2014
CASE LAW SUMMARY

Insurance Coverage

Bad Faith - Action "Ripe" When Appraisal Determines Damages and Coverage

Cammarata v. State Farm Florida Insurance Company, 152 So. 3d 606 (Fla. 4th DCA 2014)

The trial court entered summary judgment in favor of the insurance company in a bad faith action holding that the bad faith action was not ripe because State Farm's liability for breach of contract had not yet been determined. The Fourth District reversed finding that the bad faith action was ripe where State Farm's liability for coverage and the extent of the insured's damages had been determined by an appraisal award.

Bad Faith – Citizen's Property Insurance Not Immune From Suit

Perdido Sun Condominium Association, Inc. v. Citizen's Property Insurance Corp., 129 So. 3d 1216 (Fla. 1st DCA 2014)

Plaintiff sued Citizen's and alleged that they failed to attempt to settle their property insurance claim in good faith. Their Complaint was filed pursuant to Florida Statute §624.155 which provides a civil remedy for persons damaged by an insurer's failure to settle claims of good faith. The trial court found that Citizens was immune from suit pursuant to Florida Statute §627.351(6)(s)(1). The First District reversed and certified conflict with the Fifth District's decision and *Citizen's Property Insurance Corp. v. Garfinkel*, 25 So. 3d 62 (Fla. 5th DCA 2010).

Coverage for Acts Within Employee's Scope of Duties

Hubner v. Old Republic Insurance Company, 39 FLWD 962 (Fla. 5th DCA 2014)
Opinion has not been released for publication and still subject to revision or withdrawal.

The insurance company issued a liability policy to the Boy Scouts of America which covered its registered volunteers, but only when the volunteers were "participating in an Official Scout Activity and in the scope of their duties as such." Norton was a volunteer whose responsibility was to encourage Boy Scouts to advance by completing requirements for whatever badge level they were working toward.

It was found that he was acting within the scope of his duties at the time of the collision where he had been assisting Scouts and completing an Eagle Scout project at a cemetery, had driven home for the sole purpose of retrieving a camera to photograph the completed project, and was involved in a collision as he was returning home after having taken the photographs.

Examination Under Oath is Condition Precedent to Recovery

Solano v. State Farm Florida Insurance Company, 155 So. 3d 367 (Fla. 4th DCA 2014)

The trial court entered Summary Judgment in favor of State Farm finding that because the insureds had not appeared for an examination under oath as required by the policy provisions, they failed to comply with the conditions precedent to filing suit which required judgment in favor of State Farm and a forfeiture of benefits.

The insureds brought property damage claim following Hurricane Wilma. The policy required the insureds to comply with certain post-loss conditions including submitting to an examination under oath, submitting sworn proofs of loss and giving timely notice of damages, as well as exhibiting damages at State Farm's request. Although State Farm made payments in 2006, the insureds hired a public adjuster in 2009 who asked State Farm to re-open the claim. The public adjuster submitted a claim in excess of $200,000.

State Farm inspected the property with the adjuster and made an additional payment for some damage and notified the insureds that it would continue to

investigate the other damage claims. State Farm inspected the property with the adjuster and made an additional payment for some damage and notified the insureds that it would continue to investigate the other damage claims.

Thereafter, the public adjuster submitted several additional sworn proofs of loss increasing the amount of damage claimed. After the third sworn proof of loss, State Farm asked the insureds to submit to an examination under oath. It also asked that the adjuster submit to an examination if the insureds intended to rely upon his knowledge and opinions. The insureds appeared for the examination under oath and filed a fourth proof of loss.

The husband gave his examination under oath and deferred almost entirely to the adjuster as to the type and extent of damages, as well as, the cost of the damage. He also deferred to his wife to answer a few questions. At the end of his interview, he refused to allow his wife to submit to an examination under oath that day because he felt that the examination might put her under too much mental stress. The public adjuster also refused to give a statement under oath, although he said he might do so in the future. The public adjuster took the position that State Farm could not compel him to provide a sworn statement.

Later, State Farm advised the insureds that they had deprived them of a meaningful examination under oath and advised them to present any additional documents or information regarding their claim. State Farm also asserted that the insureds had failed to provide a proper sworn proof of loss. They eventually explained to the insureds what documents were still needed and why it believed the proofs of loss were deficient.

The insureds retained counsel who then submitted a fifth proof of loss and demanded an appraisal. Their counsel offered to submit the wife to an examination under oath. State Farm accepted the fifth proof of loss together with documentation as complying with the policy, but asserted an appraisal was premature until it had investigated the claim. The parties then scheduled the wife's examination under oath and to examine her, as well as the public adjuster and to receive the documentation requested in its letters. Five days before the scheduled examination under oath, the insureds filed a Complaint against State Farm to compel an appraisal.

The wife then appeared for her examination under oath as scheduled and was prepared to testify but State Farm's counsel, citing the filing of the lawsuit and pending litigation, declined to proceed with the examination. State Farm then moved to dismiss the original Complaint and the Plaintiffs filed an Amended

Complaint alleging that State Farm had breached the policy by denying coverage. The Amended Complaint did not request an appraisal.

State Farm then moved for Summary Judgment arguing that Plaintiffs failed to comply with their post-loss obligations before filing suit in violation of the policy's "no action" clause. The trial court granted Summary Judgment, however, the Fourth District reversed.

Although the Fourth District has held that a requirement to provide an examination under oath is a condition precedent to recovery and "an insured's refusal to comply with the demand for a statement is a willful material breach of an insurance contract which precludes the insurer from recovery under the policy"; nevertheless, they pointed out that the insureds in this case cooperated to some extent and therefore a fact question remained as to whether the condition was breached to the extent that the insureds should be denied any recovery under the policy.

Specifically, the husband appeared for his Unsworn Statement, gave answers to some of the questions posed and deferred to the adjuster for most of the other information. He arranged for the adjuster to attend an examination under oath, but the public adjuster on his own refused to provide the sworn statement. State Farm did not show that the insureds could have compelled the adjuster to provide a sworn statement and, as such, the Summary Judgment was reversed.

Improper to Force Insurer to Defend Lawsuit Without Resolution of Coverage Dispute

FCCI Commercial Insurance Company, Inc. v. Armour, 132 So. 3d 864 (Fla. 2d DCA 2014)

Armour initiated arbitration proceedings against the general contractor, the prior proper owner and 14 sub-contractors used to complete his residence. After the sub-contractors were dismissed from the arbitration proceedings, he filed a separate action against them in the Circuit Court. FCCI insured two of the sub-contractors. As a result, FCCI filed a separate declaratory action to resolve its duty to defend and indemnify the two sub-contractors under their insurance policies. The Circuit Court granted Armour's Motion to Stay the Declaratory Action after arguing that consideration of the policy provisions regarding FCCI's duty to defend and indemnify its insured's would involve the same factual disputes and issues raised in the Arbitration and liability actions. The trial court stayed both the

declaratory judgment and the liability actions pending the resolution of the Arbitration action. FCCI then filed a Petition for Writ of Certiorari.

The Second District granted the petition and quashed the trial court's decision to stay the declaratory action, noting that the trial court's order would cause irreparable harm to FCCI by forcing it to defend its insureds without resolution of the coverage dispute.

No Prejudice to Insurer Required When Condition Precedent is Breached

Rodrigo v. State Farm Florida Insurance Company, 144 So. 3d 690 (Fla. 4th DCA 2014)

Where the insured failed to file a sworn proof of loss as required by the policy, the insurance company was not obligated to pay because the insured materially breached a condition precedent. An insurance company need not show prejudice when the insured breaches a condition precedent to filing suit.

Notice of Policy Expiration

Rodriguez v. Security National Insurance, Co., Inc., 138 So. 3d 520 (Fla. 3d DCA 2014)

The Third District affirmed summary judgment in favor of an insurer in an action for breach of contract and bad faith in denying coverage to an insured. Rodriguez brought a wrongful death action against the insured stemming from an auto accident. The insured entered into a *Coblentz* agreement with Rodriguez and agreed to a consent judgment of $2.5 million in exchange for assigning his rights to a claim against the insurer. The insured's policy had lapsed 2 months prior to the accident.

Rodriguez argued that the insurer failed to give the insured notice that the policy would expire. The insurer sent notices to the address listed on the policy application and declarations page, but the address did not list the apartment number.

Without deciding whether the insurer had a statutory obligation to provide notice, the Third District held that the insurer gave sufficient renewal notice. Florida Statute §627.728(5), which deals with notices of cancellation and of intention not to renew, states that proof of mailing to the insured's address shown in the policy shall be sufficient proof of service. Similarly, the Policy required such

notices to be mailed to the "address shown in our records." The Third District also noted that an insurer's proof of mailing of a notice of cancellation to the insured prevails as a matter of law over the insured's denial of its receipt.

Prejudice to Insurer Required When Post-Loss Obligation is Breached

Bush v. State Farm Mutual Automobile Insurance Company, 39 FLWD 1575 (Fla. 2d DCA 2014) **Has not been released for publication.**

The Plaintiff filed a claim for uninsured motorist benefits. After receipt of the Complaint, State Farm served a Notice of Examination by an orthopedic surgeon. The Plaintiff objected to the notice and demanded various protections. State Farm advised that it did not agree to her demands and when the time came for the examination, she failed to appear.

Thereafter, State Farm added a defense of "no coverage" to its pleadings and filed a Motion for Summary Judgment arguing that because the Plaintiff breached a policy term, she forfeited coverage. The Plaintiff responded that Summary Judgment was improper because her failure to submit to the examination did not prejudice State Farm or warrant the denial of coverage. The trial court then entered Summary Judgment.

Relying upon the Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014), the Second District held that a Compulsory Medical Examination provision in the UM context is a post-loss obligation of the insured and is not a condition precedent to coverage. Thus, it was error to enter Summary Judgment.

State Farm v. Curran, 135 So. 3d 1071 (Fla. 2014)

A defendant has the burden of pleading and proving prejudice where an insured breaches a compulsory medical examination in an uninsured motorist contract before the insured forfeits benefits under the contract. Different presumptions arise depending on which duty has been breached. Failure to undergo a CME is a failure to cooperate, and the insurer bears the burden to prove prejudice. A failure to provide notice of an accident, on the other hand, gives a rebuttable presumption of prejudice. Further, a CME in a bodily injury policy is a

condition subsequent to the policy, whereas, a medical examination for a life insurance policy is a condition precedent to the policy.

Third-Party Indemnification Payment Can Satisfy Self-Insured Retention

Intervest Constr. of Jax, Inc. v. General Fid. Ins. Co., 133 So. 3d 494 (Fla. 2014)

The insured could use payments made by a third-party for indemnification to satisfy its self-insured retention provision. A homeowner sued her general contractor, Intervest, for an injury that occurred while using attic stairs. Intervest was then indemnified by the subcontractor who constructed the stairs for $1 million. Intervest had an insurance policy with General Fidelity with a self-insured retention ("SIR") provision of $1 million. The parties settled at mediation for $1.6 million. Intervest claimed that the indemnity payment satisfied the SIR, thus General Fidelity was responsible for the remaining $600,000.

The SIR provision at issue stated in part:

> "We have no duty to defend or indemnify unless and until the amount of the 'Retained Limit' is exhausted by payment of settlements, judgments, or 'Claims Expense' by you."
>
> "The 'Retained Limit' will only be reduced by payments made by the insured."

The Florida Supreme Court held that under the policy language that existed in the General Fidelity policy, the insured's indemnity rights under its contract with its subcontractor which it pursued and obtained from their insurer, satisfied the SIR and General Fidelity owed the remaining $600,000 to the Plaintiff; unless the *"Transfer of Rights"* provision also commonly referred to as the "*Subrogation Clause*" gave General Fidelity as the liability insurer priority of those funds under the terms of the policy. The Florida Supreme Court held that it did not, based on the specific language of this policy; and, in recognition of a principle of equity known as the "made whole doctrine".

The Florida Supreme Court agreed that the policy language appeared to be less restrictive than those found in the decisions found in other jurisdictions particularly in California that had terms obligating the insured to satisfy the retained limit it had to make the payment *from its own account*. The Florida Supreme Court found that specific language to be materially different from the terms in this policy which merely required the insured to "make the payment" to meet its SIR threshold, which they found to be more liberal and could be done in many different ways.

For example, the Court noted that, Intervest, by negotiating a contract with a subcontractor where it required indemnity from them as a condition factoring into "the price" of the contract, and then recovering those funds from them, can be construed as the insured having, on its own, exhausted the SIR of $1,000,000.

As it concerns the second certified question, the Supreme Court of Florida anchored its decision in applying the equitable principle, the "made whole doctrine" in finding that the subrogation clause in the policy did not give the insurer, General Fidelity, superior rights over their insured to the funds collected from the subcontractor's insurer.

"The 'made whole doctrine' provides that, absent a controlling contractual provision that states otherwise, the insured has priority over the insurer to recover its damages when there is a limited amount of indemnification available.

The *Transfer of Rights* provision stated that the insured transfers all rights to collect from responsible third parties *for payments we make* to satisfy the insured's legal obligation. The policy defined "we" to mean General Fidelity throughout when used throughout the policy. In this case, albeit somewhat simultaneously, Intervest had already collected the $1,000,000 from the third party in settlement of their indemnity claim. The Florida Supreme Court held that the insured's payment of these funds to the Plaintiff indeed triggered General Fidelity's obligation to pay the $600,000 balance of the settlement.

The Court's decision was grounded, in part, that because Intervest made its $1,000,000 payment *before* General Fidelity paid anything at all, and therefore, the *Transfer of Rights* provision did not apply to abrogate the common law made whole doctrine giving the insured priority to the funds available from responsible third parties.

Third Party's Cause of Action Against Insurer Does Not Accrue Until Settlement or Verdict Obtained

Star Insurance Company v. Dominguez, 141 So. 3d 690 (Fla. 2d DCA 2014)

The Plaintiff brought a wrongful death case against the County and also brought a count for declaratory relief against the insurance company that provided excess liability coverage for an amount above the sovereign immunity limits. The trial court refused the insurer's request to dismiss the count, deciding to sever it instead.

Even though the trial court had severed the action to prevent the jury from learning about the existence of insurance coverage, the Second District found that this was insufficient noting that Florida Statute §627.4136(1) expressly states that a cause of action against an insurance company by a party that is not its insured, does not accrue until a settlement or verdict has been obtained. The Court went on to state that allowing the party to circumvent the statute by merely instituting a separate action would result in insurance companies having to litigate claims which have not yet accrued and for which the insurance company might ultimately bear no liability. Such an interpretation would, therefore, nullify the protection conferred by the statute.

Untimely Notice of Loss Defense

Lo Bello v. State Farm Florida Insurance Company, 152 So. 3d 595 (Fla. 2d DCA 2014)

In 2002, the Lo Bellos moved into their home. In late 2004, they noticed cracking in their home but believed it to be from normal settlement and did not associate it with sinkhole activity. In 2008, they consulted a public adjuster and then filed a claim under their sinkhole insurance. State Farm then took examinations under oath of the Lo Bellos and denied coverage for the claim based upon late reporting and the assertion that State Farm had been prejudiced by its inability to perform a prompt investigation. They also alleged that the Lo Bellos failed to take appropriate measures to save or protect the property from further peril.

The homeowners then filed a claim against State Farm and in defense of the claim, State Farm raised the failure to timely report the claim and that they had been prejudiced by the late notice. State Farm was granted Summary Judgment and the Second District reversed holding that there were material issues of fact concerning whether the insureds timely reported of their loss to State Farm.

The Second District stated that, in considering State Farm's defense of untimely notice, the Court's must follow a two-step analysis which requires determining whether notice was timely given, and, if untimely, whether the insurer was prejudiced by the untimely notice. In this case, they ruled that the question as to whether the insureds timely reported the claim to the insurer was an issue of fact for the jury to decide. If the jury determined that the notice was untimely, then the insureds can only recover if they overcome the presumption of prejudice.