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INSURANCE COVERAGE/BAD FAITH UPDATE

Dear Ladies and Gentlemen:

This month we would like to share with you some recent opinions from the Florida District Court of Appeals. We have highlighted specific cases dealing with coverage and bad faith issues that may be of interest to you.

EXECUTIVE SUMMARY

1. In *Citizens Prop. Ins. Corp. v. European Woodcraft & Mica Design, Inc.*, the Fourth District held that where an insurance application clearly provides, on the second page, actual notice of limitations on an insurance agent's authority to bind the insurer, even though the applicant did not receive page two of the application, but a printed line directly above the signature line on page one of the application stated, "I further understand and agree to the terms as set forth on page 2;" and applicant's principal admitted that when he signed the application, he understood page two was part of the entire application, but never asked to review same, applicant was placed on inquiry notice and court erred in finding there was no evidence that applicant was ever put on notice of any limitations on agent's authority to bind coverage.

2. In *Florida Ins. Guaranty Assoc. v. Sunrise Condo. Assoc., Inc.,* the Fourth District held that the lower court properly found that there were seven separate covered claims arising out of the same hurricane as the policy listed seven separate schedules and seven separate premiums for each of the seven buildings, within the meaning of section 631.57(2) of the Florida Statutes, and each of the seven separate claims should have its own statutory cap of $300,000.00.

3. In *Travelers of Florida f/k/a First Floridian Auto & Home Insurance Co.. v. Stormont,* the Third District held that because of subsequent actions taken by an insurer in failing to appoint a competent appraiser, thus requiring the insured to request relief from a court, and additionally failing to pay the appraisal award in a timely fashion, the right to attorney's fees began not from the filing of the suit, because the suit was filed prematurely; but rather, from the time the court ordered the insurer to appoint a competent appraiser.

4. Finally, in *Sweeney v. Citizens Prop. Ins. Corp.,* the First District Court of Appeal held that, summary judgment was properly granted in favor of an insurer where, there was an examination under oath provision in an insurance policy and the insured

failed to submit to an examination under oath where there was evidence the insured sent numerous correspondence to the insured's last known address, some of which were responded to, regarding the scheduling of the examination under oath.

UPDATES

I. ***Citizens Prop. Ins. Corp. v. European Woodcraft & Mica Design, Inc., 35 Fla. L. Weekly D 2169 (Fla. 4th DCA 2010).***

FACTS AND PROCEDURAL HISTORY:

Citizens Property Insurance Corporation ("Citizens") appointed Global Insurance Services, Inc. ("Global") as its licensed Florida agent, giving it authority to submit insurance applications to Citizens. European Woodcraft & Mica Design, Inc. ("European Woodcraft"), the plaintiff, applied, through Global, for windstorm insurance. The application sent to the plaintiff had the following language right above the signature line: "I understand and agree to the terms as set forth on page 2." Further, the second page of the application stated the effective date of coverage was upon approval of Citizens, and that no insurance agent had the power to bind coverage. However, the application sent to the plaintiff only contained the first page of the application, not the second.

An agent for the plaintiff signed the application. The agent admitted that, at the time he signed the first page of the application, he understood page 2 of the application was a part thereof, yet he never requested to review same. Upon receipt of the application, Citizens faxed Global a confirmation which stated that it was not a binder of coverage and that coverage was contingent upon compliance with other applicable requirements. Citizens then notified Global that the plaintiff's premium check was void for insufficient funds. Global advised European Woodcraft of the issue. An agent for European Woodcraft delivered a new check to Global on the premise that once Citizens received the check, the process for securing the insurance would be completed.

After receiving the plaintiff's check, Citizens determined a mistake was made in the property designation section of the application. The correct property designation increased the amount of the premium. Citizens issued a Notice of Deficiency to Global and to the plaintiff. The notice to the plaintiff was returned as undeliverable, and Global received the notice but never communicated it to the plaintiff. Thereafter, Hurricane Wilma struck South Florida damaging the plaintiff's property. The plaintiff reported the loss to Citizens and was advised there was no coverage. The plaintiff then filed suit.

The trial court found that at all material times, Global was a general lines agent for Citizens, who had apparent authority to bind insurance coverage for Citizens. The court further found that there was no evidence that European Woodcraft was ever put on notice of any limitations on Global's authority to bind coverage. Citizens appealed.

APPELLATE COURT DECISION

Citizens argued on appeal that the plaintiff should have been placed on notice of the limitations imposed on Global by Citizens as a result of the incorporation by reference doctrine. The court noted that there are two different rules for the incorporation by reference doctrine. A document must be considered incorporated by reference where the incorporating document specifically provides it is subject to the incorporated document. In the present case, the court stated, the application did not state it was subject to the conditions on page 2. Further, if the collateral document is sufficiently described or referenced in the incorporating agreement, it may be considered, but only for the purpose of determining the intention of the contracting parties.

In the instant case, the court held, the language on the first page of the application did not expressly refer to, or describe, the agency disclaimer on the second page of the application. Thus, the court held, the second page of the application cannot be incorporated by reference.

Citizens further argued that European Woodcraft should have been placed on inquiry notice regarding the limitations of Global's actual authority. The court noted that in order to charge a person with notice of a fact of which he might have learned by inquiry, the circumstances known to him must be such as should reasonably suggest inquiry and lead him to inquiry. The court cited to the following passage from a Florida Supreme Court case:

> "[A] person has no right to shut his eyes or ears to avoid information, and then say that he has no notice; that it will not suffice the law to remain willfully ignorant of a thing readily ascertainable by whatever party puts him on inquiry, when the means of knowledge is at hand."

Sapp v. Warner, 141 So.124, 127 (Fla. 1932).

Under the circumstances in this case, the court held, the plaintiff was placed on inquiry notice and therefore, was subject to the limitations imposed on Global by Citizens. Accordingly, the court reversed the trial court's finding that European Woodcraft was not put on notice of any limitations on Global's actual authority.

PRACTICAL POINTERS AND RECOMMENDATIONS

In order to avoid the problem presented in *European Woodcraft*, we recommend insurers to review their insurance applications to insure that language similar to that used by Citizens appears just before the signature line so as to put a prospective insured on inquiry notice that the application they are signing is subject to the entirety of the insurance application, and that by their signature, they are acknowledging the whole of the application.

II. ***Florida Ins. Guaranty Assoc. v. Sunrise Condo. Assoc., Inc., 35 Fla. L. Weekly D 2125 (Fla. 4th DCA 2010).***

FACTS AND PROCEDURAL HISTORY

B.T. of Sunrise Condominium Association, Inc. ("Sunrise") had an insurance policy with Southern Family Insurance Company ("SFIC"). The declarations page of the policy indicated the policy covered seven buildings. All seven buildings were damaged by Hurricane Wilma. Sunrise filed a claim with SFIC for each of the seven buildings. SFIC assigned a single claim number, and added a suffix for each building, given them numbers one (1) through seven (7).

Subsequent thereto, SFIC issued seven separate checks, dividing the policy limit between the seven buildings. SFIC became insolvent, and Florida Insurance Guaranty Association ("FIGA") took over its obligations. Sunrise was not satisfied with the amount paid to it by SFIC, and demanded supplemental payments from FIGA. FIGA then tendered $299,900, which represented the statutory cap of $300,000 that FIGA was required to pay on each covered claim pursuant to section 631.57 of the Florida Statutes, minus the $100 FIGA deductible. FIGA took the position that the claims constituted a lump sum obligation for only one claim under the policy. Sunrise remained dissatisfied, and demanded appraisal, which was refused by FIGA. Sunrise then filed a Petition for Declaratory Relief, seeking a determination by the trial court that each of Sunrise's seven (7) buildings were an individual claim.

The parties filed cross-motions for summary judgment and the trial court ruled in favor of Sunrise, ordering FIGA to select an appraiser for each of the seven separately covered claims. FIGA appealed.

APPELLATE COURT DECISION

The Fourth District Court of Appeal noted that, pursuant to section 631.57 of the Florida Statutes, FIGA has the same obligations as the insolvent SFIC, and FIGA's responsibility is directly linked to SFIC's contractual obligations. Essentially, the Fourth District noted, FIGA stood in the shoes of SFIC with respect to covered claims.

The court went on to note there was a difference between a policy, which contains an "aggregate" value for several insured buildings, and Sunrise's policy with SFIC, which had separate schedules for each of the seven buildings. Under the applicable policy limits, the court noted, Sunrise could not apply nor transfer the limit of insurance coverage for one building to another building which might have been under-valued and, thus, underinsured. The court further noted that if FIGA's position were correct and the seven buildings all constituted one claim, Sunrise would have been entitled to the total aggregate policy limit of insurance coverage for all seven buildings – a construction that was surely not intended by the SFIC policy.

The court looked to an Indiana case for guidance, *Anderson Mattress Co. v. First State Insurance Co.*, 617 N.E.2d 932 (Ind. App. 5th Dist. 1993). It quoted language in *Anderson Mattress*, which, in relevant part, stated that a distinction must be made between a policy which speaks in terms of a lump-sum obligation and one which separately schedules different items of property. *See Anderson Mattress*, 617 N.E.2d at 935. In the latter case, the Indiana court noted, each separately treated item of property is in effect covered by a separate contract of insurance, and the amount recoverable with respect to a loss affecting such property is determined independently of other items of property. *See id.*

The Fourth District applied the principles in *Anderson Mattress* to the case before it, and noted that the SFIC policy provided separate contracts of insurance since it spoke it terms of separately scheduled buildings. The schedule of property values, which was included in the SFIC insurance policy, made the coverage specific, not blanket. The court further noted each of the seven buildings was separately listed on the declarations page, with a separate covered amount and a separate premium listed for each building. According, the Fourth District held, each of the seven buildings were separate claims and each should have its own statutory cap of $300,000.

PRACTICAL POINTERS AND RECOMMENDATIONS

In order to avoid the issue presented in *Sunrise Condo Assoc.*, we recommend that if an insurer intends separate buildings to be covered by one aggregate policy limit, the insurer should not separately list each building with a separate coverage amount, and a separate premium for each building.

III. *Travelers of Florida f/k/a First Floridian Auto & Home Insurance Co. v. Stormont, 35 Fla. L. Weekly D 2059 (Fla. 3d DCA 2010).*

FACTS AND PROCEDURAL HISTORY

Ray Stormont, the insured and plaintiff, owned a Ford Mustang Cobra SVT, which he insured with Travelers of Florida ("Travelers"), the defendant. The car was valuable because it had been owned by and modified for Petty Racing Enterprises and had been driven by a member of the Petty family. In January of 2006, the car was stolen. The insured retained counsel and submitted a claim to Travelers. Travelers offered to pay $39,587 based on an independent appraisal it had conducted on the vehicle. However, the insured claimed the vehicle was worth a value of $65,000- 75,000 based on another appraisal. In 2006, Travelers demanded appraisal and appointed an appraiser. The insured failed to respond. Instead, in October of 2006, the insured filed a suit against Travelers demanding payment of the claim. Travelers moved to dismiss, or, in the alternative, abate the action pending completion of appraisal. The trial court denied Travelers' motion to dismiss, but granted its motion to abate the action and compelled appraisal.

In 2008, the insured filed a motion to compel appointment of an appraiser, or alternatively, to strike the demand for appraisal. The appraisal clause in the insurance policy required each party to appoint a competent appraiser. According to the motion, the Travelers' appraiser admitted to the insured's appraiser that he had no appraisal knowledge and no opinion regarding the value of the vehicle. The insured objected to Travelers' appraisal as not being qualified but Travelers refused to appoint another appraiser. The trial court denied the insured's motion to strike the demand for appraisal. The court ordered each side to submit the names of proposed umpires and selected an umpire therefrom. Travelers then failed to pay its half of the umpire fee, which was $750.00. The insured paid the entire fee.

In April of 2008, the appraisal set the value of the car at $95,000.00. Travelers failed to pay. In June of 2008, the insured filed a motion to enter judgment in accordance with the award, which was the value of the vehicle, as per the appraisal, plus interest, costs, and attorney's fees. In August, Travelers paid interest from the date of the appraisal award to the July 2008 date of payment. The trial court entered prejudgment interest of $23,219.93, and entered a judgment for attorney's fees in favor of the insured. Travelers appealed.

APPELLATE COURT DECISION

The Third District Court of Appeal of Florida noted section 627.428 of the Florida Statutes provides that upon rendition of a judgment against an insurer and in favor of an insured, the court shall award a reasonable sum as fees or compensation for the insured's attorney prosecuting the suit in which recovery is had. However, the court noted, in order for an insured to be entitled to attorney's fees, it must have been reasonably necessary for the insured to file a court action.

In the instant case, Travelers argued the insured filed suit prematurely. The court agreed and stated that once the insurer demanded appraisal, the insured was required to comply with the appraisal clause; proceeding to court was not justified. The insured countered and argued the insurer breached its obligations under the insurance policy because it acted in bad faith, and, as such, waived the right to appraisal. The court noted a waiver of the right to arbitrate occurs only when a party engages in conduct inconsistent with that right. Assuming the insured is correct that the insurer appointed an incompetent appraiser, the court stated, that act is not inconsistent with the right to appraisal. It is an attempted exercise of the right to appraisal.

According to the Third District, if the insured believed that the insurer's appraiser was not competent, and, as in the present case, the appraisal clause required the appointment of a competent appraiser, the issue must have been raised by the insured upon learning of the grounds for disqualification. The correct procedure would have been to first to make a written demand that the insurer replace the appraiser. If the insurer declined to do so, then the insured must promptly file a complaint in circuit court seeking removal of the appraiser. In this case, the court noted, the insurer disclosed the identity of its appraiser in June of 2006. The insured learned of the ground for disqualification early

on, but did not seek disqualification until 2008. Thus, as the insured filed suit prematurely, he is not entitled to attorneys feel from the time he filed suit prematurely; but rather, from the time he sought disqualification.

Next, Travelers argued it was unnecessary for the insured to file a motion to enter judgment in accordance with the appraisal award and, as such, the insured is not entitled to attorney's fees. The court noted the appraisal award was entered in April of 2008. The insurer failed to pay. Then, in June, three months later, the insured filed a motion to enter judgment in accordance with the appraisal award. The court found it was entirely reasonable for the insured to file this motion after the insurer not only failed to pay the award, but also failed to pay half of its umpire's fees.

The insurer then argued the trial court erred by awarding prejudgment interest from the date of the theft of the auto on January 28, 2006. The court noted the insurance policy in this case does not specify when an appraisal award is to be paid by the insurer. Per the court, where that is the case, the insured is entitled to interest from the date of the appraisal award as that is the date on which damages were liquidated. Thus, the court held the prejudgment interest award must be reduced, so as to cover the period from the date of award until the date of the insurer's payment of the $95,000 principal amount of the award.

PRACTICAL POINTERS AND RECOMMENDATIONS

In order to avoid the problems and issues present in *Stormont*, where an appraisal process is permitted with respect to a first party property claim, an appraisal should be invoked by a carrier immediately upon determining that there is a disagreement with the insured regarding the valuation of the claim. Further, if the insured fails to comply with the appraisal process, as outlined in the insurance contract, and files suit instead, an appropriate motion to dismiss and/or motion to abate should immediately be filed, drawing the court's attention to the insured's failure to comply with the appraisal process.

Moreover, a carrier should not wait for the insured to take action after the appraisal decision has been rendered. Rather, a carrier should pay the appraisal award immediately, unless there is extrinsic evidence of grossly improper conduct by an appraiser or umpire. Mere dissatisfaction with the appraisal award or valuation of the claim by an appraiser or umpire is not sufficient reason for a carrier to delay or refuse to pay an appraisal award.

IV. *Sweeney v. Citizen Prop. Ins. Corp., 35 Fla. L. Weekly D 2059 (Fla. 1st DCA 2010)*

FACTS AND PROCEDURAL HISTORY

Ms. Sweeney had an insurance policy with Citizens Property Insurance Corporation ("Citizens"), which set forth Ms. Sweeney's obligations under the policy when there was a claim for loss. Specifically, the policy provided that "[i]n the case of

loss [the insured] must . . . submit to examinations under oath. . . ." Ms. Sweeney sustained a loss, yet did not submit to an examination under oath, even though numerous correspondence were sent from Citizens to Ms. Sweeney requesting her examination underoath. Citizens filed for summary judgment on the grounds that Ms. Sweeney failed to submit to such an examination. The trial court granted Citizens' motion. Ms. Sweeney appealed.

APPELLATE COURT DECISION

The First District Court of Appeal affirmed the trial court's order because no issues were preserved for review. The concurring opinion, however, wrote to explain that even if issues were preserved, the trial court order would be affirmable on the merits.

Judge J. Rowe authored the concurring opinion, and noted that Ms. Sweeney argued on appeal that she never received the letters from Citizens notifying her that they wished to schedule an examination under oath. The concurring opinion further noted that Ms. Sweeney failed to appear for an examination under oath, despite repeated attempts by Citizens to contact her at her address of record, for the purpose of scheduling her examination under oath. The concurring opinion pointed to the long-standing Florida rule that there is a rebuttable presumption that mail properly addressed, stamped, and mailed was received by the addressee, and cited to a Florida Supreme Court case. *See Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973). According to Florida law, the concurring opinion noted, the rebuttable presumption only arises when there is proof that the mail was being sent to the correct address, citing to a Third District Court of Appeal case. *See Star Lakes Estates Ass'n v. Auerbach*, 656 So. 2d 271, 273 (Fla. 3d DCA 1995).

Judge Rowe again turned to the facts of the instant case, and noted that the evidence on record demonstrated that Citizens mailed several letters to Ms. Sweeney's correct address. The concurring opinion further noted all the letters were sent to the same address, which was the address on Ms. Sweeney's policy with Citizens. Further, two of the letters were received at that address; one bore a signature which appeared to be Ms. Sweeney's, with a receipt returned to Citizens, and another was responded to by phone to request re-scheduling. Based on the foregoing, the concurring opinion stated, Ms. Sweeney was presumed to have received the letters from Citizens request the scheduling of an examination under oath, and Ms. Sweeney had not presented any evidence to rebut the presumption.

Further, Ms. Sweeney argued that despite her failure to submit to an examination under oath, she should be relieved of this obligation under her policy because her failure was not willful. In support of her argument, Ms. Sweeney argued that during the course of her pursuing her claim against Citizens, she met repeatedly with adjusters representing Citizens and responded to discovery requests. However, the concurring opinion noted, Ms. Sweeney's arguments were not supported by the law. Even if Ms. Sweeney was cooperative and complied with Citizens' discovery requests, she was still required to submit to an examination under oath as a condition precedent to filing suit. Accordingly,

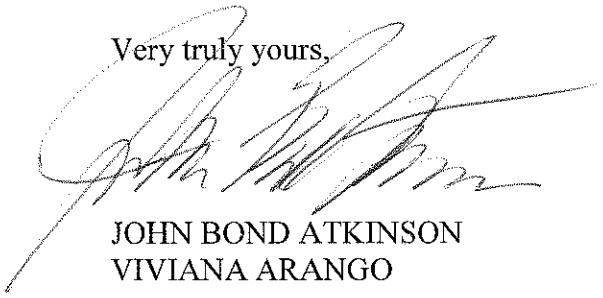
the concurring opinion stated, assuming Ms. Sweeney's arguments were preserved for review, the court could have affirmed the trial court's order on the merits.

PRACTICAL POINTERS AND RECOMMENDATIONS

In order to prevent the issue presented in *Sweeney*, an insurer needs to make sure it makes repeated and documented attempts to contact its insured to schedule an examination under oath. The insurer needs to direct those attempts to the last known address of the insured, and to the address that is stated on the insured's policy with the insurer, if the last known address of the insured is different from the insured's address on the insured's policy with the insured.

We hope you find the above updates helpful. Should you have any questions with respect to the foregoing, please feel free to contact us at our Miami office.

Very truly yours,



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