law recommends that the insured be counseled upon the availability of special jury instructions and the use of special verdict forms

dealing with the allocation of damages. This will, theoretically, allow the jury in the underlying matter to address the issue based upon the insured's representation of facts which she/he may be legally unable to present in the subsequent coverage litigation. Should the carrier fail to advise the insured of this option, then the carrier inherits the burden of proving which portion of the damage award is covered and which portion is not. A carefully worded, supplemental Reservation of Rights letter advising of this issue is, therefore, a prudent consideration. That letter should be sent at least thirty (30) days before trial in order to allow the insured sufficient time to conduct any pretrial preparation prior the presentation of the defense in the underlying case.

These issues are representative of the evolution and nuances in the laws affecting insurers and their corporate clients in Florida. Staying abreast of these issues is essential to success here, as well as any jurisdiction where losses occur.

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