

**2009**  
**CASE LAW SUMMARY**

**Insurance Coverage**

**Attorney's Fees**

*Pawtucket Mutual Insurance v. Manganelli*, 3 So.3d 421 (Fla. 4<sup>th</sup> DCA 2009)

Plaintiff filed a claim for uninsured motorist benefits. The policy included an arbitration clause which provided that unless both parties agreed otherwise, arbitration would occur in the county where the insured "lives." The insured requested arbitration in Palm Beach County, but the insurer maintained that the insurer lived in New Hampshire because he listed his primary residence there when the policy was issued. The insured brought an action for declaratory judgment and the trial court determined that Manganelli "lived" in Palm Beach County. The insurance company did not appeal that ruling.

Following arbitration, the insured moved for attorney's fees and costs pursuant to F.S. §627.428 and §627.727(8) arguing that his suit against Pawtucket was only necessary because they effectively denied coverage by refusing to arbitrate in Palm Beach County. The Fourth District upheld the award of attorney's fees even though Pawtucket did not deny coverage pro se, but by maintaining that arbitration had to take place in New Hampshire, it forced its insured to engage in unnecessary litigation.

*United Automobile Insurance v. Lopez*, 7 So.3d 583 (Fla. 3d DCA 2009)

County Court entered summary judgment in favor of the plaintiff. The Circuit Court, Appellate Division reversed the granting of the summary judgment but awarded the plaintiff attorney's fees because he had prevailed in the lower court. The Third District reversed, finding that an appellate court may not award attorney's fees to an insured unless the insured prevails on the appeal.

*Lewis v. Universal Property & Casualty Insurance Company*, 13 So.3d 1079 (Fla. 4<sup>th</sup> DCA 2009)

Homeowners appealed denial of their motion seeking prevailing party attorney's fees from their insurer, Universal Property & Casualty, pursuant to §627.428, Florida Statutes, (2008). Following Hurricane Wilma in October, 2005,

the homeowners' roof in Coral Springs was damaged. The insurance policy had an appraisal clause where either party could demand appraisal or mediation, as the manner in which to resolve a dispute over the amount to pay for the damage under the policy.

The parties went to mediation which resulted in an impasse. Thereafter, the insured's counsel drafted a civil complaint for breach of contract, however prior to the filing of the complaint, Universal sent a letter indicating it was invoking its right under the policy to an appraisal. Over the insured's objection, the appraisal went forward and the civil suit was stayed. The appraisal was concluded with Universal having to pay an additional \$51,000 to the insured. After the appraisal was concluded, the insured sought an award of attorney's fees under §627.428 as a prevailing party. The insured argued these are not awardable because it did not "deny coverage" and rather that it was merely a dispute as to the amount of the loss.

The Fourth District disagreed with the insurance company and decided that the insureds were entitled to fees even if the appraisal award was never confirmed by a court, and there was no judicial relief in favor of the insureds, nor was there a technical denial of the claim. The Fourth District explained that the purpose behind §627.428 is to place the insured in the place he or she would have been if the carrier had reasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees.

The court explained that the timing of the complaint being filed after the appraisal or the appraisal was invoked was irrelevant because there were steps taken by the insured to invoke their rights under the contract which the carrier was resisting, including a position that the damages were not payable. Furthermore, it should not matter whether there is a race to the courthouse, or that there was never any formal confirmation of the appraisal award as Florida law squarely hold that payment of the claim after suit was filed operates as a confession of judgment entitling the insured to attorney's fees.

*Grider-Garcia v. State Farm Mutual Automobile Insurance Company*, 14 So.3d 1120 (Fla. 5<sup>th</sup> DCA 2009)

The Fifth District clarified that an insured petitioner on a Writ of Certiorari is not entitled to an award of attorney's fees pursuant to F.S. §627.428 as a "prevailing party". The Fifth District acknowledged the statute does not authorize a court to grant fees to an insured who does not succeed in his or her application

for certiorari. Furthermore, even if the insured wins on certiorari, it is doubtful that they would be entitled to attorney's fees unless they are ultimately the prevailing party in the underlying litigation.

This decision is in contrast to the Fourth District which determined that the purpose of §627.428 is to reimburse successful insureds for their attorney's fees despite losing an appeal when they ultimately recover under the policy.

### **Bad Faith**

*Seminole Cas. Ins. Co. v. Mastrominas*, 6 So. 3d 1256 (Fla. 2d DCA 2009)

Seminole Insurance Casualty Insurance Company sought certiorari review of a discovery order requiring it to produce certain items in its claims file. The Plaintiff alleged breach of contract and sought a declaratory judgment that coverage was in effect on the date of accident. The lawsuit did not include a claim of bad faith. The Second District held that because the issue of coverage was still in dispute and had yet to be determined, the trial court departed from the essential requirements of law by ordering Seminole to disclose materials in its claims file. Additionally, requiring the disclosure of claims materials during the litigation of coverage issues would result in irreparable harm that could not be adequately addressed on appeal.

*Granada Insurance Company v. Ricks*, 12 So.3d 276 (Fla. 3d DCA 2009)

An insured and plaintiff joined together to sue the insured's general liability carrier, Granada Insurance Company, for an accident allegedly caused by its insured's negligence. Granada had denied coverage. While the coverage issues remained unsolved, Granada sought protection from a Notice of Deposition directed by the plaintiff to the President of the company. The plaintiff argued that despite the fact that the president had no direct knowledge of the facts or handling of the claim, they were permitted to determine whether there was a corporate policy that flows from the top to denial of claims based on certain types of events, and how those decisions are made. The trial court ordered the deposition to go forward regarding the policies and procedures of claims handled by Granada.

The Third District Court quashed the Order on the universally applied rule that discovery which concerns only potential issues of bad faith or other purported issues of improprieties in defending the claim are wholly impermissible unless and until it is determined that the policy indeed provides coverage. This included

depositions of corporate representatives as well as preventing the discovery of claim handling manuals, materials and other company policies, as those are privileged work product and irrelevant in a coverage dispute.

*Gutierrez v. Yochim*, 23 So.3d 1221 (Fla. 2d DCA 2009)

Gutierrez appealed a summary judgment entered in favor of Dairyland Insurance Company, one of the defendants in this case. The ultimate issue in this matter concerned whether Dairyland acted in bad faith in failing to settle a claim against its insured; Gutierrez. The defendant asserted that it had orally offered to settle its policy limits within a day of receiving the medical records. Dairyland argued that any delay in tendering the policy limits was caused by the Plaintiff's attorney who failed to provide the medical records, and who instead, sent out medical authorization forms. Dairyland added that it was trying to verify the full extent of the claimant's injuries and had every right to wait for the medical information.

Reversing the summary judgment, the Second District noted that although Dairyland did not have possession of the medical records pertaining to the claimant's injuries, the insurer knew within days of the accident that its insured was entirely at fault in causing the collision based upon interviews with the insured, Ms. Gutierrez. Further, because the accident involved a motorcycle, Dairyland was aware that the insured was responsible for all personal injury damages that exceeded her \$10,000 policy, without regard to the issue of whether Mr. Yochim suffered a permanent injury. Dairyland also knew that Mr. Yochim suffered catastrophic injuries because he was hospitalized for 13 days and later transferred to a nursing home. The court held that Dairyland's fiduciary duty to timely and properly investigate the claim against its insured was not relieved simply because it was waiting to receive information from the claimant's attorney. The court concluded that whether Dairyland reasonably handled this claim was a factual dispute that should be determined by the finder of fact.

### **Declaratory Judgment**

*Century Surety Co. v. de Moraes*, 998 So. 2d 662 (Fla. 4<sup>th</sup> DCA 2009)

The Fourth District held that the trial court departed from the essential requirements of law in staying a non-jury declaratory judgment action pending resolution of a jury proceeding in the underlying wrongful death action because the two actions were mutually exclusive. Further, they found that a decision on the

issues underlying insurance coverage would promote settlement and avoid collusive actions between the claimant and the insured.

### **First Party Claims**

*State Farm v. Nichols*, 21 So.3d 904 (Fla. 5<sup>th</sup> DCA 2009)

This District Court found that the statute that allowed insurers to withhold payment to insureds for repairs for a sub-surface sinkhole damages was permissive, not mandatory; therefore, the policy that requires insurer to pay within 60 days following loss settled by appraisal process is controlling. The homeowner's policy clearly required State Farm to pay the full amount of the appraisal award within 60 days. However, the Florida Statute 627.707(5)(b) F.S. 2007, appears to allow carriers to withhold funds until homeowners have contracted for repairs to the subterranean portion of a sinkhole loss. The statute states in pertinent part

The insurer may limit its payment to the actual cash value of the sinkhole loss, not including underpinning or grouting or any other repair technique performed below the existing foundation of the building, until the policyholder enters into a contract with a performance of building stabilization or foundation repairs. After the policyholder enters into the contract, the insurer shall pay for the amounts necessary to begin and perform the repairs.

As stated above, the Fifth District construed that language as permissive, not mandatory, and therefore, it is not in conflict with the contractual requirement that payment is due for all loss within 60 days.

### **Insurance-Coverage**

*United Automobile Insurance v. Reece*, 4 So.3d 80 (Fla. 3d DCA 2009)

United's policy provided separate coverage for bodily injury and property damage liability. United paid the property damage liability claim and then sought to contest the bodily injury coverage. Finding that this was a divisible automobile insurance policy, the Third District reversed thereby allowing United to contest bodily injury coverage.

*Estate of Tinervin v. Nationwide Mutual Insurance Co.*, 23 So.3d 1232 (Fla. 4<sup>th</sup> DCA 2009)

A wrongful death case was brought against a pediatrician who failed to see lab results for approximately three months after blood was drawn. The reason for the error was that his spouse, an employee of the practice, failed to clip the lab results to the outside of the medical chart and place it on his desk for review.

The Fourth District agreed with the trial court that the policy exclusion that excluded coverage for bodily injury, property damage, personal injury or advertising injury, due to the rendering or failure to render professional services applied.

Although the insured argued that the services were merely clerical in nature and did not involve any judgment, it nonetheless was an “intricate part” of the practice of professional services. Furthermore, the spouse was a trained nurse who performed other roles such as taking vital signs and writing them in the patient’s chart. Furthermore, her function as a professional medical assistant fell under §458.3485, Florida Statutes, (2007) which defines a medical assistant as a professional multi-skilled person dedicated to assisting in all aspects of the medical practice under the direct supervision and responsibility of a physician.

The court found, however, that the insurer had a duty to defend that was separate and distinct from the duty to indemnify, and all damages from the duty to defend should be awarded to the insured.

### **Reinsurance-Non Admitted Primary Liability Insurer**

*Advantage General Insurance Company v. Kiln/QBE International*, 8 So.3d 1213 (Fla. 4<sup>th</sup> DCA 2009)

The trial court erroneously dismissed Advantages’ suit against its reinsurer, Kiln d/b/a Lloyds Underwriters and QBE d/b/a Lloyds of London, pursuant to §626.903, Florida Statutes (2007), which prohibits lawsuits by unauthorized insurers. The court found that the instant lawsuit did not arise out of an unauthorized insurance transaction by Advantage, and therefore their suit against the reinsurer was not banned. The facts were that Advantage, a British Virgin Islands insurance company, insured an airline which was a Florida corporation. Advantage also purchased reinsurance from Kiln and QBE.

Advantage settled two wrongful death claims for the airline, and later sought to recover from KILN and QBE damages when they refused to pay amounts that were insured to pay the lawsuits through the reinsurance policy. Kiln and the reinsurers moved to dismiss based upon §626.903, Florida Statutes, because as an unauthorized insurer, they claimed it was barred from bringing suit in Florida.

The Fourth District found that the trial court misapplied the statute which stated that as to transactions not permitted under §624.402, no unauthorized insurer shall institute, file or maintain any suit, action or proceeding in this state (Florida) to enforce any right, claim or demand arising out of any insurance transaction in Florida. Kiln and QBE argued that Advantage lacked a certificate of authorization when it sold insurance to Air Sunshine in Florida, and therefore could not have sought relief in Florida courts under the above-referenced statute.

The Fourth District court disagreed and pointed out that when Advantage purchased reinsurance from Kiln and QBE in Florida, *Advantage was the insured*. Therefore, in making the purchase of reinsurance, Advantage was not “transacting insurance” within the meaning of the Florida instance code. Accordingly, this suit brought by Advantage against the reinsurers was permitted.