

State Specific: Florida



The Language Was Not Enough: Florida Supreme Court Holds that the Standard “Transfer of Rights” Provision Does Not Abrogate the “Made Whole Rule”

BY JESSICA M. SKARIN AND AARON M. JACOBS, BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

Many insurance policies contain a standard “transfer of rights” provision, which gives the insurer a contractual right to pursue recovery of any amounts paid, i.e., a conventional right of subrogation.

The scope of these transferred rights had not been addressed in Florida until the Eleventh Circuit certified the issue to the Florida Supreme Court. In its recent opinion, the Florida Supreme Court clarified that a basic transfer of rights provision, *without more*, does not give the insurer a right of priority. Under such circumstances, priority of recovery remains dictated by Florida’s common law “made whole doctrine.”

In *Investment Construction of Jax, Inc., et al. v. General Fidelity Insurance Co.*,¹ general contractor ICI Homes, Inc. (“ICI”) subcontracted with Custom Cutting, Inc. (“Custom Cutting”) to assist in the construction of a residence. After the work was complete, the homeowner sued ICI for personal injuries sustained as a result of a defect in a staircase installed by Custom Cutting. ICI in turn

sought indemnification from Custom Cutting.

At mediation, Custom Cutting’s liability carrier agreed to tender its policy limits of \$1 million to settle ICI’s indemnity claim. This amount was applied to the \$1.6 million settlement of the homeowner’s claim. The dispute on appeal involved whether the indemnity payment could be used to satisfy ICI’s \$1 million Self-Insured Retention (“SIR”), and whether ICI or its liability carrier, General Fidelity, was responsible for paying the remaining \$600k to the homeowner. Although the issue was not addressed by the District Court, the Eleventh Circuit noted that even if the indemnity payment could satisfy ICI’s SIR, General Fidelity may, nonetheless, be entitled to a portion of the indemnity payment pursuant to the “transfer of rights” provision in ICI’s policy.

After confirming that the indemnity payment satisfied ICI’s SIR, the Florida Supreme Court turned to the scope of General Fidelity’s subrogation rights. The Court held that equitable principles such as the “made whole doctrine” apply to conventional subrogation, “except as modified by specific provisions...”² In this case, the insurance policy stated,

“If the insured has rights to recover all or part of any payment we have made ... those rights are transferred to us.”³ This standard language was not enough to abrogate the “made whole doctrine,” which gives the insured priority of recovery in limited fund situations, where the tortfeasor is unable to pay both the insured and the insurer in full. Accordingly, the Florida Supreme Court held ICI’s right of priority was preserved, because the standard “transfer of rights” provision did not expressly address the priority of reimbursement.

With this decision, Florida aligned itself with the majority of jurisdictions that apply equitable principles to conventional subrogation, and permit a modification of priority rights only when there is express policy language contrary to the equitable principles. As subrogation professionals, this case serves as a reminder of potential “made whole” issues, as well as the benefits of using recovery sharing agreements between the insurer and insured, to avoid this type of dispute.

Endnotes:

¹ ___So.3d___, 2014 WL 463309 (Fla. Feb 6, 2014).

² *Id.* at *9.

³ *Id.*