ATKINSON &
BROWNELL P.A.
ATTORNEYS AT LAW

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

February 15, 2012

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. We have highlighted specific cases that may be of interest to you.

In *Rodriguez v. Government Employees Ins. Co.*, the Fourth District Court of Appeal held that in instances where adverse parties are both entitled to attorneys' fees pursuant to a proposal for settlement and/or a prevailing party contract provision, there should be a set-off of fees with the Court awarding only the difference to the party with a greater amount of recoverable fees.

In *On-Site Fasteners and Construction Supplies, Inc. v. MAPFRE Ins. Co.* the First District Court of Appeal affirmed an order granting summary judgment in favor of the insured on the issue of whether theft of personal property from a new warehouse location was covered under commercial property insurance policy that excluded theft coverage at an existing location.

In *Southern Owners Ins. Co. v. Mathieu,* the Second District Court of Appeal reversed a trial court ruling allowing third parties to assert a declaratory action against an insurance carrier despite having not settled with or obtained a verdict against that carrier's insured.

In *North Pointe Casualty Ins. Co. v. Arden Insurance Associates, Inc., et al.*, the Fourth District Court of Appeal affirmed the trial court's ruling that damages arising out of an underlying incident that occurred after the expiration of the policy period had ended were covered because the insurer failed to provide notice of its non-renewal in accordance with Fla. Stat. §627.4133.

I. *Alberto Rodriguez v. Government Employees Ins. Co.*, 2011 Fla. App. LEXIS 20444 (Fla. 4th DCA 2011).

FACTS AND PROCEDURAL HISTORY

This case arises out of a motor vehicle accident involving Mr. Rodriguez. At the time of the accident, he was the owner and holder of a policy issued to him by GEICO. Following the accident, GEICO examined the insured vehicle and assigned a value to the repairs. Mr. Rodriguez elected to have his car repaired at a specific shop, and GEICO issued a payment for the repairs consistent with its estimate. Rodriguez then, seeking additional funds from GEICO, alleged that the initial estimate did not include repairs for all of the damages sustained as a result

of the accident. GEICO supplemented its estimate and issued another check for the remaining repairs.

Subsequent to that payment, Mr. Rodriguez filed suit in county court against GEICO seeking damages under the policy for negligent repairs made by the body shop he selected, and for alleged additional repairs that were necessary as a result of subject motor vehicle accident but the payment for which was not contained in GEICO's first and supplemental payments.

GEICO obtained summary judgment on Mr. Rodriguez's negligent repairs claim, but its motion was denied with regard to Mr. Rodriguez's claim that GEICO failed to pay for all the repairs resulting from the accident. Following the denial of its motion, GEICO amended its answer to assert affirmative defenses that Mr. Rodriguez was not the owner of the vehicle, that he misrepresented his ownership to GEICO, and that his conduct was negligent and fraudulent. GEICO also asserted a counterclaim for fraud, conspiracy to commit fraud, unjust enrichment, and sought a refund of the funds paid to Mr. Rodriguez by GEICO for repairs.

The trial court ordered the parties to attend arbitration. The arbitrator found that Mr. Rodriguez misrepresented his ownership of the vehicle, and therefore recovery was barred. On the counterclaim for fraud, the arbitrator found that Mr. Rodriguez's misrepresentation did not amount to fraud, and therefore Mr. Rodriguez was not required to refund the payments he previously received.

Based on the arbitrator's findings, judgment was entered in favor of GEICO on the complaint and Mr. Rodriguez on the counterclaim. GEICO moved for attorneys' fees based on a $100 proposal for settlement provided in accordance with Fla. Stat. § 768.79, and Mr. Rodriguez moved for attorneys' fees based on Fla. Stat. § 627.428. The county court granted GEICO's claim for attorneys' fees (totaling $168,386.39) and denied Mr. Rodriguez's claim. Mr. Rodriguez appealed.

APPELLATE COURT DECISION

The Appeal Court held that parties' respective fee awards were mutually exclusive because they involved totally different claims and were based on different statutory provisions.[1] GEICO's proposal for settlement was strictly limited to Mr. Rodriguez's original complaint concerning insurance coverage. Conversely, Mr. Rodriguez's claim for fees was for successfully defending GEICO's counterclaim for fraud. The Court found that Mr. Rodriguez obtained a judgment in his favor on GEICO's counterclaim and was therefore entitled to an award of attorneys' fees.

Relying on the case of *Tierra*, the Court concluded that Fla. Stat. § 768.69 could not defeat or cut off an attorney's fee award granted under a prevailing party contract provision.[2] Rather, the recovery of attorney's fees by both parties should be the difference between one party's awarded fees and costs and the other party's awarded fees and costs. The Court reversed

---

[1] *See Tierra Holdings, Ltd. v. Mercantile Bank*, 2011 Fla. App. LEXIS 7152, 36 Fla. L. Weekly D1049 (Fla. 1st DCA May 18, 2011).

[2] *Id.* at 1052.

and remanded the matter for the trial court to award Mr. Rodriguez attorney's fees under Fla. Stat. § 727.428 and reduce GEICO's award of attorney's fees under Fla. Stat. § 768.79 by the award of fees to Rodriguez.[3]

II. *On-Site Fasteners and Construction Supplies, Inc. v. MAPFRE Ins. Co.*, 2011 Fla. App. LEXIS 12739 (Fla. 1st DCA 2011).

FACTS AND PROCEDURAL HISTORY

On-Site Fasteners and Construction Supplies, Inc. ("On-Site") operated a construction supply business with two locations-- Orange Park and St. Augustine. MAPFRE issued a commercial property insurance policy to On-Site covering both locations. The Declarations contained in that policy provided that coverage for loss by theft was excluded for the Orange Park location, but was included for the St. Augustine location. The policy provided various types of coverage for the premises and "business personal property" (which included stock/inventory). It also included various provisions for extending coverage for up to 30 days for "newly acquired" property and "property off-premises."

Subsequent to the issuance of the policy, On-Site entered into an agreement to lease another warehouse facility in the same business park in which its Orange Park premises was located. Although the new lease provided that On-Site would take possession of the premises on November 1, 2007, it obtained permission to do so two weeks early to accommodate a large shipment of inventory due to arrive around that time. The shipment was stored in the newly leased warehouse, but two weeks later approximately $19,000 of inventory was stolen during a burglary. On-Site filed a claim. MAPFRE denied that claim on the grounds that the loss was excluded from coverage because it occurred as a result of theft. On-Site then filed a declaratory judgment action and both parties moved for summary judgment.

In support of its motion, On-Site argued that the Orange Park property listed in the declarations was the only location to which the theft exclusion applied. On-Site also argued that coverage was provided under the following policy provision:

> (a) If this policy covers Your Business Personal Property, you may that insurance to apply to:
>
> (i) Business personal property, including such property that you newly acquire, at any location you acquire other than at fairs, trade shows or exhibitions.

MAPFRE argued that the theft exclusion applied to On-Site's new location because it was located in the same business park as its Orange Park location. MAPFRE also cited the following provision, which provides a maximum of $10,000 in coverage.

> d. Property Off-Premises
>
> (1) You may extend the insurance proved . . . to apply to your Covered

[3] The Court noted that among the fees awarded to GEICO were those incurred in pursuing its fraud claim, and that the inclusion of those fees was improper.

Property while it is away from the described premises, if it is:

(a) Temporarily at a location you do not own, lease, or operate;
(b) In storage at a location you lease, provided the lease was executed after the beginning of the current policy term; or
(c) At any fair, trade show or exhibition.

The trial court found that although the theft did not occur at either address specified in the Declarations, "the Policy extends coverage beyond those locations. Specifically, the Policy extends coverage up to a maximum of $10,000.00, to 'covered property while it is away from the described premises if it is . . . in storage at a location you lease provided the lease was executed after the beginning of the current policy term.'" The trial court granted On-Site's motion for summary judgment and denied MAPFRE's. Both parties appealed.

APPELLATE COURT DECISION

The Appellate Court held that the "Off-Premises" policy provision applied only to temporary storage situations, where property was moved off-site for storage or is transported to a fair, trade show or exhibition. Here, the Court found that the stolen property was not "away from the described premises," but rather housed in the newly-leased warehouse. The court agreed with On-Site that the "newly acquired location" provision did apply, because this was not temporary storage but a new warehouse to store inventory. The Appellate Court affirmed the trial court's order granting summary judgment in favor of On-Site and denied MAPFRE's motion for summary judgment, but reversed the trial court's order to the extent that it relied on the incorrect policy provision in finding that the policy provided coverage for On-Site's loss with regard to the applicable policy provisions.

III. *Southern Owners Ins. Co. v. Diane Mathieu and John Mathieu*, 67 So. 3d 1156 (Fla. 2d DCA 2011).

FACTS AND PROCEDURAL HISTORY

In June 2006, Mr. and Mrs. Mathieu learned of the existence of substantial water intrusion affecting the rear decks of their home. They subsequently filed suit and asserted a negligence claim against the construction company Innovative Flooring & Stonecrafters of SWF, Inc. ("Innovative"), which was insured by Southern Owners Ins. Co. ("Southern Owners"). In order to determine whether the Southern Owners insurance policy would provide coverage for their negligence claim against Innovative, the Mathieus filed a separate declaratory judgment action against Southern Owners.

Southern Owners moved to dismiss the declaratory judgment action as premature, arguing that Fla. Stat. § 627.4136 (also known as the nonjoinder statute) precluded the action because the Mathieus were not named insureds under the policy nor had they obtained a settlement with or verdict against the insured.

The trial court denied Southern Owners' motion to dismiss, holding that the declaratory judgment action was not barred because the purpose of Fla. Stat. § 627.4136 was to provide a

mechanism to enforce settlements while the declaratory judgment statutes were specifically designed to allow litigants to clarify their rights. Southern Owners appealed.

APPELLATE COURT DECISION

The Appeals Court initially found that generally a party may not obtain a writ of certiorari to quash an order denying a motion to dismiss unless the insurer asserts that the pre-suit requirement of § 627.4136 have not been met.

The Court then began its review by looking at the pre-suit requirements of § 627.4136.

Fla. Stat. § 627.4136 states in relevant part:

> (1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
> (2) . . . No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third-party beneficiary or otherwise, prior to first obtaining a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.

The Court found that it was undisputed that the Mathieus had not obtained a settlement with or verdict against Innovative and therefore did not yet have a beneficial interest in Innovative's liability policy.[4] The Court rejected the Mathieus' argument that because their declaratory judgment action was initiated in a separate proceeding from the underlying negligence action, it was not subject to dismissal. The Court found that such an interpretation would nullify the protection offered by Fla. Stat. § 627.4136. The Court held that where an injured third-party brings a declaratory judgment action against an insurer prior to obtaining a settlement with or verdict against the insured, the action must be dismissed.[5] The Appeals Court found that the trial court's failure to do so was therefore a departure from the essential requirements of the law.

IV. *North Pointe Casualty Ins. Co. v. Arden Insurance Associates, Inc., et al.*, 75 So. 3d 798 (Fla. 4th DCA 2011).

FACTS AND PROCEDURAL HISTORY

Arden Insurance Associates, Inc. ("Arden") is an insurance agency that sold insurance through North Pointe Casualty Ins. Co. ("North Pointe") to P.F. Construction, a construction company that served as a subcontractor to Double A Industries, Inc. ("Double A"). Double A

---

[4] *Gen. Star Indem. Co. v. Boran Craig Barber Engel Constr. Co.*, 895 So. 2d 1136, 1138 (Fla. 2d DCA 2005).

[5] *See* § 627.4136; *Dollar Sys., Inc.*, 967 So. 2d at 449.

was insured under P.F. Constriction's insurance policy with North Pointe as an additional insured. At the conclusion of the policy period, North Pointe did not renew the policy, but failed to give notice to its insured, P.F. Construction, of its non-renewal. As a result, P.F. Construction did not obtain replacement coverage prior to an occurrence that took place after the policy period had expired; an occurrence that resulted in an underlying claim.

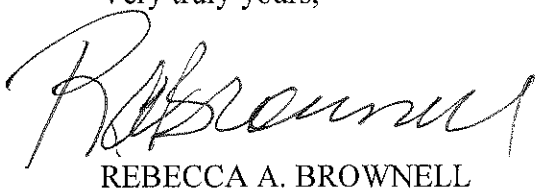
At issue was whether North Pointe's failure to provide 45 days advanced written notice of non-renewal in compliance with Fla. Stat. §627.4133 resulted in the policy remaining in effect at the time of the underlying claim, thus providing coverage to Double A as an additional insured. The trial court ruled in the affirmative, awarding summary judgment in favor of Arden. North Point affirmed.

APPELLATE COURT DECISION

The Appeals Court held that because the insurer failed to give the statutory written notice to P.F. Construction, and because P.F. Construction did not obtain replacement coverage before the underlying incident, the terms of the 2004-05 policy remained in effect at the time of the underlying claim.[6] The Court found that because the terms of the 2004-05 policy remained in effect at the time of the underlying incident, Double A remained covered as an additional insured under the 2004-05 policy. The Court concluded that absent a notice to the contrary, the insured was entitled to assume that the terms of the renewed policy are the same as those of the original contract.[7] Thus, the Court affirmed.

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

---

[6] *See* § 627.4133(1)(c), Fla. Stat. (2005).

[7] *Marchesano v. Nationwide Prop. & Cas. Ins. Co.*, 506 So. 2d 410, 413 (Fla. 1987)