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11th Circ. Won't Revive Arch's \$4M Suit Against Auditor

By **Bibeka Shrestha**

Law360, New York (July 14, 2011) -- The Eleventh Circuit on Thursday upheld the dismissal of a lawsuit in which Arch Insurance Co. accused accounting firm Clements Purvis & Stewart PC of causing it more than \$4 million in losses by negligently auditing a Georgia construction company.

Arch had issued performance bonds to Douglas Asphalt Co. in 2005 and 2006 to cover scores of projects that the insurer became responsible for completing after the construction company encountered serious financial problems. Arch claimed it had relied on material misrepresentations that Clements Purvis negligently made while auditing Douglas Asphalt on the insurer's behalf.

But the Eleventh Circuit backed the Georgia federal court's decision to dismiss Arch's complaint because it lacked a sufficient factual basis for the insurer's negligent claim.

"The complaint fails to include facts regarding the tests Clements Purvis performed or failed to perform or facts regarding how Clements Purvis' actions deviated from the standard of care," the appeals court said in its opinion. "Further, the complaint fails to state what information in the audited financial statements was inaccurate or constituted a misrepresentation."

The appellate court further ruled that the lower court justifiably denied Arch's motion for leave to amend its complaint.

That motion was premature, the Eleventh Circuit said, because it requested leave to amend only if Clements Purvis' motion to dismiss was granted. Moreover, Arch did not say what it would change about its complaint or attach a proposed amended complaint.

In denying Arch's motion to amend, the Georgia federal court specifically said the insurer could request leave to amend the complaint at that time if it desired, but the plaintiff filed no such motion. Even after the lower court dismissed the accounting firm's motion to dismiss on Jan. 25, Arch did not request to amend its complaint, the Eleventh Circuit said.

"We think their failure to plead sufficiently anything that our accounting firm did wrong reflects the fact the firm really didn't do anything wrong," Joe Kingma, an attorney for Clements Purvis, said Thursday about the decision.

An attorney for Arch was not immediately available for comment Thursday.

Arch is represented by John Peavy Jr. of Bovis Kyle & Burch LLC.

Clements Purvis is represented by John Bunyan, Joe Kingma and John Rogers of Carlock Copeland & Stair LLP.

The case is Arch Insurance Co. v. Clements Purvis & Stewart PC, case number 11-10865, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Andrew Park.

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