WIND 2021

CASE LAW AND LEGISLATIVE UPDATE

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LEGISLATIVE CHANGES

Section 624.422, Florida Statutes

- 624.422 Service of process; appointment of Chief Financial Officer as process agent.— (2) Prior to its authorization to transact insurance in this state, each insurer shall file with the department designation of the name and address of the person to whom process against it served upon the Chief Financial Officer is to be forwarded. Each insurer shall also file with the department designation of the name and e-mail address of the person to whom the department shall forward civil remedy notices filed under 624.155. The insurer may change a ~~the~~ designation at any time by 246 a new filing.

Section 624.155, Florida Statutes

624.155 Civil remedy.— (3)(a) As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. Notice to the authorized insurer must be provided by the department to the e-mail address designated by the insurer under s. 624.422.

* * *

(c) No action shall lie if, within 60 days after the insurer receives ~~filing~~ notice from the department in accordance with this subsection, the damages are paid or the circumstances giving rise to the violation are corrected.

* * *

(e) The applicable statute of limitations for an action under this section shall be tolled for a period of:

1. Sixty ~~65~~ days after the insurer receives from the department ~~by the mailing of~~ the notice required by this subsection.
2. Sixty days after the date appraisal is invoked pursuant to paragraph (f) ~~or the mailing of a subsequent notice required by this subsection.~~

CONCURRENT CAUSATION

Sec. First Ins. Co. v. Czelusniak

2020 WL 2463762, 45 Fla. L. Weekly D1151 (Fla. 3d DCA 2020)

FACTS

• In 2016, “heavy rains and wind caused roof and water damage” through the roof, windows, and doors.

• The claim was denied due to the water damage exclusionary endorsement contained within the carrier’s policy which states, in pertinent part, that “water damage, meaning… water penetration through the roof system or exterior walls or windows” is “excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.”

Sec. First Ins. Co. v. Czelusniak

2020 WL 2463762, 45 Fla. L. Weekly D1151 (Fla. 3d DCA 2020)

FACTS (Cont'd)

• The case went to trial and the judge granted directed verdict in favor of the insured stating that, because the policy did not specifically exclude damage caused by water coming in through doors, coverage for such damages should be afforded.

• In rendering his ruling, the judge "reasoned that although water entering through the door is not expressly excluded, the jury would be unable to separate the water that came in through the door (non-excluded cause) from water that came in through the walls and windows (excluded causes)."

Sec. First Ins. Co. v. Czelusniak

2020 WL 2463762, 45 Fla. L. Weekly D1151 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reversed the trial court.

- It was noted that the water damage exclusionary endorsement contained anti-concurrent causation language

- "While there is no provision in the policy expressly excluding damage from water penetrating through the doors of the dwelling, the policy expressly excluded damage from water penetrating through the 'roof system or exterior walls or windows.'"

Sec. First Ins. Co. v. Czelusniak

2020 WL 2463762, 45 Fla. L. Weekly D1151 (Fla. 3d DCA 2020)

HOLDING (Cont'd)

- Additionally, "because evidence of water entering through the exterior walls and windows was undisputed and is expressly excluded by the policy, the entire loss is excluded from coverage due to the anti-concurrent cause provision regardless of any other cause or event contributing concurrently or in any sequence to the loss.

- "Accordingly, the anti-concurrent cause provision, coupled with the undisputed evidence that the loss was caused by a combination of both excluded and covered perils, foreclosed the analysis of whether the jury could legally or factually separate the damage caused by water coming through the door from water coming through the walls and windows."

ACV vs. RCV

Vazquez v. Citizens Prop. Ins. Corp.

2020 WL 1950831, 2020 WL 1950831 (Fla. 3d DCA 2020)

FACTS

• The insured filed an action for breach of contract alleging that insurer failed to pay Actual Cash Value for loss. The trial court granted the insurer's motion *in limine* to preclude the insured from introducing evidence of matching costs before insured began making repairs reasoning that the plain language of insurance policy and relevant statutes limit the initial payment of actual cash value to the direct physical loss to the property, and matching is not a direct physical loss.

Vazquez v. Citizens Prop. Ins. Corp.

2020 WL 1950831, 2020 WL 1950831 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA affirmed the trial court's decision.

- Damages related to "matching" were not a direct physical loss and, therefore, did not need to be paid under an Actual Cash Value analysis.

Citizens Prop. Ins. Corp. v. Tio

2020 WL 1291855, 45 Fla. L. Weekly D641 (Fla. 3d DCA 2020)

FACTS

• The insured filed a lawsuit alleging a breach of contract due to a denied claim. During litigation, the carrier stipulated as to coverage but filed a motion for summary judgment alleging that the actual cash value of the loss fell below the policy's deductible. The trial court denied their motion for summary judgment and allowed the case to proceed to trial on damages only.

• Like in *Vasquez*, the trial court also limited the evidence to a presentation of actual cash value; however, in *Tio* the court granted the insureds motion for rehearing and allowed the jury to consider the full extent of loss. Ultimately, the jury rendered a finding of $70,000.00 in favor of the insured and a final judgment was entered accordingly.

Citizens Prop. Ins. Corp. v. Tio

2020 WL 1291855, 45 Fla. L. Weekly D641 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA affirmed the trial court's decision.

- Policy and statute governing an insurer's post-loss adjustment and claim settlement obligations do not operate as a limitation on a policyholder's remedies for an insurer's breach of an insurance contract.

- After the carrier breached the contract, the trial court properly instructed the jury to consider all damages supported by competent evidence.

WATER DAMAGE

Kokhan v. Auto Club Ins. Co. of Florida

297 So. 3d 570 (Fla. 4th DCA 2020)

FACTS

- The insured filed a breach of contract as a result of a denied claim for damages stemming from a leak from a pool system. The trial court granted summary judgment in favor of the insurer based on the carrier's application of the water damage exclusion as follows:

c. WATER DAMAGE, meaning:
(1) flood, surface water, waves, tidal water, storm surge, tsunami, seiche, overflow of a body of water, or spray from any of these, whether or not driven by wind;
(2) water or waterborne material or substance from outside of the plumbing system on the ***residence premises*** that enters the ***residence premises*** through sewers or drains;
(3) water or waterborne material or substance which overflows or discharges from a sump, sump pump, or related equipment;
(4) water below the surface of the ground, including water which exerts pressure on or seeps or leaks or flows through a building; sidewalk; driveway; foundation; swimming pool; spa; or other structure;
(5) water which is released, overflows or escapes from a dam, levee, or other structure designed to contain surface water;
whether caused by or resulting from human, animal, or naturally occurring forces, or however caused.

Kokhan v. Auto Club Ins. Co. of Florida

297 So. 3d 570 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA reversed the trial court.

- The language of water damage exclusion provisions in policy plainly referred to naturally-flowing water or waterborne material existing outside of the plumbing system.

Deshazior v. Safepoint Ins. Co.

2020 WL 2549546, 45 Fla. L. Weekly D1210 (Fla. 3d DCA 2020)

FACTS

• The insureds property sustained water damage in a bathroom. The insureds hired a restoration company to do the mitigation, discarded the damaged pipe, and did not immediately report the claim to the carrier. Ultimately, the carrier determined that the property damage appeared to have been caused by long-term seepage and exposure to water, coupled with failure to maintain the plumbing in and around the bathroom where the claimed leak occurred and denied the claim.

• In litigation, the trial court granted summary judgment in favor of the insurer.

Deshazior v. Safepoint Ins. Co.

2020 WL 2549546, 45 Fla. L. Weekly D1210 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA affirmed the trial court.

- The insurer proffered evidence that damage likely occurred by slow leakage or seepage of water over period of weeks or months, and insureds failed to introduce sufficient evidence to show that the damage was instead caused by a one-time accidental release of water

APPRAISAL

State Farm Florida Ins. Co. v. Speed Dry, Inc.

292 So. 3d 1260 (Fla. 5th DCA 2020)

FACTS

• The insureds filed a claim for storm damages which was covered subject to the insurer's scope of damages including repair to the roof. The insured then assigned its benefits to the plaintiff who filed suit.

• The insurer invoked appraisal during litigation. The trial court denied the motion to compel appraisal stating "whether State Farm would be required to pay for matching shingles and/or an entire new roof was a coverage question requiring "an immediate need for declaratory judgment action."

State Farm Florida Ins. Co. v. Speed Dry, Inc.

292 So. 3d 1260 (Fla. 5th DCA 2020)

HOLDING

- The 5th DCA reversed the trial court.

- The insurer was entitled under insurance policy to compel appraisal regarding dispute as to whether insurer was permitted to replace damaged or missing shingles with shingles that did not match remaining shingles on roof, where insurer conceded that there was a covered loss and thus did not wholly deny coverage for storm damage to roof.

People's Tr. Ins. Co. v. Ortega

2020 WL 3443454, 45 Fla. L. Weekly D1523 (Fla. 3d DCA 2020)

FACTS

• As a result of Hurricane Irma damages, the carrier accepted coverage and invoked its option to repair as outlined in the policy. The carrier notified the insureds that, in the event of a dispute as to the scope of repairs, the insureds must provide a Sworn Proof of Loss.

• The insureds responded by provided a proof of loss with "pending" on the line earmarked for the total amount claimed. The carrier rejected the proof of loss and requested a completed proof of loss with supporting documentation. The insureds then filed a lawsuit and, during litigation, moved to compel appraisal.

People's Tr. Ins. Co. v. Ortega

2020 WL 3443454, 45 Fla. L. Weekly D1523 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reversed the trial court.

- The trial court erred by granting insureds' motion to compel appraisal without holding evidentiary hearing to determine whether insureds had complied with post-loss obligation to submit sworn proof of loss that is compliant with policy requirements

Am. Coastal Ins. Co. v. Quadomain Condo. II Ass'n, Inc.

294 So. 3d 921 (Fla. 4th DCA 2020)

FACTS

• The insured sought to compel appraisal during litigation. The insurer contended that the insured failed to comply with certain post-loss conditions. The trial court granted the motion without conducting an evidentiary hearing.

Am. Coastal Ins. Co. v. Quadomain Condo. II Ass'n, Inc.

294 So. 3d 921 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA reversed the trial court.

- It was error to grant insured's motion to compel appraisal without conducting evidentiary hearing where there was factual dispute as to whether insured complied with its post-loss obligations.

State Farm Florida Ins. Co. v. Sanders

2020 WL 1870776, 45 Fla. L. Weekly D870 (Fla. 3d DCA 2020)

FACTS

• After agreeing to appraisal during litigation, the insureds' appraiser was hired to act as the insureds' "agent and representative" in exchange for 10% of the amount recovered.

• The insurer argued that the insureds' appraiser was not "disinterested" due to the agent/principal relationship with the insured and due to the contingency interest in the outcome.

• The trial court allowed the insureds' appraiser to act on their behalf.

State Farm Florida Ins. Co. v. Sanders

2020 WL 1870776, 45 Fla. L. Weekly D870 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA denied the writ of certiorari.

- The trial court did not depart from essential requirements of law because its order followed district court's existing precedent.

- Question certified: Can a fiduciary, such as a public adjuster or appraiser who is in a contractual agent-principal relationship with the insureds and who receives a contingency fee from the appraisal award, be a disinterested appraiser as a matter of law?

State Farm Florida Ins. Co. v. Crispin

290 So. 3d 150 (Fla. 5th DCA 2020)

HOLDING

• Insured's public adjuster who is entitled to a contingency fee of insurance proceeds recovered may not serve as a "disinterested appraiser."

State Farm Florida Ins. Co. v. Thompson

291 So. 3d 203 (Fla. 5th DCA 2020)

HOLDING

• Insured's public adjuster who is entitled to contingency fee from recovered insurance proceeds may not serve as a disinterested appraiser.

State Farm Florida Ins. Co. v. Cadet

290 So. 3d 1090 (Fla. 5th DCA 2020)

HOLDING

• Insured's public adjuster, who is entitled to contingency fee from recovered insurance proceeds, is not authorized to serve as insured's disinterested appraiser.

Baptiste v. People's Tr. Ins. Co.

2020 WL 559183, 45 Fla. L. Weekly D259 (Fla. 3d DCA 2020)

FACTS

• After Hurricane Irma, the insureds filed a claim with the insurer. The insurer accepted coverage, stated that the damages were below the deductible, and invoked its option to repair.

• Instead of allowing repairs, the insureds filed a declaratory seeking, among other things, a declaration that People's Trust's notice of election to repair their property was invalid and; (ii) a declaration that the policy's appraisal provision contained within the Preferred Contractor Endorsement does not apply.

• Upon motion of the insurer, the trial court compelled appraisal.

Baptiste v. People's Tr. Ins. Co.

2020 WL 559183, 45 Fla. L. Weekly D259 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA affirmed the trial court.

- Appraisal provision of homeowner's insurance policy's Preferred Contractor Endorsement applied to homeowner's and insurer's dispute over amount of loss sustained by homeowners due to hurricane damage to their home, and thus insurer had right under the provision to compel homeowners to participate in appraisal process; relevant language of provision required appraisal where insurer elected to repair a covered loss and the parties failed to agree on amount of loss, including the scope of repairs.

People's Tr. Ins. Co. v. Vidal

2020 WL 2463075, 45 Fla. L. Weekly D1149 (Fla. 3d DCA 2020)

FACTS

• The insureds filed a claim related to Hurricane Irma. The carrier Accepted coverage and elected its option to repair notifying the insured that, in the event of a dispute on scope, they were requesting an estimate. The carrier also informed the insureds that, if there was continued disagreement as to the scope of repairs, either party may request appraisal.

• The insureds filed suit. The carrier then moved to compel appraisal. The insured argued that the carrier waived appraisal by failing to allege it as an affirmative defense. The trial court entered an order denying the motion to compel appraisal reasoning that the carrier actively litigated the case.

People's Tr. Ins. Co. v. Vidal

2020 WL 2463075, 45 Fla. L. Weekly D1149 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reversed the trial court.

- The insurer did not waive right to compel appraisal by not invoking its appraisal right as an affirmative defense to insured's breach of contract action where insurer, in the same pleading containing affirmative defenses, asserted counterclaims seeking insureds' compliance with appraisal.

- The court held that a party will not be deemed to have waived appraisal unless party's litigation position is inconsistent with party's assertion of right to appraisal.

State Farm Florida Ins. Co. v. Chirino

300 So.3d 1240 (Fla. 3d DCA 2020)

FACTS

• The insured sought to record video and audio of the appraisal inspection. The carrier sought to prevent the recording under the protections of the Florida Constitution. The trial court ordered that the recording be allowed. The carrier then filed a writ of certiorari.

State Farm Florida Ins. Co. v. Chirino

2020 WL 1540959, 45 Fla. L. Weekly D756 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA denied the writ.

- The court allowed the recordings finding that the trial court's order did not depart from the essential requirements of the law.

- The appellate court mandated that copies of the recordings be made available to any party upon request.

Blackboard Specialty Ins. Co. v. Ytech-1428 Brickell, LLC,
2020 WL 7233374, 45 Fla. L. Weekly D2754a (Fla. 3d DCA Dec. 9, 2020)

FACTS

• A Hurricane Irma claim was sent to appraisal. When the carrier failed to pay, the insured filed a petition seeking to confirm the appraisal award. The carrier moved to dismiss the petition. The court *sua sponte* entered final judgment in favor of the insured.

Blackboard Specialty Ins. Co. v. Ytech-1428 Brickell, LLC,
2020 WL 7233374, 45 Fla. L. Weekly D2754a (Fla. 3d DCA Dec. 9, 2020)

HOLDING

- The 3d DCA reversed the trial court's ruling holding that a petition to confirm appraisal was not the proper course of action.

- The 3d DCA remanded with instructions to provide the insured leave to amend and file a complaint alleging a viable cause of action regarding outstanding issues of coverage.

CHANGE IN POLICY TERMS

People's Tr. Ins. Co. v. Lavadie

2020 WL 3443456, 45 Fla. L. Weekly D1521 (Fla. 3d DCA 2020)

FACTS

- The Insureds obtained a homeowner's insurance policy in 2014. In early 2016, the carrier sent the insureds a renewal package that included a "Notice of Change in Policy Terms." The new policy contained a "Preferred Contractor Endorsement" allowing the carrier the option to repair covered damages.

- After the new policy was received, the insureds filed a claim. When the carrier invoked the option to repair, and invoking appraisal. The insureds responded by refusing appraisal noting that the scope of damages was far greater than that of the carrier's estimate. The carrier then filed suit seeking specific performance of the appraisal process.

- The insureds filed a motion for summary judgment seeking to invalidate the notice of change in policy form. The court granted the motion and the appeal followed.

People's Tr. Ins. Co. v. Lavadie

2020 WL 3443456, 45 Fla. L. Weekly D1521 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reserved the trial court.

- While the modern iteration of Florida Statute 627.43141 requires that the insurer give the insured notice of policy changes along with a summary of the changes put in place, the prior version of the statute did not.

FEES & MULTIPLIERS

Wesson v. Florida Peninsula Ins. Co.

296 So. 3d 572 (Fla. 1st DCA 2020)

FACTS

• After the trial court entered a judgment in favor of the Plaintiffs, the parties stipulated to fees with only the issue regarding a contingency fee multiplier remaining outstanding. After an evidentiary hearing where the trial judge gave the highest weight to the insureds' difficulty in locating an attorney, the court denied the request for a multiplier.

Wesson v. Florida Peninsula Ins. Co.

296 So. 3d 572 (Fla. 1st DCA 2020)

HOLDING

- The 1st DCA reversed the trial court.
- In determining whether relevant market required contingency fee multiplier to obtain competent counsel, the trial court erred in considering plaintiff's actual difficulty in locating counsel rather than looking at the relevant market itself.
- Additionally, the trial court erred in analyzing whether counsel was able to mitigate risk of nonpayment where instead of relying on undisputed evidence that plaintiff could not afford an hourly fee, the trial court relied on the likelihood of success.
- Likelihood of success is to be considered in determining range of multiplier rather than whether risk of non-payment is mitigated

Universal Prop. & Cas. Ins. v. Deshpande

2020 WL 660097245, Fla. L. Weekly D2511, (Fla. 3d DCA 2020)

FACTS

• The court awarded a lodestar amount of $206,090.00 in attorneys' fees and $3,315.00 in paralegal fees. The trial court then applied a 2.0 multiplier increasing the total fee award to $415,495.00. The court awarded $12,510.14 in costs and $13,800.00 to Plaintiff's fee expert. The final judgment for fees and costs payable to Deshpande's counsel was $441,805.14 following the $25,000 settlement.

Universal Prop. & Cas. Ins. v. Deshpande

2020 WL 660097245, Fla. L. Weekly D2511, (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reversed the trial court.

Heid v. Florida Ins. Guar. Ass'n

2020 WL 1070948, 45 Fla. L. Weekly D523 (Fla. 2d DCA 2020)

FACTS

• After HomeWise Preferred Insurance Company became insolvent, FIGA absorbed the insured's policy and assumed responsibility of the handling of the pending sinkhole claim.

• In 2013, the insured demanded a coverage determination to which FIGA replied that it had not and was not denying coverage. The insureds then filed a lawsuit.

• FIGA invoked the neutral evaluation process after which FIGA advised the insured that her claim was not covered and no payment would be forthcoming. Ultimately, the insured provided two reports which swayed FIGA's decision and FIGA conceded that sinkhole activity was present.

Heid v. Florida Ins. Guar. Ass'n

2020 WL 1070948, 45 Fla. L. Weekly D523 (Fla. 2d DCA 2020)

FACTS (Cont'd)

- The insured then moved for fees and costs arguing that FIGA confessed judgment.

- FIGA argued that it acted swiftly in agreeing to cover the loss once evidence of a sinkhole became available.

- The trial court denied the motion for fees reasoning that FIGA never affirmatively denied the claim.

Heid v. Florida Ins. Guar. Ass'n

2020 WL 1070948, 45 Fla. L. Weekly D523 (Fla. 2d DCA 2020)

HOLDING

- The 2d DCA affirmed the trial court.

- FIGA is prevented from paying "[a]ny amount payable for a sinkhole loss other than testing deemed appropriate by the association or payable for the actual repair of the loss" and specifically prevents FIGA from paying attorney's fees and costs in connection with a sinkhole loss.

- Question certified: Does the language in section 631.54(3)(c) regarding attorney's fees in connection with a sinkhole loss operate to prevent a sinkhole claimant from receiving fees from FIGA under section 631.70?

Florida Ins. Guar. Ass'n v. Valdez

2020 WL 1444978, 45 Fla. L. Weekly D730 (Fla. 2d DCA 2020)

HOLDING

- Question certified: Does the language in section 631.54(3)(c) regarding attorney's fees in connection with a sinkhole loss operate to prevent a sinkhole claimant from receiving fees from FIGA under section 631.70?

Florida Ins. Guar. Ass'n v. Rubin

297 So. 3d 635 (Fla. 4th DCA 2020)

FACTS

- In 2005, the insureds filed a Hurricane Wilma claim. In 2010, after Coral Insurance Company was declared insolvent and FIGA assumed responsibility, the insureds obtained a new estimate and immediately filed a lawsuit against FIGA.

- The first time FIGA received notice of the reopened claim was two months after suit was filed.

- In 2015, after the insured prevailed on the parties' competing motions for summary judgment, the parties settled the case at mediation with fees and costs remaining outstanding.

Florida Ins. Guar. Ass'n v. Rubin

297 So. 3d 635 (Fla. 4th DCA 2020)

FACTS (Cont'd)

- The trial court entered a judgment in favor of the insureds on the matter of entitlement to attorney's fees and costs.

- The appeal followed.

Florida Ins. Guar. Ass'n v. Rubin

297 So. 3d 635 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA reversed the trial court.

- The trial court improperly found that insured was entitled to prevailing party attorney's fees under section 631.70 because FIGA never denied insurer's claim by affirmative action before suit was filed and FIGA was not notified of insured's claim until after he filed suit with circuit court.

PREMATURE SUIT

Goldberg v. Universal Prop. & Cas. Ins. Co.

302 So. 3d 919 (Fla. 4th DCA Sept. 9, 2020)

FACTS

• The insured filed a claim as a result of damage caused by Hurricane Irma. The carrier initially paid its estimated amount for the dwelling but failed to tender payment for claimed damage to personal property.

• Despite the policy provision requiring notice of a supplemental or reopened claim, the insured filed suit without ever placing the carrier on notice of a dispute. The carrier moved for summary judgment due to the failure to submit a supplemental claim which the trial court granted.

Goldberg v. Universal Prop. & Cas. Ins. Co.

302 So. 3d 919 (Fla. 4th DCA Sept. 9, 2020)

HOLDING

- The 4th DCA affirmed in part and reversed in part.
- The trial court did not err in entering summary judgment in favor of insurer as to coverage on the dwelling because insured failed to comply with policy requirement that he submit a supplemental claim prior to filing suit. A competing estimate by a public adjuster or by a prospective contractor would fall within definition of a “supplemental claim.”
- The trial court erred in granting summary judgment in favor of insurer on insured's personal property claim because, by failing to pay any amount for personal property loss, the insurer effectively denied coverage. Such a denial waives the insurer's right to insist on insured's compliance with policy conditions.

Skene v. Avatar Prop. & Cas. Ins. Co.

2020 WL 1897264, 45 Fla. L. Weekly D907 (Fla. 2d DCA 2020)

FACTS

- Trial court dismissed a suit with prejudice finding that the lawsuit was premature.

Skene v. Avatar Prop. & Cas. Ins. Co.

2020 WL 1897264, 45 Fla. L. Weekly D907 (Fla. 2d DCA 2020)

HOLDING

- The 2d DCA reversed the trial court.

- It is error to grant final summary judgment in favor of insurer on grounds that suit was premature where insurer admitted coverage under the policy.

DECLARATORY ACTIONS

People's Tr. Ins. Co. v. Valentin

2020 WL 1542061, 45 Fla. L. Weekly D754 (Fla. 3d DCA 2020)

FACTS

- In July of 2017, the insured's property sustained water damage from a roof leak. The carrier invoked their right to repair and requested several documents, including a sworn proof of loss. The carrier also invoked appraisal.

- A year later, the insured submitted an improperly completed proof of loss and never corrected it. The insured did, however, execute a work authorization form.

People's Tr. Ins. Co. v. Valentin

2020 WL 1542061, 45 Fla. L. Weekly D754 (Fla. 3d DCA 2020)

FACTS (Cont'd)

- The carrier filed suit alleging (I) mandatory injunction/specific performance, (II) declaratory judgment, and (III) breach of contract/rescission. Despite the fact that the insured authorized repairs on the property, the carrier believed that the failure to comply with post-loss obligations may have relieved it of its obligation to do so.

- The insured moved to dismiss the complaint and the trial court granted leave to amend the complaint. The carrier argued that there was nothing more that could be plead and requested a dismissal with prejudice.

People's Tr. Ins. Co. v. Valentin

2020 WL 1542061, 45 Fla. L. Weekly D754 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA affirmed in part and reversed in part.

- Because the carrier failed to allege damages properly, the breach of contract action was properly dismissed. Due to the carrier's decision not to amend, the issue was not preserved on appeal and dismissal with prejudice was affirmed.

- Because the actions for specific performance and declaratory action both adequately plead the necessary elements, the trial court committed error in dismissing same.

People's Tr. Ins. Co. v. Franco

2020 WL 1870361, 45 Fla. L. Weekly D879 (Fla. 3d DCA 2020)

FACTS

• After invoking their option to repair, and having not received requested documentation such as a proof of loss or executed work authorization, the carrier filed a lawsuit seeking (1) declaratory relief as to the parties' rights and obligations under the Policy, and (2) a judgment for anticipatory repudiation and breach of the Policy terms "permanently voiding any further coverage obligations, and for an award of all reasonable costs incurred in prosecuting this action."

• The court granted a motion to dismiss and provided leave to amend. The carrier waived its amendment and appealed.

People's Tr. Ins. Co. v. Franco

2020 WL 1870361, 45 Fla. L. Weekly D879 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reversed the trial court.

- The trial court erred in dismissing insurer's complaint as the complaint adequately plead the causes of action asserted.

Sec. First Ins. Co. v. Phillips

2020 WL 3115493, 45 Fla. L. Weekly D1426 (Fla. 5th DCA 2020)

FACTS

• After receiving notice of a claim which occurred soon after the insured purchased the property, the carrier determined that the damages preexisted and filed an action seeking declaratory judgment to determine whether the damages did, in fact, predate the policy.

• The trial court ultimately found that the complaint was inappropriate in the context of a declaratory action, reasoning that this case was about whether the alleged damage occurred before or after the insured purchased the policy.

Sec. First Ins. Co. v. Phillips

2020 WL 3115493, 45 Fla. L. Weekly D1426 (Fla. 5th DCA 2020)

HOLDING

- The 5th DCA reversed the trial court.

- Because policy would permit insurer to deny coverage if damage happened before inception of the policy, there was a genuine dispute between the parties, and insurer presented a justiciable question as to the existence of its right to deny coverage under the policy.

DISCOVERY

Anchor Prop. & Cas. Ins. Co. v. Yanes

299 So. 3d 501 (Fla. 3d DCA Mar. 4, 2020)

FACTS

- Trial court ordered the production of all documents in the field adjuster's file created prior to the date of denial.

- The insurer filed for writ of certiorari.

Anchor Prop. & Cas. Ins. Co. v. Yanes

299 So. 3d 501 (Fla. 3d DCA Mar. 4, 2020)

HOLDING

- The 3d DCA granted the writ and quashed the order.

- "Florida law 'prohibits insureds from obtaining discovery into an insurer's claims files and claims handling materials until contract/coverage litigation has been concluded.'"

Progressive Am. Ins. Co. v. Herzoff

290 So. 3d 153 (Fla. 2d DCA 2020)

FACTS

- The trial court ordered the production of the entire claim file from a prior claim that was not the subject of ongoing litigation.

- The insurer filed for writ of certiorari.

Progressive Am. Ins. Co. v. Herzoff

290 So. 3d 153 (Fla. 2d DCA 2020)

HOLDING

- The 2d DCA granted the petition and quashed the order.

- The trial court departed from essential requirements of law in finding that the claim file from a prior claim involving the same insured boat could not be protected from discovery as work product because the prior claim had been settled without litigation.

- "That does not mean the entirety of Progressive's 2015 claim file is protected work product."

Avatar Prop. & Cas. Ins. Co. v. Simmons

298 So. 3d 1252 (Fla. 5th DCA 2020)

FACTS

- The trial court ordered that the carrier turn over photographs contained within the insurer's claim file over the carrier's objection and assertion of "claims file" privilege.

- The insurer filed for writ of certiorari.

Avatar Prop. & Cas. Ins. Co. v. Simmons

298 So. 3d 1252 (Fla. 5th DCA 2020)

HOLDING

- The 5th DCA denied the petition.
- The trial court did not depart from essential requirements of the law by requiring insurer to produce photographs within its claim file, and photographs and reports within its underwriting file, pertaining to the condition of the subject property when the insurance policy was issued.
- Although insurer's objection to request at issue was work product privilege, insurer never attempted to demonstrate that photographs at issue were prepared in anticipation of litigation.
- There is no “claims file” privilege

Avatar Prop. & Cas. Ins. Co. v. Jones

291 So. 3d 663 (Fla. 2d DCA 2020)

FACTS

- The trial court ordered production of "[a]ny and all photographs taken" by the carrier of the property as the carrier had not filed a privilege log over the objection of the insurer that the request was overly broad and protected by the work product privilege.

- The insurer filed for writ of certiorari.

Avatar Prop. & Cas. Ins. Co. v. Jones

291 So. 3d 663 (Fla. 2d DCA 2020)

HOLDING

- The 2d DCA granted the petition and quashed the order.

- The obligation to file a privilege log does not arise until after court has ruled on party's non-privilege discovery objections.

SANCTIONS

Beseler v. Avatar Prop. & Cas. Ins. Co.

291 So. 3d 137 (Fla. 4th DCA 2020)

FACTS

• After the insureds put forth statements regarding the causation and repairs of damage, the insurer moved to dismiss the case for fraud upon the court alleging that (1) the insureds changed their account of the cause of loss during their depositions; (2) the invoices regarding the garbage disposal repair predated the cause of loss by a month, and (3) the insureds made prior fraudulent claims.

• The trial court granted the insurer's motion and dismissed the case.

Beseler v. Avatar Prop. & Cas. Ins. Co.

291 So. 3d 137 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA reversed the trial court.
- The court abused its discretion in dismissing case for fraud upon the court based on finding that evidence provided completely contradicted insureds' prior statement where the record does not demonstrate that insureds knowingly entered a scheme to defraud the insurer and the court.
- Collective inconsistencies between the insureds' statements regarding the cause of loss and repair were not significant enough to warrant dismissal and could have been managed through impeachment and other less severe sanctions

Strems Law Firm, P.A. v. Avatar Prop. & Cas. Ins. Co.

297 So. 3d 592 (Fla. 4th DCA 2020)

FACTS

• The insurer moved to dismiss the insureds' lawsuit as a result of the bad faith conduct during litigation and discovery.

• The court granted the motion to dismiss and, when the attorney sought a lesser sanction, the court imposed additional sanctions against the attorney and ordered them to pay the amount sought by the clients.

Strems Law Firm, P.A. v. Avatar Prop. & Cas. Ins. Co.

297 So. 3d 592 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA affirmed in part and denied in part.

- There was no error in dismissing case as a sanction for plaintiff's counsel's bad faith conduct when the court properly rendered findings of the necessary *Kozel* factors.

- There was error in imposing monetary sanction against plaintiff's counsel to the benefit of the insured because such relief was not sought and was imposed without notice in contradiction with due process. Additionally, the trial court improperly prejudged the merits of the underlying lawsuit.

BLASTING

Hernandez v. Citizens Prop. Ins. Corp.

2020 WL 2549534, 45 Fla. L. Weekly D1209 (Fla. 3d DCA 2020)

FACTS

• The insured filed a claim alleging that his property sustained damages as a result of vibrations caused by off-site blasting explosions. The carrier denied coverage and, during litigation, moved for summary judgment.

• The trial court granted the motion concluding that the insurance policy's exclusion provision did not cover indirect damage to property as a result of earth movement that may have been triggered by off-site fire or explosion.

Hernandez v. Citizens Prop. Ins. Corp.

2020 WL 2549534, 45 Fla. L. Weekly D1209 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA affirmed the trial court.

- The trial court properly concluded that the policy excluded from coverage indirect damage to property as result of earth movement that may have been triggered by an off-site fire or explosion.

SUMMARY JUDGMENT EVIDENCE

Estevez v. Citizens Prop. Ins. Corp.

2020 WL 2176719 (Fla. 3d DCA 2020)

FACTS

- The insureds sued the carrier their claim for water damage to their home was denied. The insurer moved for summary judgment based on the affidavits and reports of two experts who inspected the damaged roof and gave the opinion that the water damage was due to wear and tear and, therefore, not covered by the policy.

- The Insureds responded to the summary judgment motion by filing only part of an affidavit prepared by their expert. The insureds later declined to provide the missing page when given the opportunity by the court below to do so. In turn, the court granted summary judgment.

Estevez v. Citizens Prop. Ins. Corp.

2020 WL 2176719 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA affirmed the trial court.

- The insurer met its preliminary burden of showing that no issue of material fact existed, and insureds failed to meet their burden to come forward with counter-evidence sufficient to reveal a genuine issue, as their expert's affidavit in truncated form contains only conclusions.

United Services Auto. Ass'n v. Velez

2020 WL 2176800 (Fla. 3d DCA 2020)

FACTS

• After receiving notice of a water claim, the carrier attempted to come to an agreement on the scope of repairs before issuing a coverage determination. Unable to receive a response, the carrier timely tendered an undisputed payment. Along with the undisputed payment, the carrier advised that appraisal was being invoked in the event of a dispute. The insured responded by filing a lawsuit.

• In litigation, the carrier moved to compel appraisal. On the day before the hearing, the insured's counsel agreed to appraisal. Once appraisal was completed, the carrier moved for final judgment asserting that no elements of breach of contract could be established. Although the insured failed to dispute the facts alleged by the carrier, the court denied the motion for final judgment.

United Services Auto. Ass'n v. Velez

2020 WL 2176800 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reversed the trial court.

- The trial court erred in denying insurer's motion for summary judgment where insured presented no evidence of insurer's breach of insurance contract. The insurer met its initial burden of demonstrating the nonexistence of any genuine issue of material fact, and insured failed to come forward with admissible counter-evidence sufficient to reveal a genuine issue of material fact.

Rodriguez v. Avatar Prop. & Cas. Ins. Co.

290 So. 3d 560 (Fla. 2d DCA 2020)

FACTS

- The insured filed a claim for water damages which was ultimately denied. Instead of answering the complaint, the carrier filed two motions for summary judgment alleging a failure to comply with conditions precedent and fraud.

- In support of their motion, the insurer filed an affidavit of the corporate representative containing numerous allegations regarding contract interpretation and pseudo-expert testimony regarding the trade specialties of plumbing and contracting. The affidavit did not, however, contain the statement that the information was based on personal knowledge nor that the affiant possessed any qualifications to present specialized testimony.

- The trial court ultimately found in favor of the insurer.

Rodriguez v. Avatar Prop. & Cas. Ins. Co.

290 So. 3d 560 (Fla. 2d DCA 2020)

HOLDING

- The 2d DCA reversed the trial court.

- The trial court erred in entering summary judgment in favor of insurer on insurer's breach of contract and fraud claims. The affidavit of corporate representative filed in support of insurer's motions was insufficient basis for summary judgment where affidavit lacked sufficient information establishing that affiant possessed personal knowledge and competency to testify to the matters set forth in the affidavit.

JURISDICTION

Curtis v. Centauri Specialty Ins. Co.

290 So. 3d 926 (Fla. 4th DCA 2020)

FACTS

• The insureds filed a lawsuit in circuit court based on an estimate in excess of $130,000. The insurer argued that the case should be in county court as the damages were subject to a water damage limit of $10,000.

• The circuit court agreed and transferred the case to county court. The insureds filed for writ of certiorari.

Curtis v. Centauri Specialty Ins. Co.

290 So. 3d 926 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA granted the petition.

- The circuit court departed from essential requirements of the law where insurer failed to prove that loss was exclusively attributable to water, and insureds dispute that water limitation applies and there is no evidence in the record to suggest insureds have not pleaded their damage amount in good faith.

- The circuit court may transfer the case at a later time if the evidence shows the damage are subject to the limitation.

BURDEN OF PROOF

Citizens Prop. Ins. Corp. v. Kings Creek S. Condo, Inc.

300 So.3d 763 (Fla. 3d DCA 2020)

FACTS

- The insured obtained a policy for the named perils of wind and hail. The insurer sought to challenge the causation of the damages without raising any affirmative defense regarding causation. Ultimately, the trial court found that, because the insurer did not raise any causation affirmative defenses, directed verdict on liability in favor of the insured was warranted.

- After a trial on damages, the insurer appealed.

Citizens Prop. Ins. Corp. v. Kings Creek S. Condo, Inc.

300 So.3d 763 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reversed the trial court.
- As the policy issued to condominium complex was for named perils of wind and hail, the insured had burden of showing that damage to roofs of condominium buildings was caused by the named peril of wind.
- The trial court erred by granting directed verdict for the insured without allowing insurer to present evidence of non-wind related causes of damage holding that the insurer was not required to plead causation as an affirmative defense as it was a challenge to the insured's ability to meet its burden.

Ottey v. Citizens Prop. Ins. Corp.

2020 WL 1035920, 45 Fla. L. Weekly D510 (Fla. 3d DCA 2020)

FACTS

- The trial court entered summary judgment in favor of the insurer regarding their defenses.

Ottey v. Citizens Prop. Ins. Corp.

2020 WL 1035920, 45 Fla. L. Weekly D510 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA reversed the trial court.

- The trial court erred in entering summary judgment in favor of insurer where there were genuine issues of material fact as to whether property sustained physical damage consistent with reported loss and the cause of any damage.

POST LOSS CONDITIONS

Avatar Prop. & Cas. Ins. Co. v. Castillo

294 So. 3d 406 (Fla. 4th DCA 2020)

FACTS

• A pipe leak caused water damage to the insured property and was reported to the carrier. The carrier requested compliance with certain policy conditions, including the requests for examinations under oath of the insureds, their handyman, and the water remediation company. The insured filed a petition for declaratory relief on the issue of whether the policy required the insureds to produce the handyman and restoration company for EUO.

• Upon consideration of competing motions for final declaratory judgment, the court found in favor of the insureds holding that the handyman and remediation contractor did not fall under the definition of agents of the insureds.

Avatar Prop. & Cas. Ins. Co. v. Castillo

294 So. 3d 406 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA affirmed the trial court.

- There was no error in finding that handyman and water restoration employees who performed home repairs for which the insureds sought coverage were not required to be produced for examinations under oath as they were not the insureds' “agents” or “representatives” as used in the policy.

Naveen v. Universal Prop. & Cas. Ins. Co.

2020 WL 5033037 (Fla. 3d DCA 2020)

FACTS

• During the adjustment phase of the insureds' claim, the carrier requested compliance with certain post-loss conditions, including the production of documents and the execution of a sworn proof of loss, on numerous occasions. While some documents were provided, suit was filed without a proof of loss having been filed.

• The carrier moved for summary judgment alleging that the failure to provide a proof of loss was a material breach of the policy thereby relieving them of their obligations for coverage. The trail court agreed.

Naveen v. Universal Prop. & Cas. Ins. Co.

2020 WL 5033037 (Fla. 3d DCA 2020)

HOLDING

- The 3d DCA affirmed in part and reversed in part.

- The trial court correctly found that insureds materially breached post-loss condition precedent to commencement of lawsuit by failing to provide insurer with a sworn proof of loss.

- However, the trial court erred by not performing an analysis whether the insurer was prejudiced by insureds' failure to comply with policy conditions.

Abdo v. Avatar Prop. & Cas. Ins. Co.

302 So. 3d 926 (Fla. 4th DCA 2020)

FACTS

- After the insureds attorney withdrew as counsel, the insured failed to attend an EUO. The carrier then denied the claim.

- The insured's new counsel then sought to reopen the claim and offered to have the insured submit to EUO. The carrier never responded.

- In litigation, the carrier moved for summary judgment based on the insured's failure to attend the EUO. The trial court granted this motion.

Abdo v. Avatar Prop. & Cas. Ins. Co.

302 So. 3d 926 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA reversed the trial court.

- Because there were questions of fact as to whether the insured willfully failed to attend the EUO, the trial court erred in entered summary judgment in favor of the carrier and the case was remanded for further proceedings.

BAD FAITH

Fortune v. First Protective Ins. Co.

302 So. 3d 485 (Fla. 2d DCA 2020)

FACTS

• The insureds brought a bad faith lawsuit after the payment of an appraisal award was issued beyond the CRN cure period. The carrier moved to dismiss the complaint and for summary judgment.

• The court ruled in the carrier's favor finding that the carrier cured the CRN by invoking appraisal prior to the CRN being filed and by timely paying the appraisal award.

Fortune v. First Protective Ins. Co.

302 So. 3d 485 (Fla. 2d DCA 2020)

HOLDING

- The 2d DCA reversed the trial court.

- The trial court erred in entering summary judgment for insurer in insureds' bad faith action on ground that insurer cured a Civil Remedy Notice of Insurer's Violations by invoking the appraisal process before the CRN was filed and paying the appraisal award more than sixty days after the CRN was filed.

- Appraisal is not a condition precedent to an insurer fulfilling its obligation to fairly evaluate the claim. Additionally, a CRN is not required to contain a specific amount sought to cure alleged bad faith.

Julien v. United Prop. & Cas. Ins. Co.

2020 WL 5652364, 45 Fla. L. Weekly D2199 (Fla. 4th DCA 2020)

FACTS

- An insured filed a bad faith lawsuit attaching their CRN which listed every statutory provision and every policy provision possible. The carrier moved to dismiss on the grounds that the CRN was deficient.

- Ultimately, the trial court dismissed the claim with prejudice based on the finding that the CRN was invalid.

Julien v. United Prop. & Cas. Ins. Co.

2020 WL 5652364, 45 Fla. L. Weekly D2199 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA affirmed the trial court.

- The insured's civil remedy notice to insurer failed to include specific information required to allege circumstances giving rise to insured's bad-faith claim regarding homeowner's insurance policy. Because it was facially deficient, dismissal was warranted.

- A motion for rehearing is currently being briefed.

Bay v. United Services Auto. Ass'n

2020 WL 6154256, 45 Fla. L. Weekly D2380 (Fla. 4th DCA 2020)

FACTS

- A CRN was filed against the wrong entity but the insurer failed to raise this in their response to the CRN. A bad faith lawsuit was filed and the carrier moved to dismiss.

- The trial court granted the motion to dismiss finding that the insurer was not afforded proper notice because the CRN was filed against the wrong entity.

Bay v. United Services Auto. Ass'n

2020 WL 6154256, 45 Fla. L. Weekly D2380 (Fla. 4th DCA 2020)

HOLDING

- The 4th DCA reversed the trial court.

- An insurer may waive defenses regarding deficiencies in a CRN by failing to raise them in their response.

Pin-Pon Corp. v. Landmark Am. Ins. Co.

20-14013-CV, 2020 WL 6588379 (S.D. Fla. Nov. 10, 2020)

FACTS

- A bad faith lawsuit was filed after the expiration of three CRNs and a verdict in favor of the insured. The carrier moved to dismiss the lawsuit alleging that each of the CRNs were deficient.

- Originally, the court ruled in favor of the carrier finding that strict compliance with the CRN statute was required and even the slightest deficiencies, such as the insured's email address being improper, rendered the CRN deficient as a whole.

- The insured moved for rehearing.

Pin-Pon Corp. v. Landmark Am. Ins. Co.

20-14013-CV, 2020 WL 6588379 (S.D. Fla. Nov. 10, 2020)

HOLDING

- The trial court overturned its prior ruling on rehearing.
- Strict technical construction is required when interpreting a statute but substantial compliance may be considered, especially when a defect is technical in nature and there is no prejudice to the opposing party.
- "Courts construe statutes to discern their meaning and to conform their rulings as nearly as possible to the law as the legislature intended. Those governed by statutes comply (or seek to comply with them) to comport themselves with the law and, in the case of a remedial statute like § 624.155, to preserve access to a statutorily provided remedy."

FORCED PLACE POLICY

Goins v. Praetorian Ins. Co.

2020 WL 5264536 (Fla. 5th DCA 2020)

FACTS

• A forced place policy was established between the named insured (the mortgage lender) and the carrier. The plaintiff sued the forced place insurance carrier on the grounds that she was a third-party beneficiary.

• The trial court found that there was no evidence of intent between the lender and the carrier that a third party would receive a benefit based on the contract.

Goins v. Praetorian Ins. Co.

2020 WL 5264536 (Fla. 5th DCA 2020)

HOLDING

- The 5th DCA affirmed the trial court.

- The language of the policy of insurance clearly reflects that plaintiff was not intended to primarily and directly benefit from the policy where policy expressly stated that it was only between the named insured and the insurer, and that there was no contract of insurance between insurer and plaintiff.

CONSEQUENTIAL DAMAGES

Citizens Prop. Ins. Corp. v. Manor House

SC19-1394, 2021 WL 208455 (Fla. 2021)

FACTS

• The carrier insured nine apartment buildings that were damaged during Hurricane Frances in 2004. After some litigation, the parties went to appraisal and a favorable award was entered by the appraisal panel.

• After the appraisal award was paid, the insured sued for breach of contract and fraud. Specifically, the insured sought to recover approximately $2.5 million in lost rental income despite no coverage under the policy for same.

Citizens Prop. Ins. Corp. v. Manor House

SC19-1394, 2021 WL 208455 (Fla. 2021)

FACTS (Cont'd)

• The lost rental income was sought as extra-contractual, consequential damages under the theory that the rental income was lost due to the delay in the commencement of repairs due to the carrier's "procrastination" in adjusting and paying the claim.

• The trial court granted the carrier's summary judgment motion holding that "nothing in the insurance contract provides coverage for lost rents" and that "there is no coverage as a matter of law for these damages…"

Citizens Prop. Ins. Corp. v. Manor House

SC19-1394, 2021 WL 208455 (Fla. 2021)

FACTS (Cont'd)

• On appeal, the 5th DCA held that "when an insurer breaches an insurance contract, the insured 'is entitled to recover more than the pecuniary loss involved in the balance of the payments due under the policy' in consequential damages, provided the damages 'were in contemplation of the parties at the inception of the contract.'"

• The 5th DCA also held that, while Citizens is immune from bad faith, the consequential damages sought are based on breach of contract and not allegations of bad faith. The question of whether an insured may recover extra-contractual, consequential damages in breach of contract without a bad faith action was certified to the Supreme Court

Citizens Prop. Ins. Corp. v. Manor House

SC19-1394, 2021 WL 208455 (Fla. 2021)

HOLDING

- The Supreme Court reversed the 5th DCA.

- "[E]xtra-contractual, consequential damages are not available in a first-party breach of insurance contract action because the contractual amount due to the insured is the amount owed pursuant to the express terms and conditions of the insurance policy. Extra-contractual damages are available in a separate bad faith action pursuant to section 624.155 but are not recoverable in this action against Citizens because Citizens is statutorily immune from first-party bad faith claims."

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