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2014 WIND Gulf Coast & Southeast Insurance Case Law Update

Q & A

Insurable Interest

Facts:

Beginning in 2006, the policyholders insured their home in Mississippi through Nationwide. In 2008, the Bank purchased the home through a foreclosure sale and attempted to remove the policyholders from the property. The policyholders renewed their policy four times and filed claims and received payments from Nationwide in 2010. In 2011, the house was destroyed by a fire. When the policyholders filed a claim for contents coverage, the insurer brought a declaratory judgment action arguing that the policyholders did not have an insurable interest in the property as they had no right to renew the policy after they lost ownership.

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Question:
Do the policyholders have an insurable interest in the property when the date of loss was after they lost ownership of the property as a result of a foreclosure sale?

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Answer:

No. Mississippi law requires an insurable interest both at the time of purchase of insurance and at the time of loss. *Nationwide Mut. Ins. Co. v. Baptist*, 2013 WL 4829262 (N.D. Miss. 2013). A renewed policy after the date an insured loses ownership is considered to be void *ab initio.*

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Appraisal- Setting Aside Appraisal Award

Facts:

A hailstorm caused damage to a shopping center in Texarkana, Texas. Appraisers for both parties agreed as to how much damage the heating, ventilation, and air-conditioning (HVAC) system sustained. The insured sought to have an appraisal award declared invalid because the umpire excluded HVAC damage estimate from the appraisal award.

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Question:

In this situation, does an umpire's error justify throwing out the entire appraisal award?

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Answer:

No. When the appraisal award is otherwise unobjectionable, an umpire's minor mistake which does not taint the entire award should not frustrate the parties' intent to be bound by the appraisal provision of their contract. *TMM Investments, Ltd. v. Ohio Cas. Ins. Co.*, 730 F.3d 466 (5th Cir. 2013).

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Examination Under Oath Requirement in Policy

Facts:

An insured failed to participate in a sworn examination under oath (EUO). The insurer denied coverage for the fire damage to the home in Houston based on the insured's failure to appear at the EUO. When the insured filed suit, the insurer filed a motion to dismiss the action claiming that it was relieved of any obligation to pay based on the following policy language: "No suit or action can be brought against us unless there has been full compliance with all the terms of this policy."

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Question:
Is an insured barred from recovery against an insurer when a policy provision requires the insured to submit to an examination under oath prior to commencing a lawsuit?

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Answer:

No. Under Texas law, the policy provision that forbids the insured from bringing suit before complying with the condition precedent of participating in an EUO does not permit the insurer to deny coverage altogether; the only remedy available to the insurer is an abatement of the action until such time as the insured complies. *Shafighi v. Texas Farmers Ins. Co.,* 2013 WL 1803609 (Tex. App.--Hous. [14th Dist.], April 30, 2013)

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Bad Faith- Appraisal Constitutes "Favorable Resolution"

Facts:

When a homeowner's house in Florida sustained sinkhole damage, the homeowner filed a civil remedy notice of insurer violation (CRN) with the State Department of Financial Services over the issue of the damages estimate provided by the insurance company and also filed suit against the insurer for breach of contract. The CRN did not allege a specific cure amount. An appraisal award was entered in the insured's favor, the insurer paid the award, and the insured filed a bad faith lawsuit.

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Question:
Can an insured homeowner maintain a bad faith lawsuit against his insurance carrier without first securing a breach of contract judgment against the insurer?

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Answer:

Yes. In *Blanchard v. State Farm Mutual Automobile Insurance Co.,* 575 So.2d 1289, 1291 (Fla.1991), the supreme court held that a bad-faith action cannot accrue until the underlying lawsuit seeking insurance benefits is resolved in the insured's favor:

"[A]n insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue.... Absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle."

In Hunt v. State Farm Florida Ins. Co., 112 So. 3d 547 (Fla. 2d DCA 2013), the appraisal award established the validity of the insured's claim and satisfied the "favorable-resolution" condition precedent for bringing a bad-faith action against the insurer.

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Question:
Was the policyholder's CRN defective in this case because it did not specify a definite "cure" amount?

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Answer:

No. In Florida, there is no statutory requirement that the policyholder is required to allege a specific claim amount in the CRN. On its face, the statute governing CRN's, Fla. Stat. §624.155 (2005) does not mandate specification of an amount:

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. If the department returns a notice for lack of specificity, the 60–day time period shall not begin until a proper notice is filed.

(b) The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
2. The facts and circumstances giving rise to the violation.
3. The name of any individual involved in the violation.

On its face, the statute does not require a specific cure amount. The Courts are "hesitant to impose a requirement beyond that directed by the Legislature." *Hunt v. State Farm Florida Ins. Co.*, 112 So. 3d 547 (Fla. 2d DCA 2013).

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Conditions Precedent – Late Notice --- Prejudice

Facts:

A Florida condominium association filed a breach of contract suit against its insurer for damages resulting from Hurricane Wilma in 2005. The insurance policy contained a provision which required the insured to provide "prompt notice" of loss to the insurer. However, the condominium association did not provide notice of a claim to the insurer until 2010, which was five years after the hurricane. In discovery, the association admitted that it had knowledge of the loss in 2005, and that a roofer had inspected the roof to determine damages associated with roof leaks a few months after the hurricane. However, the association did not notify the insurer immediately after the hurricane because initially there was a question of whether the damages would exceed the policy deductible.

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Question:
Did the condominium association's delay in providing its notice of claim prejudice the insurance company in its investigation?

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Answer:

Yes. If an insurance policy requires prompt notice of loss, the insured must give notice that implicates a potential claim without waiting for the full extent of damages to become apparent. Here, the condominium association failed to overcome the presumption of prejudice. Once the presumption of prejudice exists, the burden shifts to the insured to show that the insurer was not prejudiced by the insured's late notice. Conclusory statements by one of its engineers that, in his opinion, the late notice did not prejudice the insurer, is not the legally sufficient evidence required to overcome the presumption of prejudice. *1500 Coral Towers Condominium Association, Inc. v. Citizens Property Insurance Corp.,* 112 So. 3d 541 (Fla. 3d DCA 2013).

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Proof of Loss Requirements

Facts:

A flood damaged an insured's property in Rhode Island which was insured by a Standard Flood Insurance Policy (SFIP) issued by Allstate Insurance Company, a private insurer participating in the National Flood Insurance Program (NFIP). The insured filed two proof of loss forms with the insurer. Contemporaneously with the submission of the proof of loss, the insured submitted a 16 page estimate from an adjuster claiming additional loss on the property, but failed to include such amounts in the signed, sworn proof of loss. When the insurer paid the amount claimed in the proof of loss form but failed to pay the additional amount contained in the adjuster's estimate, the insured filed suit.

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Question:
Is the insured entitled to recover the amount contained in the adjuster's estimate when the insured did not sign and swear to that amount in the proof of loss?

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Answer:

No. Here, the insured did not satisfy the requirements of the proof of loss provision in the SFIP. A signed and sworn proof of loss "claims only the amounts listed in those forms, and the insured must timely file an additional proof of loss to claim any additional amount of money." Merely attaching an adjuster's estimate of damages to two proofs of loss claiming a smaller amount does not comply with the SFIP. Given that it is the government's liability at stake in any suit against a "Write Your Own" (WYO) insurer, compliance with the proof-of-loss provision serves as a condition precedent to a waiver by the federal government of its sovereign immunity; where waiver depends on compliance with the terms of a federal insurance policy, it follows that the terms of that policy must also be strictly construed and enforced. *DeCosta v. Allstate Ins. Co.,* 730 F.3d 76 (1st Cir. 2013)

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Overhead and Profit

Facts:

A Florida homeowner with replacement cost coverage files a claim for damage to the home. Insurer pays the claim, but withholds payment for general contractor's Overhead and Profit until the home is repaired or under contract for repair.

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Question:
Can the insurer withhold Overhead and Profit until expenses are actually incurred or there is a contract to make the repairs?

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Answer:

No. Overhead and Profit are replacement costs when the insured is reasonably likely to need a general contractor for the repairs. F.S. § 627.7011(3) does not permit withholding Overhead and Profit pending actual repair.

Trinidad v. Florida Peninsula Ins. Co., 121 So.3d 433 (Fla. 2013)

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Question:
If the insured ultimately decides not to repair the home, would he be entitled to keep the Overhead and Profit payment?

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Answer:

Yes. § 627.7011(3) states replacement costs must be paid regardless of whether the insured actually replaces or repairs the damaged property.

Note:

Since this loss the statute has been amended to:

For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred. If a total loss of a dwelling occurs, the insurer shall pay the replacement cost coverage without reservation or holdback of any depreciation in value

For personal property: The insurer must offer coverage under which the insurer is obligated to pay the replacement cost without reservation or holdback for any depreciation in value, whether or not the insured replaces the property.

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Appraisal – Ordinance & Law (Florida)

Facts:

Florida home sustains roof damage from Hurricane Wilma. The insured disputes the amount paid by the insurer and requests appraisal. Insured believes the city would not allow any roof repair without meeting current code. The unpire disagrees and the appraisal award states that "Ordinance & Law was not appraised." Insurer timely pays the award. The city denies a roofing permit as the % of repair would require the entire roof replaced to meet code. The insured requests payment for the entire roof replacement under Ordinance and Law coverage. Insurer refuses to pay as the claim was settled by appraisal. Insured files declaratory action requesting appraisal.

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Question:
Is insured entitled to a second appraisal?

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Answer:

In *Jossfolk v. United Property and Casualty Ins. Co.*, 110 So.3d 110 (Fla. 2013), the court held Ordinance and Law is not recoverable until incurred and thus could not have been appraised in the original appraisal.

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Q & A

Ordinance and Law (La.)

Facts:

A commercial property in New Orleans was damaged during Hurricane Katrina. The policy contains an Ordinance or Law endorsement:

We will not pay for incurred construction costs…until the property is actually repaired…as soon as reasonably possible after the loss or damage, not to exceed 2- years.

The repairs and code upgrade cannot be performed until 4 years after Hurricane Katrina. Insured claims the 2-year limitation is an impossible condition and should not be enforced under La. Art. 1769, which states an impossible condition "makes the obligation null." Insured files an affidavit from its CFO:

"The time for obtaining funds, complying with administrative law for approval to rebuild, issue contracts, and construction time (which often included delays) made completing repair within 2-years impossible."

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Question:

Does the impossibility of completing repairs due to forces beyond insured's control (destruction of the local government infrastructure to issue permits timely, shortage of materials and labor to perform repairs) prevent the enforcement of the policy 2-year limitation for paying increased construction costs under the Ordinance or Law endorsement?

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Answer:

No. An **impossible condition**, under La. Art. 1769, is not simply one that is impossible under the facts of a given case (no matter how egregious) rather, it is ***one that is impossible in all cases***.

Orleans Parrish School board v. Lexington Ins. Co., 118 So.3d 1203 (La. App. 4th Cir. 2013)

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Flood – Statute of Limitations

Facts:

A hurricane strikes the Texas coast causing widespread flood damage. FEMA begins processing claims, but issues a 6-month extension for insureds to file a sworn proof of loss. A homeowner's claim is denied based on the adjuster's report, and the notice letter informs the insured he must file suit "within 1-year of the date of this letter." The homeowner later files his sworn proof of loss within the extension period.

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Question:

What is the trigger date for the 1-year limitation to file suit?

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Answer:

In *Wolfe v. American Bankers Ins. Co. of Florida*, No. 10578 (S.D. Tex. March 1, 2013), the Court found the 1-year filing period for a federal flood claim begins to run when FEMA or its fiscal agent denies a claim that is based on the insured's sworn proof of loss, not from the date a claim is denied based upon an adjuster's report.

**Caveat:*
WYO Bulletin W-13069 (issued Nov. 21, 2013) *Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy and the 1-Year Statute of Limitations in 42 U.S.C. § 4072*:

"[I]n those instances in which a denial letter has been issued such that the statutory 1 year to bring the lawsuit will run before the Proof of Loss extended deadline runs, the insured has to both file the lawsuit and have the required Proof of Loss requirements completed within 1 year of the date of the denial or partial denial of the claim. . . The 1 year to sue typically will not be triggered until the required Proof of Loss . . . is submitted and there is a complete or partial disallowance/denial of the amount sought. However . . . there are instances when the claim may be denied for reasons that do not require an adjuster's report or Proof of Loss from the insured."

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Q & A

Suspension of Operations

Facts:

The insured owned a shopping center that suffered extensive roof damage caused by hurricane winds. Roof damage and loss of electricity caused some of the shopping center's tenants to close their stores for weeks after the hurricane, and the shopping center itself was closed for about two weeks. The entire roof had to be replaced, and as an incentive to remain at the shopping center, the shopping center offered tenants a six-month rent abatement. An anchor tenant that was not offered a rent abatement was unable to pay its rent and eventually closed. The shopping center tried to recover its losses by filing claims for suspension of operations and extra expenses.

The policy provided the insurer "will pay for the actual loss of 'business income' sustained due to the necessary suspension of 'operations' during the 'period of restoration,' but not to exceed 12 consecutive months." "Operations" was defined by the policy as the "business activities occurring at the shopping center."

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Question:

Can the shopping center recover under the suspension of operations provision?

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Answer:

No. In *GBP Partners, Ltd. v. Maryland Cas. Co*., 505 Fed. Appx. 389, 2013 WL 57905 (2013), the Fifth Circuit Court of Appeals explained the shopping center was in the business of owning and renting shopping center space and under Texas law, a suspension of operations clause requires business to have completely ceased for some interval. Because the shopping center never ceased owning or leasing space, it did not suspend its operations and could not recover under the suspension of operations c

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