2013
CASE LAW SUMMARY

Insurance Coverage

Appraisal

Citizens Prop. Ins. Corp. v. Casar, 104 So. 3d 384 (Fla. 3d DCA, 2013)

The Third District reversed an order granting Casar's Motion to Compel Appraisal. Casar filed a claim with Citizens for water damage, Citizens inspected the property twice and the two parties could not agree as to the value of the property damage and what items were covered. Casar refused to sign the appraisal agreement which excluded certain items.

The policy contained the following appraisal clause:

b. Appraisal. If you and we fail to agree on the amount of loss, either may request an appraisal of the loss by presenting the other party with a written request for appraisal of the amount of loss. If the other party agrees in writing to participate in appraisal, that appraisal shall proceed pursuant to the terms of a written agreement between the parties.

Appraisals are creature of contract and whether a party can be compelled to appraisal depends on the contract provisions. The appraisal provision in Casar's policy unambiguously requires a written request for appraisal and a written agreement between the parties in order for an appraisal to take place. Because of the disagreement between Casar and Citizens as to which items were damaged by the water leak, Casar never consummated Citizens' proposed agreement for appraisal. As there was no written agreement between the parties, Citizens was not required to participate in the appraisal.

Citizens Property Insurance Corporation v. Zunjic, 126 So. 3d 355 (Fla. 3d DCA 2013)

Citizens appealed an Order granting Zunjic's Motion to Compel appraisal and Order denying Citizens' Motion for Summary Judgment. The Third District reversed, following *Citizens v. Casar*, as there was no agreement between the parties to appraise the loss as required by the appraisal provision of Citizens'

policy. The appraisal provision contained the following language: "If the other party agrees in writing to participate in appraisal, then the appraisal shall proceed pursuant to terms of the written agreement between the parties."

In their dispute for the amount of payment for a claim of damaged tile, Citizens acknowledged Zunjic's request for an appraisal and provided a proposed Appraisal Agreement to Zunjic. Citizens wrote to Zunjic, stating: "if you do not agree with the elements in the Appraisal Agreement, please revise and submit for our review" and twice attempted to come to an agreement for the Appraisal, to which Zunjic never responded.

Accordingly, the Third District agreed that appraisal was improper at that time. The appraisal clause required as a condition precedent that the parties enter into a written agreement setting forth the terms of the appraisal. Further, Florida law does not require an insurer to participate in appraisal absent a written agreement between the two parties.

Arbitration

Truck Ins. Exchange v. Pediatrix Medical Group, Inc., 121 So. 3d 50 (Fla. 4th DCA 2013)

Trial court erred in denying insurer's motion to compel arbitration where policy provided for arbitration of disputes or differences of opinion "arising with respect to interpretation of the policy or in the event of disagreement as to whether or not a particular settlement should be made." Where a contract contains an arbitration provision, there is a presumption in favor of arbitration and an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Assignee of Insured Entitled to Attorney's Fees

Indiana Lumbermen's Mut. Ins. Co. v. Pennsylvania Lumbermen's Mut. Ins. Co., 125 So. 3d 263 (Fla. 4th DCA 2013)

Two insurance companies insured a subcontractor who had been named as a third-party defendant resulting from a property damage claim. *Indiana Lumbermen's* (ILM) provided the subcontractor a defense while *Pennsylvania Lumbermen's* (PLM) denied a defense. At mediation, *ILM* settled the claim,

contingent upon the subcontractor's assignment of rights against *PLM* for failing to fulfill its duty to defend and indemnify. *ILM* prevailed against *PLM* but the trial court declined to award *ILM* fees under §627.428, Fla. Stat.

The Fourth District held that under §627.428, the assignee of an insured, just like the insured, is entitled to court-awarded fees when the insurer would not have paid the proper amount of the claim but for the litigation. An assignee of an insurance claim stands in the shoes of the insured and logically should be entitled to an attorney's fee when he sues and recovers on the claim.

Bad Faith

GEICO Gen. Ins. Co. v. Harvey, 109 So. 3d 236 (Fla. 4th DCA 2013)

A third party bad faith claim against an insurer for failure to settle may not be brought in the underlying tort action but must be raised in a separate cause of action. This is because the bad faith action does not arise out of the same transaction or occurrence as the subject matter of the litigation, but arises from the insurer's breach of its duty to act in good faith in handling the claim against the insured. First party bad faith claims, however, may be brought in the same action and the trial court may either abate the bad faith action until coverage and damages have been determined, or dismiss the bad faith claim without prejudice.

Defect in Civil Remedy Notice is Not Reviewable

State Farm Insurance Company v. Ulrich, 120 So. 3d 217 (Fla. 4th DCA 2013)

State Farm filed a Petition for Certiorari from orders that denied its Motion to Abate an insurance bad faith action and denied its Motion for Protective Order from bad faith discovery. State Farm argued that the respondents could not maintain their first-party bad faith action because State Farm invoked the appraisal provision of the insurance policy and paid the appraisal award. State Farm further maintained that it could not be liable in a statutory bad faith action unless there had been a determination that it breached the insurance contract.

Finally, State Farm contended that the civil remedy notice filed was defective because it was not specific enough. The Fourth District denied the petition finding that State Farm was not materially harmed and had an adequate remedy on appeal from a final order. They specifically held that an alleged

deficiency in a civil remedy notice served by an insured is not reviewable by certiorari.

Duty to Defend

Nationwide Mut. Fire. Ins. Co. v. Advanced Cooling and Heating, Inc., 126 So. 3d 385 (Fla. 4th DCA 2013)

Advanced was hired to repair an air conditioner. Upon completion of the work, the problem had not been cured and claims of breach of contract ensued. Advanced put its insurer, Nationwide, on notice that Nationwide had a duty to defend Advanced against the customer's claim. Nationwide denied Advanced a defense. Advanced sought declaratory judgment as to Nationwide's duty to defend.

The question of duty to defend is answered based upon a review of the underlying pleadings filed against the insured, as well as, the insurance policy itself. Advanced's insurance policy covered bodily injury or property damage resulting from an occurrence pursuant to policy definitions. Property damage refers to damaged property other than the property being repaired. Because the customer only sued for the breach of contract and faulty workmanship in installing the air conditioner, this was a purely economic injury which did not constitute property damage under a commercial general liability insurance policy.

Improper to Allow 3rd Party Company to Litigate Issue of Coverage

Beazley Insurance Company v. Banerjee, 38 FLWD 2116 (Fla. 4th DCA 10/9/13)

Banerjee filed a negligence lawsuit against various defendants including A & B Engineering on December 19, 2006. In February, 2008 A & B applied for a professional liability insurance company with Beazley Insurance. Beazley issued a policy at the end of February, 2008 with a one year policy period of March 4, 2008 through March 4, 2009. In April, 2008, A & B provided Beazley with copies of the summons and complaint in the Banerjee action and the insurance company commenced a defense subject to a reservation of rights. On July 22, 2008, Beazley denied coverage.

In 2012, Banerjee sought leave to add Beazley as a party defendant in a declaratory judgment claim. On July 16, 2012, the trial court granted Banerjee's motion, thereby adding a declaratory judgment claim to the 2006 action. Beazley

responded with a Motion to Dismiss claiming that the declaratory judgment claim was in violation of Florida Statute 627.4136(1).

In September, 2012, Banerjee and A & B entered into a settlement agreement providing for the entry of a Final Judgment against A & B for $2.75 million dollars. That same month Beazley removed the case to federal court but the federal court remanded the action to state court because removal was untimely, apparently using the date that the lawsuit was filed in 2006 rather than July 16, 2012 when Beazley became a party.

The Fourth District granted certiorari finding that, at the time that Beazley was added as a defendant to the lawsuit, joinder was barred by §627.4136 because Banerjee had not obtained a settlement or verdict against A & B; the insured. As such, they ruled that a separate action must be commenced against Beazley to litigate the issue of coverage.

Multiple Occurrences

Maddox v. Florida Farm Bureau General, etc., et al., 121 So. 3d 652 (Fla. 5th DCA 2013)

The Fifth District reversed final judgment granting declaratory relief to Florida Farm Bureau. The trial court erred in concluding that only one "occurrence" under the homeowner's insurance policy took place. Maddox and her two sons lived with Bullard and his two dogs. One day, Maddox found one of the dogs biting her son, Ivan. Once the dog released her grip on Ivan's face, she bit Maddox in the face. Both Ivan and Maddox suffered injuries from the dog bites.

Maddox filed suit against Bullard for damages. Bullard's insurer, Florida Farm Bureau, sought declaratory relief to determine it was not liable to pay any damages to Maddox. Florida Farm Bureau argued that the damages claimed by Maddox for her bodily injury were subject to the same occurrence limit applicable to the damages suffered by her son and that the per incident occurrence by payments to Ivan.

In the absence of explicit policy language to the contrary, the Florida Supreme Court has adopted the "cause theory," which looks to the cause of the parties injuries for determining the number of "occurrences" under an insurance

policy. The inquiry is whether there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages.

In *Koikos v. Travelers Insurance Co.,* the Florida Supreme Court held that "it is the act that causes the damage, which is neither expected nor intended, from the standpoint of the insured, that constitute the occurrence." In this case, the immediate injury producing acts where the dog bites, and the dog bite that inflicted the injuries to Maddox was not the same bite that inflicted the injuries to Ivan. Therefore, each dog bite was a separate occurrence.

Rescission

Universal Prop. & Cas. Ins. Co., v. Johnson, 114 So. 3d 1031 (Fla. 1st DCA 2013)

The Johnsons' home-owners insurance claim was denied after discovery that they had falsely answered "no" to a question of whether they had been convicted of a felony in the last ten years on their insurance application. Mrs. Johnson had in fact been convicted of five felonies stemming from previous arrests due to violating probation. The Johnsons brought suit seeking damages for breach of contract.

Universal counterclaimed to rescind the insurance contract pursuant to Florida Statute 627.409(1) which provides that "a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply: the misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or the hazard assumed by the insurer."

The Johnsons moved for summary judgment on grounds that Universal could not rely on the statute because the insurance contract language contained a more stringent standard for rescission on the grounds of misrepresentation than the statute. The pertinent language of the contract provided:

2. Concealment or fraud. The entire policy will be void if, whether before or after a loss, an insured has;
    a. intentionally concealed or misrepresented any material fact or circumstance;
    b. engaged in fraudulent conduct; or
    c. Made false statements; relating to this insurance.

The trial court entered partial summary judgment that, based upon the policy language, Universal would be required to prove at trial that the misrepresentation at issue was intentional and that Universal was entitled to rescind the contract based only upon the commission of an intentional misrepresentation which was material to the acceptance of the risk. At trial, the Johnsons testified that the misrepresentation was unintentional. The trial court denied Universal's motion for directed verdict. The jury returned a verdict finding the Johnsons did not knowingly and intentionally make a misrepresentation.

However, the jury found that if the true facts had been known to Universal, it would not have issued the policy or contract, would not have issued the policy at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss. The jury's verdict mirrored the language of Florida Statute 627.409. Universal's motions for JNOV and for new trial were denied, and final judgment was entered in favor of the Johnsons.

On appeal, Universal argued error in granting Summary Judgment which required Universal to prove the misrepresentation was intentional before the claim could be denied and the contract voided. Although parties are free to "contract out" or "contract around" state or federal law through or to an insurance contract, the First District did not read the insurance policy at issue to impose a more stringent standard for voiding a policy than was provided in the statute. The Court determined that the language of the policy would be superfluous if a "false statement" included only intentionally false statements. A contract is not to be read so as to make one section superfluous. All provisions of the contract must be construed as to give effect to each.

Further, a single policy provision should not be read in isolation and out of context "for the contract to be construed according to its entire terms as set forth in the policy and amplified by the policy application, endorsements, or writers." Finally, Statute 627.409 mandates that any misrepresentation, innocent or intentional, would void an insurance contract if the misrepresentation is material either to the acceptance of the risk or to the hazard assumed by the insurer or if the true facts had been known to the insurer [the insurer in good faith would not have issued the policy]. Thus, because the jury found that Universal would not have issued the policy had they known Ms. Johnson was convicted of a felony, the contract of insurance was void.

Reimbursement of Attorney's Fees for Defense of Mutual Insured

Progressive v. Fla. Dept. of Fin. Svcs., 125 So. 3d 201 (Fla. 4th DCA 2013)

Ortiz entered into a subcontract agreement with TBT and Patco for trucking services, which required Ortiz to maintain an auto policy at his expense. Ortiz secured coverage with Progressive as his primary insurance and TBT and Patco's insurance (Aequicap) as the excess insurer. The subcontract agreement also contained an indemnification provision that required Ortiz to hold harmless and provide TBT a defense. TBT was named an additional insured on the Progressive policy.

Thereafter, Ortiz was involved in an auto accident. The injured filed suit against Ortiz, TBT and Patco. Several months after demanding indemnity and a defense, Progressive agreed to defend TBT and Patco. TBT and Patco filed suit against Progressive for attorney's fees and costs incurred in the months before Progressive assumed the defense. The trial court entered summary judgment in TBT and Patco's favor.

On appeal, Progressive argued that the trial court's order violated the "anti-subrogation" rule which prohibits reimbursement for defense costs between insurers of a mutual insured. The Fourth District rejected this argument, as this rule does not apply where there is an indemnification agreement.

Reservation of Rights Letter Not Required Where No Coverage Exists

Danny's Backhoe Svc., LLC, v. Auto Owners Ins. Co., 116 So. 3d 508 (Fla. 1st DCA 2013)

Where insurer claims a complete lack of coverage, failure to provide an insured with a reservation of rights letter does not preclude the insurer from denying coverage. The notice requirement in under §627.426(2), Florida Statute, only applies where coverage exists but the insurer seeks to assert a coverage defense. The term coverage defense means a defense to coverage that would otherwise exist. The statutory language does not include a disclaimer of liability based on a complete lack of coverage.

Sworn Proof of Loss is a Condition Precedent to Filing Suit

State Farm v. Laughlin-Alfonso, 118 So. 3d 314 (Fla. 3d DCA 2013)

Laughlin-Alfonso submitted a supplemental home damage claim to State Farm through her public adjuster. After this, State Farm requested several documents from her, which included a sworn proof of loss. Laughlin-Alfonso did not comply with these requests. Thereafter, she filed suit and once again, she did not comply with any of State Farm's requests during the course of discovery. She also rejected State Farm's nominal settlement offer.

After State Farm prevailed, it moved for attorney's fees which the trial court denied finding that its nominal settlement offer was made in bad faith. The Third District reversed finding that State Farm did not act in bad faith when it made the nominal settlement offer. In so doing, they commented that insureds must comply with the conditions precedent to filing a lawsuit including submission of a sworn proof of loss. Because the insured failed to do so, State Farm had a reasonable basis to conclude that its exposure was nominal.

Third Party Must Get Settlement/Verdict Before Filing 3rd Party Action

Lantana Ins., Ltd., v. Thornton, 118 So. 3d 250 (Fla. 3d DCA 2013)

Certiorari review of an order denying motion to dismiss is appropriate when an insured demonstrates that the presuit requirements of 627.4136, Fla. Stat., have not been met. §627.4136(1) requires the person not insured to first obtain a settlement or verdict against the insured as a condition precedent to a third party cause of action against an insurer. Without a verdict against insured, the injured is without a beneficial interest in the policy and thus no cause of action against the insurer had accrued.