

# Third Party Entitled To Coverage But Not Damages for Insurer's Failure To Obtain Its Consent To Settlement

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August 2010

Applying Florida law, the United States District Court for the Middle District of Florida has held that a ship manufacturer was entitled to coverage for a wrongful death action as a third-party beneficiary under a professional liability policy issued to an architects and engineering (A&E) firm with which it had contracted for services. *Atl. Marine Fla., LLC. v. Evanston Ins. Co.*, 2010 WL 2542281 (M.D. Fla. June 23, 2010). The court also held, however, that the manufacturer had no basis for recovery against the insurer for its failure to obtain the manufacturer's consent to settle the underlying claim against the firm.

The case arose out of an accident in which a ship's captain died when a watertight door on the vessel closed on him. In the ensuing wrongful death action, plaintiffs alleged negligence and strict liability against both the ship's manufacturer and the A&E firm that designed and engineered the door. Pursuant to the contract between the manufacturer and the A&E firm, the firm had obtained a professional liability insurance policy as well as a comprehensive general liability (CGL) policy. The manufacturer tendered the claim under both policies, but both insurers refused to defend it on a number of grounds, including that the manufacturer was not an insured under the policies.

In the coverage litigation that followed, the court concluded that the manufacturer was a third-party beneficiary of the professional liability policy and as such was entitled to coverage. The court found that the policy was a contract entered into between the insurer and the firm in order to directly benefit the manufacturer. In making this finding, the court pointed out that the policy included a number of specific endorsements that addressed the relationship between the manufacturer and the firm as well as the specific project involving the ship at issue. The court also pointed out that the manufacturer paid the premium for the policy and negotiated the right to maintain certain controls over the policy, including whether to cancel coverage, report claims and approve settlements.

Despite its recognition of the manufacturer's rights under the professional liability policy, the court rejected the manufacturer's claim for breach of contract based on the insurer's failure to obtain the manufacturer's consent to a settlement of the underlying suit on behalf of the A&E firm. The court recognized that while the policy provided that the insurer was not to settle any claim without the manufacturer's consent, the policy also

provided that should the manufacturer refuse to consent to any settlement recommended by the insurer, the insurer's liability under the policy was limited to the amount for which the claim could have been settled plus defense costs incurred up to the date of such refusal. According to the court, in light of this provision, the manufacturer could not prove that it had sustained any damages as a result of the insurer's failure to obtain its consent. The court reasoned that "all that withholding consent would have accomplished would have been to expose [the firm] to a potential judgment in excess of the settlement amount and caused [the firm] to incur attorneys fees beyond what [it] would have been entitled to recover under [the] policy." The court further noted that, even if the manufacturer had withheld its consent, the insurer still would have been obligated to settle the claim on terms that it deemed in its insured's best interests.

As to the CGL policy, the court found that while the manufacturer was not a named insured on the policy, the policy extended coverage to persons and entities with which the named insured had a written agreement to provide insurance in connection with work performed by the named insured. On this basis, the court concluded that the manufacturer was an additional insured within the scope of the policy's insuring agreement. Nonetheless, the court held that coverage for the underlying suit was barred by the policy's exclusion for liability for bodily injury resulting from professional services.