ATKINSON &
BROWNELL P.A.
ATTORNEYS AT LAW

One Biscayne Tower, Suite 3750, 2 South Biscayne Blvd. Miami, Fl 33131

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CASE LAW UPDATE

Dear Ladies and Gentlemen:

This month we would like to share with you some recent opinions from the Florida District Courts of Appeal and the United States District Court for the South District of Florida. We have highlighted specific cases that may be of interest to you.

In *First Specialty Ins. Corp. v. Milton Construction Co.*, U.S. District Court for the Southern District of Florida affirmed summary judgment in favor of the insurer on the basis of the Seminal case of *Deni Assoc. of Fla. v. State Farm Fire & Cas. Ins. Co.*, establishing that the Total Pollution Exclusion contained in a homeowners insurance policy precluded coverage for damages arising out of defective Chinese drywall.

In *Redland Ins. Co. v. CEM Site Constructions, Inc.*, the Second District Court of Appeal held that even where the term "driver" is undefined in an insurance policy, which creates ambiguity, that summary judgment is inappropriate where there are factual disputes which must be resolved in order for the Court to make an ultimate determination as to whether a policy which fails to define the term "driver" makes the policy ambiguous.

In *Travelers Commercial Ins. Co. v. Harrington*, the First District Court of Appeal held that bodily injury damages suffered by an insured as a result of a single-vehicle accident in which the driver of the vehicle was a permissive user was entitled to uninsured motorist benefits. The Court found that limitations on stacking uninsured motorist coverage are only available where the waiver is accepted by the insured claiming the uninsured motorist benefit. The Court also certified two questions to the Florida Supreme Court as matters of great public importance.

In *Liberty Ins. Corp. v. Milne*, the Fourth District Court of Appeal held that a third party complaint filed in an underlying action by an insured against an insurance carrier after the final judgment was entered in that action must be dismissed, though without prejudice to the insured's right to file an independent action.

In *People's Trust Homeowners Ins. v. Avagyan*, the Fourth District Court of Appeals held that summary judgment regarding coverage under a homeowners insurance policy for damages allegedly arising out of a pipe bursting was improper where there was evidence of fraud.

Phone: (305) 376-8840 • Fax: (305) 376-8841
www.atkinsonbrownell.com

***First Specialty Ins. Corp. v. Milton Construction Co.*, 2012 U.S. Dist. LEXIS 97972 (S.D. Fla. July 16, 2012).**

FACTS AND PROCEDURAL HISTORY

In 2008, Milton Construction Co. ("Milton"), along with a number of other defendants, was sued in a class action suit brought in Federal Court in Louisiana.[1] The claims against Milton in that action were asserted by residents and homeowners at the San Lorenzo Condominium in Miami, Florida, who claimed to have suffered bodily injury and property damage arising out of defective drywall installed in that condominium and the harmful effects of the sulfur compounds that exited the drywall causing property damage and personal injury.

Specifically, the claimants alleged that when sulfur compounds exited the Chinese drywall, it caused "rapid sulfidation and damage to personal property (such as air conditioning and refrigerator coils, faucets, utensils, electrical wiring, copper, electronic appliances and other metal surfaces and property)" and "caused personal injury resulting in eye problems, sore throat and cough, nausea, fatigue, shortness of breath, fluid in the lungs, and/or neurological harm."

Milton was insured under two CGL policies issued by First Specialty Insurance Company ("First Specialty"). Both policies contained a Total Pollution Exclusion endorsement, which stated in relevant part:

> This insurance does not apply to:
>
> (1) "Bodily injury," "property damage," "personal injury," or "advertising injury" caused by or arising out of, in whole or in part, the actual, alleged, or threatened discharge, dispersal seepage, migration, release, or escape of pollutants at any time.
>
> (2) Any loss, cost, or expense arising out of any:
>
> (a) request, demand, or order that any Insured or others test for, monitor, clean up, remove, contain, treat, detoxifying, or neutralizing or in any way responding to, or assessing the effects of pollutants.
>
> Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals, and waste. Waste includes material to be recycled, reconditioned, or reclaimed.[2]

After the Louisiana action was filed, Milton requested that First Specialty defend and indemnify it in the defective Chinese drywall litigation. First Specialty denied coverage on the basis that the Total Pollution Exclusion provision precluded coverage. Following its denial, First

[1] *See Block v. Gebrueder Knauf Verwatungsgesellschaft, K.G.*, et al., Case No. 11-1363 (E.D. La., filed June 8, 2008).

[2] *See* Total Pollution Exclusion (Endorsement FSIC-3381).

Specialty filed a declaratory judgment action, seeking a declaration that the insurance policies did not require it to defend or indemnify Milton. This Motion for Summary Judgment followed.

DISTRICT COURT DECISION

The Court began its analysis with the foundation that a duty to defend is determined by the allegations in the Complaint. The Court looked to the complaint filed in the Louisiana case. The Louisiana claimants alleged that they suffered damages and injuries caused by sulfur compounds that exited the defective Chinese drywall and entered the air. The complaint alleged that Milton was liable for personal injuries and/or property damage caused by "discharge, dispersal, seepage, migration, release, or escape of pollutants."

The Court relied on the Seminal Florida case on pollution exclusions in insurance policies. *Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 771 So2d 1135 (Fla. 1988). In *Deni,* the Florida Supreme Court addressed whether a pollution exclusion applied to two separate incidents, one involving indoor air contamination caused by an accidental ammonia spill inside a commercial building and another involving two bystanders who were accidentally sprayed with insecticide near a citrus grove. In both instances, the insurers disputed coverage based upon a pollution exclusion that barred liability for any injury or damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants," with "pollutants" meaning "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acides, alkalines, chemicals and waste." In considering that exclusion, the Florida Supreme Court rejected the argument that the exclusion was ambiguous and should be limited to environmental or industrial pollution. Instead, the Court found it "clear that the incidents at issue were excluded from coverage under the respective insurance policies," because ammonia fumes and insecticides were "irritants" or "contaminants" and, as such, "pollutants" under the policies.

In addition to the Court's reliance on *Deni,* it noted that courts in the Southern District of Florida have found allegations pertaining to the release of sulfuric gases from defective Chinese drywall to fall within pollution exclusions virtually identical to the First Specialty policy.[3] As a result, this Court granted summary judgment in favor of First Specialty that, based on the allegations contained in the complaint, the drywall's release of sulfur compounds both contaminated and irritated the claimants and their property. Therefore, the sulfur compounds constituted "pollutants", and the Total Pollution Exclusion was applicable thereby negating First Specialty's duty to defend or indemnify.

I. *Redland Ins. Co. v. CEM Site Contractors, Inc.*, 86 So. 3d 1259 (Fla. 2d DCA 2012).

FACTS AND PROCEDURAL HISTORY

This case arose from a motor vehicle accident involving a vehicle operated by Charles McLeod III ("McLeod III") and a vehicle operated by John P. Jorge ("Jorge"). The collision

[3] *Colony Insurance Co. v. Total Contracting & Roofing, Inc.*, 2011 U.S. Dist. LEXIS 120269, 2011 WL 4962351 (S.D. Fla. Oct. 18, 2011); *Gen. Fid. Ins.*, 808 F. Supp. 2d at 1320-21.

resulted in the death of Jorge. At the time of the accident, McLeod III was operating a vehicle owned by his father, Charles McLeod, Jr. ("McLeod, Jr."), who owned and managed CEM Site Constructors, Inc. ("CEM"). CEM maintained a commercial auto insurance policy issued by Redland Insurance Company ("Redland"). McLeod III was conducting work for CEM at the time of the accident.

Following the accident, the Estate of Jorge sued CEM for wrongful death and CEM made a claim with Redland for liability coverage. Redland denied the claim because of CEM's failure to include McLeod III on the drivers list.

Redland filed a declaratory judgment action naming CEM, McLeod, Jr., McLeod III and the Estate of Jorge as defendants seeking a declaration that (1) it was entitled to rescission of the policy under Fla. Stat. § 627.401(1) because the failure to include McLeod III on the drivers list constituted a fraudulent, material misrepresentation rendering the entire policy void *ab initio*, and (2) regardless, McLeod III was excluded from coverage for failure to qualify as an "insured" under the policy because he was an employee driving a vehicle owned by a member of his household.

Jorge's Estate moved for summary judgment, on the basis that (1) the terms of the insurance application were ambiguous because the term "driver" was not defined in the policy, (2) McLeod III was not an employee at the time CEM's application was submitted, and (3) McLeod III qualified as an insured because he was not a member of McLeod, Jr.'s household at the time of the accident. The trial court granted the motion determining that the issue of ambiguity as to the term "driver" was controlled by the case of *Great Oaks Cas. Ins. Co. v. State Farm Auto Ins. Co.*, 530 So.2d 1053 (Fla. 4th DCA 1988). Because the term "driver" was undefined, the terms of the application were ambiguous.

APPELLATE COURT DECISION

On appeal, this Court agreed that there was an ambiguity in the policy with regard to the word "driver" but reversed the trial court's ruling, holding that there were outstanding issues of fact that precluded the granting of summary judgment. Namely, whether McLeod III was an employee of CEM, how often McLeod III drove for CEM when it completed the application, what effects prior dealings between the parties had on CEM's understanding of the terms in the application, and whether Redland's failure to use its Non-Specified Operators form impacted CEM's ability to properly complete the application.

II. *Travelers Commer. Ins. Co. v. Harrington*, 86 So. 3d 1274 (Fla. 1st DCA 2012).

FACTS AND PROCEDURAL HISTORY

This matter arose from a single-vehicle accident. Crystal Harrington ("Harrington") was injured while riding as a passenger in a vehicle owned by her father and insured under a Travelers policy purchased by her mother, which provided both liability and uninsured coverage. The driver of the vehicle, Joey Williams ("Williams"), had his own insurance policy with Nationwide Insurance ("Nationwide"). Williams was a permissive driver at the time of the

accident and therefore also covered under the permissive user provisions of the Travelers' liability policy.

After the accident, Harrington received payment for her medical expenses from the Nationwide policy to the limit of that policy. The policy did not cover all of Harrington's medical expenses. She then received payment under the liability portion of the Travelers policy. Because Harrington's medical expenses were in excess of the amount of the combined insurance payment, she sought uninsured motorist benefits under the Travelers policy. Travelers denied her claim. In doing so, Travelers relied on a statement in its policy booklet that describes an "uninsured motor vehicle" as not including "any vehicle which is owned by or furnished or available for the regular use of the named insured or any family member." Travelers' position was that since the vehicle was owned by Harrington's father and was available for regular use by a family member, uninsured motorist coverage was not available.

Harrington filed suit. Both parties moved for summary judgment. The trial court granted summary judgment in favor of Harrington. In reaching its conclusion, the Court reasoned that Section (3)(c) of Fla. Stat. § 627.727 applied when a non-family member was a permissive user and the permissive user's operation of the vehicle causes injury to a family member who is a Class 1 insured.[4] The Court noted that the distinction between Class I insureds who are household members and Class II insureds who are other persons such as permissive users was governed by *Mullis v. State Farm Mut. Auto Ins. Co.*, 252 So.2d 229 (Fla. 1971), where the Florida Supreme Court held that without the policyholder's express rejection of coverage per the statute, a policy exclusion will not be given under Fla. Stat. § 627.727.

In addition to the coverage issue, the parties also presented the issue of whether the uninsured motorist benefits under the Travelers' policy could be stacked by adding the three $100K uninsured motorist coverages in the policy together for a total of $300K. The Court turned to Fla. Stat. § 627.727(9), which listed several situations where an insurer may limit stacking, but in doing so required that such limitation be expressly accepted by the insured. Harrington's mother had expressly accepted the non-stacking limitation by written endorsement but her daughter was not a signatory, so she did not accept any limitation on the stacking benefits. As a result, the trial court ruled that the non-stacking election by Harrington's mother did not apply to her daughter because Travelers had not obtained a knowing acceptance of any such limitation. The waiver must be accepted by the insured who is claiming the benefit.

APPELLATE COURT DECISION

On appeal, the Court found that trial court's interpretation of Fla. Stat. § 627.727(3) was in accordance with the Florida Supreme Court's opinion in a prior case.[5] In that case, the court found that where a Class I insured (a named insured or family member) is injured as a result of result of a Class II insured's (a permissive user) use of the Class I insured's vehicle, the vehicle may be treated as uninsured for the purpose of uninsured motorist coverage if the driver's

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[4] *Mullis v. State Farm Mutual Automobile Insurance Co*, 252 So. 2d 229 (Fla. 1971); *see also Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80 (Fla. 2000); *Diaz-Hernandez v. State Farm Fire & Casualty Co.*, 19 So. 3d 996 (Fla. 3d DCA 2009).

[5] *Travelers Insurance Co. v. Warren*, 678 So. 2d 324 (Fla. 1996).

liability coverage is inadequate.[6] As a result, the policy provided uninsured motorist coverage for Harrington because Williams was a Class II insured who caused her injuries. Summary judgment confirmed in favor of Harrington.

The Appellate Court certified the following questions to the Florida Supreme Court as being of great public importance:

> -WHETHER THE FAMILY VEHICLE EXCLUSION FOR UNINSURED MOTORIST BENEFITS CONFLICTS WITH SECTION 627.727(3), FLORIDA STATUTES, WHEN THE EXCLUSION IS APPLIED TO A CLASS I INSURED WHO SEEKS SUCH BENEFITS IN CONNECTION WITH A SINGLE-VEHICLE ACCIDENT WHERE THE VEHICLE WAS BEING DRIVEN BY A CLASS II PERMISSIVE USER, AND WHERE THE DRIVER IS UNDERINSURED AND LIABILITY PAYMENTS FROM THE DRIVER'S INSURER, WHEN COMBINED WITH LIABILITY PAYMENTS UNDER THE CLASS I INSURED'S POLICY, DO NOT FULLY COVER THE CLASS I INSURED'S MEDICAL COSTS.
>
> -WHETHER UNINSURED MOTORIST BENEFITS ARE STACKABLE UNDER SECTION 627.727(9), FLORIDA STATUTES, WHERE SUCH BENEFITS ARE CLAIMED BY AN INSURED POLICYHOLDER, AND WHERE A NON-STACKING ELECTION WAS MADE BY THE PURCHASER OF THE POLICY, BUT WHERE THE INSURED CLAIMANT DID NOT ELECT NON-STACKING BENEFITS.

III. *Liberty Ins. Corp. v. Susan M. Milne*, 2012 Fla. App. LEXIS 12532 (Fla. 4th DCA 2012).

FACTS AND PROCEDURAL HISTORY

This action arose out of a motor vehicle accident involving a vehicle operated by Susan Milne ("Milne") and a vehicle operated by Timothy Litersky ("Litersky"). Litersky sued. The jury found Milne liable. Another jury entered an award of damages. Litersky moved for new trial which was denied. Milne had an insurance policy issued by Liberty Insurance Corporation ("Liberty"). Liberty was joined as a defendant, but only for the limited purpose of the non-joinder statute.[7] The Court entered final judgment for $50,000.00 – the policy limits.

Milne then filed a third party complaint against Liberty alleging bad faith on the part of Liberty for failure to settle. Liberty moved to dismiss the complaint on the basis that the court lacked subject matter jurisdiction because the pleading was filed after entry of final judgment. Once the time had run to file a motion for rehearing or new trial, all the court had jurisdiction over was the enforcement of the judgment. The court did not have jurisdiction over a new claim. It was undisputed that Milne had a right to pursue a bad faith claim, but could only do so by filing a new complaint.

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[6] *Id.*

[7] *See* Fla. Stat. § 627.4136.

The trial court denied Liberty's motion to dismiss but granted abatement. The instant writ of petition followed.

APPELLATE COURT DECISION

The Court confirmed the long standing rule that a court loses jurisdiction over a cause of action after judgment or final decree is entered. The Court explained that Milne's filing of the third party complaint did not revive the underlying action and that any attempt to file the third party complaint or serve Liberty was a nullity after denial of the last motion for new trial. As a result, the Court granted the writ of petition prohibiting the trial court from asserting jurisdiction over the third party complaint. It quashed the order denying Liberty's motion to dismiss. In doing so, the dismissal was without prejudice for Milne to file a separate new complaint.

IV. *People's Trust Homeowners Ins. v. Ovsep Avagyan and Sonia Avakian*, 2012 Fla. App. LEXIS 144013 (Fla. 4th DCA 2012).

FACTS AND PROCEDURAL HISTORY

Ovsep Avagyan ("Avagyan") and Sonia Avakian ("Avakian") had a homeowners insurance policy with People's Trust Homeowners Insurance ("People's Trust"), under which they filed a claim for damages sustained to their home as a result of a water leak from a burst kitchen pipe. People's Trust denied the claim. Avagyan and Avakian filed a declaratory judgment action seeking a determination that they were entitled to "full coverage" for the loss and that People's Trust was estopped from claiming the policy was void. People's Trust raised nine affirmative defenses, including claims that the damages alleged were the result of a pre-existing condition; that the insureds did not allow the insurer an adequate opportunity to inspect the premises; and that, prior to allowing inspection by the insurer, the insureds removed large portions of drywall, which prevented the insurer from determining the scope and cause of the loss, and intentionally concealed or misrepresented material facts, rendering the policy void.

Following discovery, Avagyan and Avakian filed a motion for summary judgment, asserting "that there is insurance coverage for the subject loss" and that People's Trust was estopped from claiming the policy was void. The trial court ruled in their favor, and People's Trust appealed.

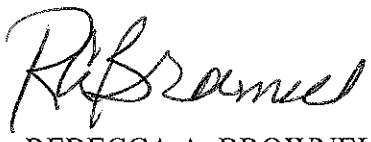
APPELLATE COURT DECISION

On appeal, the Court reversed the trial court's decision, finding that unresolved issues of fact remained. A determination that Avagyan and Avakian were entitled to "full coverage" for the loss required resolution of the cause of the damage for which coverage was sought and of the affirmative defenses raised by People's Trust. Evidence produced at the time of summary judgment revealed that prior to inspection by People's Trust's adjuster, Avagyan and Avakian removed drywall in multiple rooms and that laminate floors and furniture in some of the same rooms where the drywall had been removed showed no signs of water damage. Evidence also revealed that grass was found growing around the bottom of the wax ring on the toilet, mushrooms were found growing on the walls, and mold had reached as high as forty-eight

inches, all of which could not have happened in the short amount of time that had passed since the burst pipe. Thus, summary judgment was improper.

We hope you find the above cases helpful and insightful. Should you have any questions with respect to the foregoing, please do not hesitate to contact the undersigned at your earliest convenience.

Very truly yours,



REBECCA A. BROWNELL
JOSEPH V. MANZO