



## Alerts

### Florida Courts Rejecting Prejudice as a Matter of Law in Certain Late Notice Cases

July 26, 2011

*Insurance Coverage Alert*

Florida state courts (see *Aubuchon Homes, Inc. v. Great American Ins. Co.*, Case No. 04-CA-004430, 20th Judicial Circuit, Lee County, Florida) have begun following *Keenan Hopkins Schmidt & Stowell Contractors, Inc. v. Continental Cas. Co.*, 653 F. Supp. 2d 1255 (M.D. Fla.), a 2009 federal case standing for the proposition that when an insurer denies a claim under late notice it cannot prove prejudice as a matter of law if it is able to investigate a claim sufficiently to permit it to deny the claim on other grounds. The *Keenan Hopkins* court held that the ability to investigate the claim effectively rebuts any presumption of prejudice arising from the late notice.

*Keenan Hopkins* arose out of a dispute regarding construction defects and insurance coverage affecting the construction of a boardwalk at an amusement park. The amusement park had hired a general contractor to build the boardwalk. The general contractor subcontracted with the subcontractor and others. After discovering issues with paint failures of the “wood trim” on the boardwalk, the general contractor identified the subcontractor as the party that had installed the defective “wood trim.”

The amusement park filed a complaint in Florida state court against the general contractor, asserting claims for breach of contract based on deficient workmanship relating to the project. The general contractor, in turn, tendered the defense to and demanded indemnification from the subcontractor on August 29, 2002. The subcontractor, which was insured by a first insurer, was sued by the general contractor in November 2004, but did not place its insurers on notice of the general contractor’s complaint until December 27, 2004. On October 31, 2005, the first insurer informed the subcontractor that it would not provide a defense or indemnity based upon the “Other Insurance, Duty to Defend, Deductible, and Known and Continuing Loss” endorsements. The subcontractor was ultimately defended by a second and third insurer. It subsequently filed this action in state court against the first insurer on June 13, 2007. The subcontractor sought to recover from that carrier the costs associated with the underlying case, including the first insurer’s share of the expenditures made by the second and third insurers, as well as the amounts paid by the subcontractor itself. The first insurer subsequently removed the case to federal court on the basis of diversity jurisdiction.

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The first insurer waited 10 months before responding to the insured's tender, at which time it denied the claim without mentioning the late notice issue. The court opined that the carrier's ability to sufficiently investigate the claim and issue a complete denial of coverage was sufficient to negate any presumption of prejudice. Thus, the court denied the insurer's summary judgment motion as to late notice. However, it ultimately concluded that the carrier was entitled to summary judgment on the duty to defend on the basis of the "Other Insurance and Duty to Defend" endorsements.

### **Practice Note**

In light of the holding in this case, carriers should be aware that, if they assert grounds other than late notice as a defense for coverage, they may be forced to give up the late notice defense in favor of the other defenses.

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