Insurance Coverage

Appraisal

Ellie's 50's Diner Inc. v. Citizens Property Insurance Corporation, 54 So. 3d 1081 (Fla. 4th DCA 2011

The Fourth District affirmed the denial of a motion for prejudgment interest in a policyholder's action against *Citizens Property Insurance Corporation* because the policy provisions allotted *Citizens* 30 days within to pay any appraisal award and thus *Citizens* made such payment within the prescribed time. The court noted very simply that in cases where parties agree to appraisal, the policy language controls, and therefore *Citizens* had 30 days to pay before any prejudgment interest would be available to the insured.

Citizens Property Insurance Corp. v. Gutierrez, 59 So. 3d 177 (Fla. 3d DCA 2011)

The Third District found that the trial court erred in granting the insured policyholder's motion to compel appraisal against the commercial property insurer. The court agreed with the insurance company that the trial court failed to conduct the requested evidentiary hearing concerning whether the insureds properly complied with the policy's post-loss conditions which itself was a condition precedent itself to a demand for appraisal under the policy. The court found that the insured must comply with all of the policy's post-loss obligations before the appraisal clause.

Gassman v. State Farm Florida Insurance Company, 77 So. 3d 210 (Fla. 4th DCA 2011)

This case arises out of a Hurricane Wilma property damage claim which was filed because the insured and the carrier could not agree upon the extent of damage caused by the hurricane and the cost of repairs. The Fourth District reversed the trial court's granting a motion to stay the lawsuit pending the completion of the appraisal process which *State Farm* demanded as a condition precedent to moving forward with a lawsuit.

The trial court agreed with the policy holder that *State Farm* failed to comply with 627.7015(2), Fla. Stat. (2007) which states that the "insurer must notify all first party claimants of their right to participate in mediation program under the section. Subsection (7) states that if the insurer fails to comply with

Subsection (2) or if the insurer requests mediation and the mediation results are rejected by either party, the insured shall not be required to submit to participate in any contractual loss appraisal process out of property damage as a precondition to legal action for breach of contract against the insurer – for failing to pay the policy holder's claims covered by the policy." The court noted that the exceptions listed under Subsection (9) did not apply and, therefore, the case was remanded with instructions to find the policy holder was not required to move forward with the appraisal process and she can proceed with her lawsuit.

Attorney's Fees

Leon v. Great American Assurance Company, 36 FLW D2250 (Fla. 3d DCA 10/12/11)

This was an action regarding an automobile policy claim that was ultimately settled for the full amount claimed. The trial court improperly denied an award of attorney's fees to the insured on the grounds of the action on the claim having been premature and unnecessary to secure a favorable result because the insured had improperly refused to submit to a contractually required pre-suit examination under oath.

Here, at the pre-suit examination, the insurer's counsel never addressed the claims and instead insisted on probing into irrelevant details of the insured's life including a prior, totally unrelated conviction and the person with whom the insured was living, repeatedly warning the insured that his refusal to answer jeopardized coverage and inviting the insured to withdraw his claim in lieu of responding. From the record, it was obvious there was no other way than filing suit for the insured to be paid on the claim.

Automobile Exclusion

Category 5 Management Group, LLC v. Companion Property & Casualty Insurance Company, 76 So. 3d 20 (Fla. 1st DCA 2011)

The First District held that a consent judgment entered into between the commercial liability's insured and the injured plaintiffs in the amount of $6,000,000 was to be reinstated and enforced against the carrier because it had a duty to defend the underlying compliant against its insured; and, by refusing to do so, it was bound by the terms of the consent agreement.

In this case, the commercial general liability insurer argued that an automobile exclusion applied to deny coverage to its named insured, general contractor, retained to supervise subcontractors and their crews performing cleanup operations in New Orleans following Hurricane Katrina. The serious injuries were caused when an employee of one of the subcontractors was driving a pickup truck owned by another subcontractor, ran a stoplight in Alabama and struck a car occupied by a family severely injuring three of the family members.

The court found that in light of the allegations of the complaint, the driver was alleged to be an employee of a subcontractor at the time of the collision, the automobile exclusion in the commercial general liability policy did not necessarily apply to preclude coverage to the general contract who was also sued in the underlying lawsuit. The court noted that by its own terms, the exclusionary clause did not apply to all claims arising out of the ownership, maintenance, or use or entrustment to others of any automobile, but only to such claims involving automobiles **"owned or operated by or rented or loaned to any insured".** In this case, because the allegations were that the car was owned and driven by persons who were not insureds under the policy issued to the general contractor, then the exclusion did not apply and a defense should have been given to the insured. Noteworthy, was that the court refused to hear argument for the first time in its answer brief that the accident occurred outside of the coverage territory, and that the doctrines of judicial and equitable estoppel precluded the plaintiff from arguing that the automobile exclusion did not apply.

Bad Faith

Genovese v. Provident Life & Accident Insurance Company, 2011 WL903988 (Fla. 11/10/11)

The Florida Supreme Court held that attorney-client privilege communications are not discoverable in an action by a first party insured against its insurer for bad faith; in particular, there is no exception in this scenario under the work product doctrine that would allow such discovery when the same information is not available without undue hardship by the opposing party.

The Florida Supreme Court recognized that for a party to bring a bad faith claim, there must be an underlying claim for coverage or benefits which the insured alleges was handled in bad faith by the insurer. Therefore, where an insurer hired an investigator including attorney, such should be done with the protection of the privilege.

The court distinguished its prior opinion that, in a first party bad faith action pursuant to Fla. Stat. §624.155, work product materials that are discoverable. However, the court noted that information that was contained in the underlying claim in litigation file material up until the date of resolution of the underlying disputed matter pertaining in any way to coverage, benefits, liability or damage is discovered. However, disclosure of the attorney-client privilege was not embodied within the prior decisions, and the privilege that a client holds to prevent any other person from disclosing such contents of communication serves a purpose to encourage clients to make full and frank disclosure to their attorneys. Furthermore, the court noted that unlike the work product doctrine, the attorney-client privilege is not concerned with the litigation discovery needs of the opposing party.

It is noteworthy in this case that if the insurance carrier elects to employ the "advice of counsel defense" then the attorney-client privilege materials will be considered waived and such communications will be discoverable since it is directly relevant to that defense.

Illinois National Insurance Company v. Bolen, 53 So. 3d 388 (Fla. 5th DCA 2011)

The Fifth District reversed the trial court's order lifting the abatement of the insured's bad faith claim following an excess judgment was entered in favor of the insured against the automobile insurer on an uninsured motorist claim. The Court found that lifting of the abatement was premature and held that because an appeal was pending, there had been no final determination of liability and damages on the UM claim and, therefore, the bad faith claim was still premature and the abatement should have been maintained until the appellate process had concluded. It is noteworthy that the verdict was $870,366.90 and the UM policy limits were $25,000.

State Farm Florida Insurance Company v. Puig, 62 So. 3d 23 (Fla. 3d DCA 2011)

The plaintiff property owners filed a lawsuit against *State Farm* for breach of contract and a declaratory judgment seeking to establish a larger payout of a damages claim following Hurricane Wilma. The underlying declaratory judgment litigation concluded on February 25, 2008 when the trial court confirmed an appraisal award larger than what *State Farm* initially paid when the claim was submitted by its insured. Thereafter, the property owner filed a first party bad faith action against *State Farm* and sought production of the carrier's complete claim

file “as of February 25, 2008”. After holding an in-camera inspection, the trial court granted a motion to compel and ordered that all of the claim and litigation files be turned over to the plaintiff over the objections based upon work product immunity and attorney client privilege.

The Third District affirmed in part and reversed in part. The court found that the trial court misinterpreted the Supreme Court’s decision in *Allstate Indemnity Company v. Ruiz*, 899 So.2d, 1121 (Fla. 2005) by impermissibly allowing production of the claim file after the resolution of the underlying litigation or claim. The Third District noted that *Ruiz* did not change that in a first party bad faith action only the claim and litigation files up until the time the claim is resolved are discoverable, and that anything after that date would only be discoverable upon a showing of undue hardship in need which was absent in this case. Secondly, the emphasized that the Supreme Court did not change or alter the longstanding protection of confidential communications between attorneys and their clients pursuant to Fla. Stat. §90.502(4) which provided a privilege deemed worthy of “maximum legal protection”.

Teachers Insurance Company v. Loeb, 75 So. 3d 355 (Fla. 1st DCA 2011)

The First District granted in part and denied in part a Petition for Writ of Certiorari based upon a finding ruling that the trial court departed from the essential requirements of law when it held that a corporate representative of an insurance company waived the attorney/client privilege with regard to the basis of its withdrawal of certain affirmative defenses in the bad faith action. The Court upheld the protection of the attorney/client privilege by finding that a waiver does not occur when a party’s representative testifies that he generally spoke about the subject matter or defenses in the litigation, but does not communicate any details of such communications. Moreover, it was important to note that the “advice of counsel” defense was not raised in this case and, thus, the communications between the insurance company representative and its attorney was irrelevant to the central issues in the case.

Notwithstanding, the Court did find a partial waiver of the attorney/client privilege occurred when the corporate representative testified about certain checks it issued to a construction company and, therefore, the Plaintiff’s policyholders were entitled to further question the corporate representative about the insurance company’s payment history and communications with that construction company.

Landmark American Insurance Company v. Studio Imports Ltd., Inc., 76 So. 3d 963 (Fla. 4th DCA 2011)

The case stemmed out of claims for loss of business income and property damage out of Hurricane Wilma first party property damage litigation. The Fourth District agreed with the insurance company that the trial court erred by failing to dismiss all the counts against it including a breach of contract and bad faith claim to be tried simultaneously on the merits. The court held that the carrier should not have to defend against a bad faith claim at the same time as the underlying claim without he policy holder first prevailing on the merits of the breach of contract claim. The court noted that the trial court can determine whether the bad faith claim should be abated or dismissed without prejudice upon remand.

Cancellation

Smith v. New Hampshire Indemnity Company, 60 So. 3d 429 (Fla. 1st DCA 2011)

The First District upheld a motion for summary judgment granted in favor of *New Hampshire Indemnity Company* sustaining its cancellation of an automobile policy for lack of payment of an increased premium based upon the insured's change of address. The court found that the policyholder's reliance on Fla. Stat. §627.7282 applies only to situations involving incorrect charged premiums pursuant to an *application for insurance*, but does not apply to incorrectly charged premiums when a policy is renewed. Instead, the cancellation was governed by Fla. Stat. §627.728 effective where they sent proper notice of a cancellation providing until a certain date to pay the additional premium of the policy would be cancelled. The statute's plain language was followed by the insurance carrier, and therefore the cancellation was upheld.

Ensuing Loss Provision

Certain Interested Underwriters at Lloyds London v. Chabad Lubovich of Greater Ft. Lauderdale, Inc., 65 So. 3d 67 (Fla. 4th DCA 2011)

The Fourth District reversed a final summary judgment entered on behalf of the policyholder, *Chabad*, and against *Lloyds*, its property and casualty insurer as a result of damage following Tropical Storm Barry. The issue involved the meaning of the "ensuing loss" provision which is an exception to the windstorm exclusion contained in the policy. The windstorm exclusion provided that if a loss or damage is caused by a windstorm, the loss is not covered regardless of any other cause or

event that contributes to the loss. However, in cases where what would normally be a non-covered event sets in motion an intervening chain of events which would be a covered loss under the policy, then that loss is covered.

Intellectual Property Exclusion

Mergenet Solutions Inc. v. Carolina Casualty Insurance Company, 56 So. 3d 63 (Fla. 4th DCA 2011)

The Fourth District held that an insurance company that issued a management liability policy containing an exclusion for intellectual property rights did not have any duty to defend or any duty to indemnify a lawsuit where the insured and its subsidiary were sued for ownership of patents and fees associated with same. The court noted that there are three principle forms of intellectual property rights which include copyright, patents and trademarks. Therefore, the court correctly granted a motion for judgment on the pleadings on behalf of *Carolina Casualty Insurance Company*.

Interest

Ellie's 50's Diner Inc. v. Citizens Property Insurance Corporation, 54 So. 3d 1081 (Fla. 4th DCA 2011

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International Acts

Essex Insurance Company v. Big Top of Tampa, Inc., 53 So. 3d 1220 (Fla. 2d DCA 2011)

The Second District Court of Appeal reversed a judgment on behalf of an insured flea market in a bench trial that found that the assault and battery exclusion did not apply to preclude coverage when an off-duty police officer hired by the flea market used force as part of a lawful arrest.

The Court found that a person cannot "negligently" use excessive force because there is no such thing as a negligent commission of an intentional tort such as battery. The court also relied on law that has held that an officer who uses excessive force during an arrest be ordinarily protect the use of that force by police officers transformed into a battery. They also found that the term arising out of any battery encompassed the claims brought in the original complaint for which Essex did not have a duty to defend and/or indemnify.

Prejudgment Interest

Jugo v. American Security Insurance Company, 56 So. 3d 94 (Fla. 3d DCA 2011)

The Third District affirmed the trial court's denial of the insured's motion for prejudgment interest when after filing suit the policyholder was awarded additional compensation for property damages related to Hurricane Wilma. The court distinguished prior case law relied upon by the insured seeking prejudgment interest because in this case coverage was admitted by the insurer from the outset and the dispute is over the quantifying of the loss. Accordingly, when coverage is not disputed, prejudgment interest is not awardable under Florida law. In contrast, when a carrier denies coverage from the outset, and it requires the insured to file a lawsuit to cause the carrier to reverse its position, admit coverage and pay the claim, prejudgment interest is allowed.

Replacement Costs

Trinidad v. Florida Peninsular Insurance Company, 36 FLW D 1081 (Fla. 3d DCA 5/18/11)

The Third District upheld a trial court determination that the insurer did not owe its insured benefits to reimburse him for "overhead and profit". The court found that the policy was unambiguous and, because the insured had not contracted to incur those costs or had already incurred the costs, summary judgment would stand because the policy was a *replacement cost policy* and not an *actual cash value* policy. The plaintiff suffered fire damage and submitted the claim to the homeowner insurer who admitted coverage and paid the claim. The insured then sued the carrier claiming payment was insufficient because it did not include an amount for overhead and profit.

The court noted that overhead and profit are elements of costs paid to a contractor for repairs and are included in repair contracts and estimates. Because the homeowner had not hired a general contractor or submitted a contract by a contractor estimating repairs, the policyholder was not entitled to claim these damages. It is important to note that the policy was not an actual cash value policy. Actual cash value is the actual cost to repair, less depreciation. The court noted that the Florida Legislature amended Section 627.7011 to require all Homeowners policies be adjusted on the basis of replacement costs as opposed to actual cash value. Based on this amendment, the words "replacement costs" were designed to cover when the insured does not hire a contractor and does not spend money to repair or replace a loss. Rather, it is to compensate the insured for the money that is "actually spent" when the property is actually repaired or replaced.

Sexual Molestation Exclusion

Valero v. Florida Insurance Guaranty Association, Inc., 59 So. 3d 1166 (Fla. 4th DCA 2011)

The Fourth District Court affirmed the trial court's interpretation that a sexual molestation exclusion applied to exclude coverage under a homeowner's policy even under a theory of negligent supervision of an alleged perpetrator who was not an insured under the policy. The exclusion at issue provided that coverage did not apply to "bodily injury…… arising out of sexual molestation …..". The insurer acknowledged there was no Florida case addressing whether a sexual molestation exclusion applied to a negligent supervision action arising out of sexual molestation.

The plaintiff tried to distinguish that the molestation had to be committed by the insured to disqualify coverage. However, in this case they argued it was ambiguous whether sexual molestation must be actually performed by an insured as opposed to someone else for which a theory of negligent supervision was brought against the insured. The Fourth District noted that they were relying more on the fact that the exclusion did not obligate insured behavior to either allow coverage to apply or preclude it under the policy itself. For example, the policy contained other exclusions that noted coverage did not apply to bodily injury which is expected or intended *by the insured*. In this particular case, sexual molestation did not have any such limiting language and, thus, the broad and unambiguous nature of the sexual molestation exclusion applied no matter who the perpetrator was for which the insured was being sued.

Temporary Substitute Vehicle

Chandler v. GEICO Indemnity Company, 36 FLW S660 (Fla. 11/23/11)

In a lengthy opinion the Florida Supreme Court resolved the conflict in authority among the districts concerning an insurer's duty to defend and indemnify its insured, a renter of a "temporary substitute vehicle" who gave consent to use the automobile to another driver who in turn allowed another person to operate the vehicle resulting in a serious collision causing injuries to minor passengers and the death of another. This case was one of contractual interpretation on whether the policy issued by GEICO as the primary insurer of the original renter of the Avis vehicle had a duty to defend and indemnify the indemnity claims brought by Avis brought against the second level alleged permissive user, as well as the initial claims brought by the injured and as stated, decedent driver.

The Court held that GEICO erroneously relied upon the rental agreement to modify its own obligations under the insurance policy issued to its named insured who was the renter of temporary substitute vehicle ultimately involved in the accident. The rental agreement prohibited any additional operators who were not given written consent or listed in the rental agreement. Furthermore, the clause read that if the car was used by someone who was an unauthorized driver, the liability protection under the rental vehicle would be terminated.

Notwithstanding, GEICO's own policy noted that the named insured was entitled to coverage for damages an insured becomes legally obligated to pay because of the bodily injuries sustained by a person … arising out of the ownership, maintenance or use of the owned auto. The GEICO policy defined an owned auto to include a "temporary substitute auto" which is a vehicle used as a substitute for the owned auto when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. Furthermore, the GEICO policy covered any other person using the automobile with the policyholder's permission. However, as to any "non-owned autos", the contract only covered the policyholders and his or her relatives driving a non-owned auto with permission of the owner. The definition of non-owned auto on the GEICO policy expressly excluded a "temporary substitute auto."

The Supreme Court found that the trial court and First District erroneously interpreted that because the rental contract required permission by Avis as the owner of the vehicle the rental car was a "non-owned auto" instead of a "temporary substitute auto" and, therefore, GEICO improperly denied coverage

under the policy. Instead, the Supreme Court noted that the injured passengers and the decedent's estate correctly argued that this interpretation conflicts with the Florida Supreme Court's earlier decision in *Susco* and *Roth* as to what the meaning of an owner's consent for the use of a vehicle under the Dangerous Instrumentality Doctrine which imposes liability on the owner of the vehicle who voluntarily entrusts that automobile to an individual who cause damage to others through the negligent operation of the vehicle.

The Florida Supreme Court determined in *Susco* that consent for use was not and could not be limited by an unauthorized operator clause in a rental agreement as that was against public policy as such private and/or secret agreements cannot restrict rights of the public operating vehicles on the roads and highways of Florida. The court reiterated that the rule is that when control of a vehicle is voluntarily relinquished to another, only a breach of the custody amounting to a species of conversation or theft will relieve an owner from responsibility for its use or misuse. The Florida Supreme Court emphasized that a bailee or a lessee of a rented automobile similarly as its owner, may permit another to operate it and the latter's negligent operation of it renders the owner vicariously liable together with his liability insurer under the Dangerous Instrumentality Doctrine despite an agreement between the owner and lessee to the contrary. The court also had to resolve the conflict and follow the principles of insurance contract analysis when determining what was a "temporary substitute auto" and "non-owned auto" in the context of the GEICO policy.

The Court pointed out that although a "temporary substitute auto" is by definition not owned by the insured, and that GEICO's policy provides that such vehicle is treated as the insured's "owned automobile" under the policy and that GEICO will cover the insured and any other person using the auto with the insured's permission, the actual use must be within the scope of that permission. Because Avis' consenter gave its permission to its renter to use the vehicle who in turn provided others permission to use the vehicle, GEICO was obligated to cover that vehicle as if it was the insured's own vehicle. Therefore, the Supreme Court quashed the decision of the First District and directed a judgment be entered in favor of the insureds and the injured parties requiring GEICO to defend and indemnity the driver of the renter vehicle for causing the accident.

Vehicle

Barcelona Hotel, LLC v. Nova Casualty Company, 57 So. 3d 228 (Fla. 3d DCA 2011)

The dispute involved whether an excavator that struck and damaged the foundation of a hotel owned by an insured was a "vehicle" under the policy issued by *Nova Casualty* and, thus, covered as a named peril under the policy. The policy did not define the term "vehicle". Therefore, the Third District agreed with the insured that an application of the dictionary definition of the term "vehicle" in consideration of the entire policy as a whole demonstrates that an excavator is a "vehicle" and therefore covered as damages flowing from a named peril under the policy. The court relied upon insurance construction law in that the plain and ordinary meaning of the word "vehicle" includes a "means of carrying or transporting something: conveyance or as …. a piece of mechanized equipment …." Therefore, the broad definition of the word "vehicle" encompasses an excavator and the court also noted that when a term is undefined in the policy, coverage is generally given a liberal or broad construction in favor of the insured and against the insurer as the drafter of the policy.