Insurance Matters!

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A Newsletter of the **Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of The Florida Bar

Wm. Cary Wright, Tampa
Co-Chair

Scott P. Pence, Tampa
Co-Chair

In This Issue:

Yours, Mine, and Ours: Florida Court Holds Wrap Exclusion Applies Equally to Named and Additional Insured

By: Gregory D. Podolak, Saxe Doernberger & Vita, P.C., Naples, FL

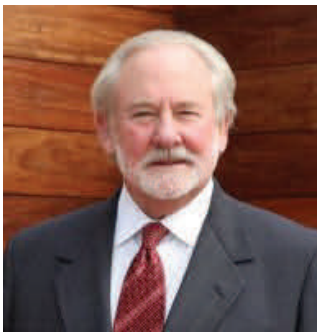
In today's construction market, large-scale projects are commonly insured under consolidated insurance ("wrap-up") programs, where the owner, general contractor, and most subcontractors are covered under the same primary and excess liability policies. This scheme functions as an alternative to traditional risk transfer, which relies on the individual insurance programs of each contractor and concomitant obligations in the trade contracts. However, when a wrap-up program is used, not all parties involved in the construction process are enrolled – generally, only those with onsite exposure are enrolled. As such, some parties still rely on traditional risk transfer, principally via additional insured coverage.

It is common practice for a general contractor to be named as an additional insured on its subcontractors' CGL policies, with the intent that the subcontractor's CGL policy will react first when the general contractor seeks liability coverage for injuries arising out of the subcontractor's work. As such, it is generally understood that if a liability claim against an enrolled general contractor involves the work of an unenrolled subcontractor, the unenrolled subcontractor's CGL policy will respond first (i.e. before the wrap-up coverage is implicated). However, recently the construction insurance market has seen an influx of broadly worded "wrap" exclusions, which can eliminate cov-

Yours, Mine, and Ours, continued on Page 2

At The Risk of Droning On

By: Charles E. Comiskey, CPCU, CIC, CPIA, CRM, PWCA, CRIS, CCM,
Sr. Vice President of Brady Chapman Holland & Associates, Houston, TX



Use of drones is an emerging liability exposure for contractors and their subcontractors. The general consensus is that drones are "unmanned aircraft" and therefore subject to the aircraft exclusion in the commercial general liability policy. The term "aircraft" is not defined in that policy.

According to the FAA, hobbyists can fly drones below 400 feet and within sight of the operator. Drones must be kept clear of other aircraft and operators must notify air-traffic control when flying within 5 miles of an airport. The hobbyist rule specifically excludes individuals or companies flying drones for business purposes.

In 2015 the FAA released its long-awaited proposal for governing small commercial drones. Drones weighing up to 55 pounds may fly during daylight hours if within sight of their remote pilots (operators cannot rely on on-board cameras), and must stay under 500 feet in altitude. Pilots must be at least 17 years old, pass an aeronautics test and be vetted by the Transportation Security Administration.

See Droning On, continued on Page 3

Yours, Mine, and Ours, continued from page 1

erage for the general contractor in a traditional risk transfer scenario. A prominent case decided last year in New York, Structure Tone, Inc. v. National Cas. Co., 2015 NY Slip Op 05760 (N.Y. App. Div. 1st Dep't July 2, 2015), reached that very conclusion.

A recent Florida Federal District Court decision reinforces the dangers of these types of exclusions when the language of the exclusion is not carefully crafted. See TNT Equip. Inc. v. Amerisure Mut. Ins. Co., 2016 WL 5146198 (M.D. Fla. Sept. 21, 2016). Although TNT Equip. involves a fact pattern different from the typical dynamic described above – an offsite, unenrolled equipment rental company pursuing additional insured coverage from an enrolled contractor, as opposed to an enrolled entity pursuing additional insured coverage via an unenrolled one – the implications of broadly applying a wrap-up exclusion appears to be universal in both scenarios: to ignore the common understanding of traditional risk transfer methods and void additional insured coverage.

"… imprecise wrap exclusions can upend these common understandings of traditional risk transfer, when a project involves a wrap-up program."

TNT Equip. involved a claim for additional insured coverage for a bodily injury lawsuit. TNT, an equipment lessor not involved in any onsite work, leased a mast climber to Stowell for stucco work on a hotel in Kissimmee (the "Project"). The TNT-Stowell lease required Stowell to include TNT as an Additional Insured under Stowell's general liability policy. Although Stowell was enrolled in the Project's controlled insurance program (the "OCIP") issued to the Project owner, Sierra, by Liberty,[1] Stowell also possessed a corporate CGL policy issued by Amerisure (the "Amerisure Policy"). Subsequently, the mast climber collapsed while in use, and an employee of Stowell's subcontractor – harnessed to the equipment – fell forty to fifty feet.

The injured party sued TNT, among others, and TNT sought additional insured coverage from Amerisure. However, the Amerisure Policy contained an industry standard controlled insurance program exclusion (the "Wrap Exclusion"). As such, Amerisure argued that TNT was excluded from coverage pursuant to the Wrap Exclusion that stated, in pertinent part:

> this insurance does not apply to bodily injury or property damage arising out of either your ongoing operations or operations included within products completed operations hazard *if such operations were at any time included within a controlled insurance program for a construction project in which you are or were involved.*

(Emphasis added). Although TNT performed no operations at the Project, Amerisure maintained that the Wrap Exclusion applied because the underlying claims were based on bodily injury arising from Stowell's operations and that Stowell's operations were covered by the OCIP.

TNT neither disputed Amerisure's assertions that Stowell was covered by the OCIP nor did it disagree that the Wrap Exclusion applied to Stowell. Instead, TNT argued that the terms "you" and "your" within the Wrap Exclusion in the Amerisure Policy referred only to Stowell as the Named Insured and not TNT as the Additional Insured. TNT further asserted that the Amerisure Policy had a Separation of Insured's provision and a Contractor's General Liability Extension Endorsement that distinguished TNT as an Additional Insured from Stowell as a Named Insured. Therefore, TNT argued, it was not subject to the Wrap Exclusion and was entitled to Additional Insured coverage under the Amerisure Policy.

The Court found that the Separation of Insureds provision merely clarified that the Amerisure Policy applied separately to each insured. The Court further found that the Separation of Insureds provision did not identify TNT as an additional insured, distinguish the rights of any insureds, or limit the scope of any exclusion. Additionally, the Court stated that the Contractor's General Liability Extension had no bearing on the Wrap Exclusion and only extended coverage to equipment lessors, like TNT, but only for "liability arising out of the maintenance, operation, or use by [Stowell] of the equipment."[2] Finally, the Court held that "[e]ven if the Court adopted TNT's construction of the foregoing terms and provisions, the claims against TNT would nevertheless come within the scope of the [Wrap] Exclusion because it expressly extends beyond the Named Insured." Id at *6.

In support of its holding, the Court looked to the Wrap Exclusion's plain language and found that the exclusion pertains to Stowell's "ongoing operations or operations included within the 'products-completed operations hazard'" that were "at any time included within a controlled insurance program." Id. (citing the Wrap Exclusion). The Court further notes that the Wrap Exclusion "plainly states that it applies regardless of whether such operations are or were conducted by Stowell or on Stowell's behalf." Id. As such, the Court found that the language of the Wrap Exclusion "provides a very clear intention to extend the [Wrap] Exclusion beyond Stowell to other parties otherwise covered by the Amerisure CGL—irrespective of whether a controlled insurance program supplied adequate coverage or coverage identical to that of the Amerisure CGL." Id.

See Yours, Mine, and Ours, continued on Page 3

Yours, Mine, and Ours, continued from page 2

Although TNT Equip. involves a fact pattern different from the typical general contractor/subcontractor dynamic previously described above, the facts still involve a traditional risk transfer scenario where one party contractually promises additional insured coverage to another party. However, it is common practice for a GL carrier to place a wrap-up exclusion on its policy with the assumption that if its named insured is enrolled in a wrap-up program, such program should respond to any claims its named insured may have. Unfortunately, this common practice does not take into consideration the additional insured coverage its named insured has promised to other parties under that policy, particularly parties who are not enrolled in a wrap-up program. As such, the Court's holding in TNT Equip. highlights that imprecise wrap exclusions can upend these common understandings of traditional risk transfer, when a project involves a wrap-up program.

An unenrolled contractor or subcontractor who is providing labor, materials, or equipment to a party enrolled in a project's wrap-up program should be concerned with whether the enrolled party's corporate GL policy contains a wrap-up exclusion. Furthermore, enrolled parties who promise to provide unenrolled parties with additional insured coverage must be aware that they may be breaching their contractual obligations to those parties if their GL policies contain a wrap-up exclusions.

Accordingly, unenrolled contractors who require additional insured coverage from enrolled subcontractors should review their subcontractors' corporate GL policies to avoid being blindsided by a wrap-up exclusion. General contractors might also consider amending their subcontracts to require their subcontractors to remove any wrap-up exclusions in their CGL policies.

In the same regard, parties who are contractually obligated to provide additional insured coverage should consider reviewing their insurance policies to determine whether any wrap-up exclusion exist that could create exposure to a breach of contract claim by a party to whom they have promised to afford such additional insured coverage. IM

[1] The record in the decision is unclear, but it appears Liberty was originally involved in the litigation, and managed to get TNT's claims dismissed.

[2] The Court reasoned that it would be unreasonable for TNT to rely on the Contractor's General Liability Extension for coverage of claims arising from Stowell's operations and simultaneously attempt to escape the OCIP Exclusion because it only applied to Stowell's operations.

Droning On, continued from page 1

General liability insurance does not apply to "bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured.

Note that this exclusion applies to Coverage A of the CGL policy only, the part that provides coverage for bodily injury and property damage. It does not apply to Coverage B, the part that provides coverage for personal injury as defined in the policy, including such issues as invasion of privacy rights.

This exclusion currently does not apply to liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft. Coverage may therefore still be provided to an upstream party for allegations of bodily injury or property damage through enforcement of a well-written indemnity agreement. There is no such exception applicable to Coverage B, so an unendorsed CGL policy will not provide any contractual liability coverage for personal injuries.

Many insurance companies have begun to add manuscripted endorsements that specifically exclude any liability arising out of the use of unmanned aircraft. The Insurance Services Office (ISO) has recently issued 67 pages of optional unmanned aircraft CGL and excess liability endorsements (mostly exclusions) that insurance companies will soon begin to utilize. That is a good indicator of how seriously the insurance industry is taking the drone issue.

Businesses operating drones could also run afoul of CGL exclusions for "illegal" activities (e.g., flying out of sight of the operator).

Recommended: If there is a known drone exposure, require specialized aircraft coverage. Stay tuned for upcoming further discussion of the proposed FAA rules regarding drones. IM

"If there is a known drone exposure, require specialized aircraft coverage. ."

Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management. IM

Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

Co-Chair - Wm. Cary Wright (cwright@carltonfields.com)
Co-Chair, Secretary & Newsletter - Scott P. Pence (spence@carltonfields.com)
Co-Vice-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
Co-Vice-Chair and CLE - Michael G. Meyer (mgmeyer83@gmail.com)
Legislative Subcommittee - Sanjay Kurian (skurian@becker-poliakoff.com
Legislative Liaison - Louis E. "Trey" Goldman (treyg@floridarealtors.org)
Website - Derrick M. Valkenburg (DValkenburg@shutts.com)
Membership - ***Open***

Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
- Do you know the difference between "claims made" and "occurrence" based insurance policies?

Get answers to these, and many other questions, by attending our **FREE** monthly CLE programs.

When: Noon - 1:00 P.M. ET on the third Monday of every month, excluding government holidays.
Where: Via Teleconference
How: Dial-in number: **888-376-5050**
Participate Code: **7854216320#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-50 minutes.

If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

Schedule of Upcoming RPPTL Section Meetings

February 22-25, 2017
Out-of-State Executive Council Meeting
Four Seasons Hotel
Austin, Texas

May 31-June 4, 2017
Executive Council Meeting & Convention
Hyatt Regency Coconut Point
Bonita Springs, Florida

July 27-30, 2017
Executive Council Meeting & Legislative Update
The Breakers
Palm Beach, Florida

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of ***Insurance Matters!***, please contact me at spence@carltonfields.com.

We Need You!

We are in need of someone to chair our membership sub-committee. Please contact us if you would like to get more involved.

Did you know?

You can access previous issues of Insurance Matters!, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at http://www.rpptl.org.