CASE LAW SUMMARY
2010

Insurance Coverage

Appraisal

Sunshine State Insurance v. Corridori, 28 So. 3d 129 (Fla. 4th DCA 2010)

Homeowners had been paid for hurricane damage; however, 2 years later they submitted a supplemental claim for damages. The insurance company then requested a sworn proof of loss and examinations under oath. The insureds did not comply with the deadlines and their late submissions were incomplete and inaccurate according to the insurance company. Sunshine then concluded that the damages claimed were not supplemental to the original damages. Homeowners then filed a petition to compel an appraisal and, without taking evidence, the trial court concluded that the new claim was supplemental, found that the homeowners had not breached their duties under the policy and ordered an appraisal.

The Fourth District reversed noting that coverage issues must be resolved before an appraisal of the amount of a loss is ordered. Issues of coverage are for judicial determination by a court and not by an appraisal panel. If the court establishes that the losses are covered by the policy then the losses can be appraised.

Sunshine State Insurance Co. v. Rawlins, 34 So. 3d 753 (Fla. 3d DCA 2010)

The Third District held that the trial court did not abuse its discretion in allowing an appraisal to go forward while preserving the right of the insurance company to contest coverage as a matter of law.

Citizens Property Insurance Corp. v. Michigan Condominium Association, 46 So. 3d 177 (Fla. 4th DCA 2010)

The circuit court granted the insured's motion to compel an appraisal before the court resolved the parties' underlying coverage dispute. The Fourth District reversed finding that all underlying coverage disputes must be resolved prior to ordering an appraisal.

Citizens Property Insurance Corp. v. Galeria Villas Condominium Association, 48 So. 3d 185 (Fla. 3d DCA 2010)

Citizens issued a homeowner's policy to the condominium association. The association filed a motion to compel appraisal pursuant to the insurance policy and the trial court granted same. The Third District reversed finding that it was premature because the insured had failed to provide certain records requested by the insurance company and because it failed to provide the insurance company's loss consultant with reasonable rights of access to an inspection of the property damage detailed in the claim.

Attorney's Fees

Hill v. State Farm Florida Insurance Company, 35 So. 3d 956 (Fla. 2d DCA 2010)

The insured suffered fire damage to her home. The underlying insurance claim was resolved by appraisal; however, a procedurally complex lawsuit alleging breach of contract remained pending. The Second District held that if the insured filed suit in good faith in order to force the insurer to adjust her claim then she was entitled to attorney's fees. If, however, she filed suit as an effort to seek attorney's fees for the normal process of adjusting the claim then she was not entitled to attorney's fees.

In doing so, they noted "adjusting and settling property claims under insurance policies is never an easy process. It requires a level of good faith and cooperation from all parties. The law does not provide any general mechanism to impose attorney's fees against one party or the other merely because the negotiation process is difficult. It is only when the claims adjusting process breaks down and the parties are no longer working to resolve the claim within the contract, but are actually taking steps to breach the contract, that the insured may be entitled to an award" of attorney's fees.

Jackson v. Anthony, 39 So. 3d 1285 (Fla. 1st DCA 2010)

Prevailing party failed to file a Motion for Attorney's Fees within 30 days of the filing of the judgment with the clerk because of pending motions for rehearing and motions to admit and consider newly discovered evidence. The First District affirmed that the denial of the Motion for Attorney's Fees citing to Florida Rules of Civil Procedure 1.525 which states "any party seeking a judgment taxing costs,

attorney's fees, or both shall serve their motion no later than 30 days after filing of the judgment…"

Travelers of Florida v. Stormont, 43 So. 3d 941 (Fla. 3d DCA 2010)

The insured's vehicle was stolen. Thereafter, a claim was filed and the insurance company demanded appraisal of the stolen vehicle. The insured failed to comply with the appraisal clause and filed suit prematurely. The Third District held that the insured was not entitled to an award of attorney's fees for that phase of the trial court's proceedings. However, where the insurer failed to pay the appraisal award, the insured was entitled to file a motion to enter judgment in accordance with the award and where the insurer then paid the amount of the award before the motion was ruled upon, the insured was entitled to an award of attorney's fees for that phase of the proceedings. The Court also held that a multiplier of 2.5 was inappropriate and held that 1.0 was the correct multiplier where it was clear that the loss would be covered by the insurance policy and that the insured would achieve a recovery.

Pineda v. State Farm, 47 So. 3d 890 (Fla. 3d DCA 2010)

The Third District held that the no attorney's fees were awardable for the portion of the case where the parties were unable to agree on an umpire and the insurer filed a petition for selection of a neutral umpire. The insureds were, however, entitled to an award of attorney's fees for successful defeating the insured's request that the trial court direct the umpire to provide an itemized appraisal.

Bad Faith

Perera v. USF&G, 35 So. 3d 893 (Fla. 2010)

The decedent was crushed to death by a piece of equipment during the course of his employment. His Personal Representative filed a wrongful death claim against his employer and several employees. At the time of his death, the Defendant maintained three insurance policies: a commercial liability policy (insuring only the employees of the Defendant) issued by CIGNA with a limit of $1 million subject to a $500,000 deductable; an excess worker's compensation employer's liability policy (insuring only the Defendant corporation) issued by USF&G with a limit of $1 million after the Defendant's self-insured retention of

$350,000; and an umbrella excess liability insuring both the company and its employees issued by Chubb with a limit of $25 million.

USF&G denied coverage based upon a coverage exclusion. The Plaintiff formally demanded $12,000,000 to settle the case at mediation. After it was clear that USF&G would not tender its limits due to its coverage defense, they were asked to leave the mediation. In the months that followed, there were continued settlement negotiations. Ultimately, the Plaintiff, the employer and the employees entered into a stipulation to settle for $10,000,000. The stipulation provided that the Defendant and the employees would pay $5,000,000 and waive the worker's compensation lien. Although not stated in the stipulation, the settlement required payment of $750,000 from the employer, $500,000 from CIGNA and $3,250,000 from Chubb. The remaining $5,000,000 was to be sought in a lawsuit against USF&G.

The trial court found that the settlement was in good faith and reasonable and approved the settlement. Thereafter, the Plaintiff was paid the $5,000,000 and sued USF&G for the remaining $5,000,000. The Plaintiff sued USF&G for breach of contract and for bad faith.

USF&G removed the case to federal court and the federal court granted summary judgment in favor of the Plaintiff on the breach of contract claim requiring USF&G to pay its policy limits of $1,000,000. The federal court found that there was no bad faith because the employer still had millions of dollars in insurance coverage from another insurer at the time of the settlement and ruled in favor of USF&G, stating that without an excess judgment, there could be no bad faith. The Eleventh Circuit Court of Appeals reversed and found that determination regarding bad faith had a potential to moot the case and remanded it to the federal court for a jury to consider that issue. Thereafter, a jury found that there was bad faith and the case went back to the Eleventh Circuit Court of Appeals. Because there was no controlling precedent on this issue within the State of Florida, the Eleventh Circuit certified two questions to the Supreme Court which were reworded as follows:

May a cause of action for third-party bad faith against an indemnity insurer be maintained when the insurer's actions were not a cause of the damages to the insured or when the insurer's actions never resulted in an exposure to liability in excess of the policy limits of the insured's policies?

The Supreme Court answered the question in the negative because, based upon the facts in this case, the insurer's actions neither caused the damages claimed by the insured nor resulted in exposure of the insured to liability in excess of the policy limits of the insured's policies.

Bad Faith-Venue

American Vehicle Insurance Co. v. Goheagan, 35 So. 3d 1001 (Fla. 4th DCA 2010)

A motor vehicle accident occurred in Palm Beach County involving AVIC's insured a Palm Beach County resident. The Plaintiff died in Palm Beach County as a result of the accident and her estate was opened in Palm Beach County. The Defendant's policy was issued for delivery to him in Palm Beach County. The underlying action resulted in a judgment against the Defendant in Palm Beach County. The estate then filed a complaint against AVIC alleging bad faith handling of the underlying claim. The claim was filed in Palm Beach County and AVIC filed a motion to transfer venue to Broward County.

In support of the motion, AVIC filed an affidavit attesting that AVIC did not maintain any offices in Palm Beach County and that its office for transaction of customary business was located in Broward County and that the claim against the underlying Defendant was adjusted in Broward County. The estate responded by asserting that the decedent and the Defendant were Palm Beach County residents; the Defendant's policy was issued for delivery in Palm Beach County; the accident occurred in Palm Beach County; the estate was opened in Palm Beach County; all communications concerning adjustment of the claim occurred in Palm Beach County; and the insurance company failed to timely tender the policy limits in Palm Beach County. The trial court denied the motion to transfer venue and the Fourth District affirmed the lower court's ruling finding that venue was proper in Palm Beach County.

Claims File – Discovery

State Farm Florida Insurance Co. v. Kramer, 41 So. 3d 313 (Fla. 4th DCA 2010)

The insured sued State Farm for breach of contract. During discovery, the Plaintiffs requested the insurer's claim and underwriting files and documents from the insurer's litigation file. In response, the insurer moved for protective order. State Farm did not assert any privilege in objections but rather argued that, during

breach of contract litigation, the insured is not entitled to discovery of the insurer's claims, underwriting and litigation files.

The trial court denied the motion for protective order and granted the Plaintiffs' motion to compel finding that a motion for protective order does not constitute a proper objection pursuant to Rules of Civil Procedure. Thereafter, the insurance company filed a response to request for production and then asserted work product and attorney/client objections and also provided a privilege log. They also moved for reconsideration of the underlying order which the circuit court denied. The Fourth District granted certiorari and found that the insurance company had not waived its attorney/client and work product objections. They remanded the case to the trial court to evaluate the privilege objections and to conduct an in-camera inspection if necessary.

Commercial General Liability

Penzer v. Transportation Insurance Co., 29 So. 3d 1000 (Fla. 2010)

The Florida Supreme Court held that a commercial general liability policy which provides coverage for "advertising injury" which is defined as "injury arising out of … or a written publication and material that violates a person's right of privacy" provides coverage for damages for violation of a law which prohibited using any telephone or facsimile machine to send unsolicited advertisements to another telephone facsimile machine when no private information is revealed in the facsimile.

Insurance Brokers

Liberty Surplus Ins. Co. v. First Indemnity Ins. Services, 31 So. 3d 852 (Fla. 4th DCA 2010)

The insurance company sued an insurance broker who negligently or intentionally misrepresented facts which had a material bearing on the risks assumed by the insurance company. The trial court dismissed the insurance company's cause of action based upon the general rule that the broker is the agent of the insured and not the insurer.

The Fourth District reversed and found that an insurance broker can be liable to an insurance company which suffers a loss as a result of the broker's own fraud

or negligence in providing information in an application which is material to the issuance of the policy.

Material Misrepresentation

Mercury Ins. Co. of Florida v. Markham, 36 So. 3d 730 (Fla.1st DCA 2010).

The trial court erred and should have upheld an auto liability insurer's rescission of a policy based on a material misrepresentation on the application under a reasonably objective standard. In particular, the insured answered an application question whether his vehicle has been altered "modified" in any way. The court found that Florida Statute §627.409(1) authorized an insured to deny coverage and rescind an insurance policy based upon a misrepresentation or incorrect statement in an insurance application if the misrepresentation is material to the acceptance of the risk, or, had if the true facts have been known by the insurer it would not have issued the policy or would not have issued it at the same premium rate.

The trial court found that "modified" was susceptible to two interpretations. The First District explained that the law is not whether the two interpretations of the word "modified" could render the application question ambiguous in the abstract. Rather the issue is whether an objective or reasonable person could truthfully answer the question in the affirmative or the negative. Where the policy and the application do not define the term modified, the court interprets the word in accordance with its plain and ordinary meaning as found in the dictionary. The court viewed photographs of the truck's modification and found that there was no way any reasonable person could answer the question negatively.

Temporary Substitute Automobile

GEICO Indemnity Company v. Shazier, 34 So. 3d 42 (Fla. 1st DCA 2010)

The plaintiff owned a car which was covered under a GEICO policy. The policy contained a standard "temporary substitute automobile" provision which extended coverage to the vehicle used with the permission of the owner. Under the policy, the vehicle had to be used as a substitute for the owned auto if it was withdrawn from normal use due to breakdown, repair, servicing, loss or destruction.

When the plaintiff began experiencing car trouble, she rented a car from Avis. Pursuant to the rental agreement, she was the only one authorized to drive the rental car. The car was ultimately involved in a serious accident while being driven by an unauthorized driver. GEICO filed a complaint for declaratory relief alleging that it owed no duty to defend or indemnify because the policy provided no coverage to the unauthorized driver. The First District found that, because the vehicle was not being used with the permission of Avis, it did not qualify as a "temporary substitute automobile" under the policy and thus there was no coverage.

Unauthorized Driver

Telemundo Television Studios, LLC v. Aequicap Insurance Co., 38 So. 3d 807 (Fla. 3d DCA 2010)

Because the insured failed to disclose a driver who was involved in an accident and the policy required the insured to disclose the identity of any drivers of the vehicle as a condition of coverage, the Third District found that coverage was properly denied. The clause in question stated "No coverage will apply to any driver newly placed in service after the policy begins until you report that driver to us and we advise you in writing that he/she is acceptable to us and that he/she is covered under the policy. Coverage on any such driver newly placed in service will become effective as of the date and time we advise you he/she is acceptable and that they are covered by the policy and not before …"

Valued Policy Law

Citizens Property Insurance Corp. v Ashe, 50 So. 3d 645 (Fla. 1st DCA 2010)

Homeowner brought a claim against Citizens after receiving a substantial recovery from his flood insurance policy. In calculating damages, the trial court based its ruling on the "other insurance" clause in the windstorm policy. The First District found that the other insurance clause was not applicable because the windstorm policy and the flood policy each covered a different peril. The First District also held that if the insured was able to prove that wind alone caused the total loss before the storm surge arrived, the "valued policy law" would require the windstorm insurer to pay the policy proceeds despite the prior recovery of flood insurance payments.

Windstorm/Flood Insurance

Florida Farm Bureau Casualty Insurance Co. v. Mathis, 33 So. 3d 94 (Fla. 4th DCA 2010).

The Mathis' home was damaged as a result of Hurricane Ivan in September, 2004 causing substantial flood damage to the home. The home was insured with a flood policy with policy limits of $250,000 and a homeowner's policy with Florida Farm Bureau Casualty Insurance Co. with policy limits of $295,600, which covered windstorm damage among other perils. The homeowner's policy also excluded water damage due to flood, surface water, overflow of a bed of water, whether or not driven by wind.

The County determined that the damage to the home was more than 50% of its value and therefore required it to be rebuilt in accordance with updated building codes. The Appellate Court disagreed with Florida Farm that the trial court committed fundamental error in failing to set off the amount paid under the flood insurance policy (its policy limits) against damages awarded under the homeowner's policy. Furthermore, under the circumstances of this case, the damages were not duplicative when the jury made a determination that the land damage alone resulted in a constructive total loss of the property or that it was a total loss because the cost to repair exceeded the pre-loss market value of the building so that it was not economically feasible to repair the building.

Noteworthy in this case is that Florida Farm, the homeowners insurer, did not affirmatively plead as set off in the amounts paid by the flood insurer. The First District noted that, even if they could consider set-off for the first time on appeal, there was no factual basis to support apportionment of damages related to the flood waters damaging the home versus those caused directly by the wind damage. The court concluded that appellate review of the set-off issue is only possible when resolution of the issues did not require factual determinations.