Insurance DECISIONS FROM AROUND THE STATE

By Gregory Yaffa

Insurer did not waive its right to rely on homeowners policy exclusion based on pre-suit conduct of acknowledging coverage and making partial payment. To the extent that these actions could have constituted waiver, the insured failed to preserve the argument by filing a reply to the carrier's affirmative defense citing to the exclusion. *Gamero v. Foremost Insurance Company*, So.3d , 42 FLW D158 (Fla. 3rd DCA 1-11-17).

Following damage to Gamero's floor tile caused by a dropped vase, Foremost initially accepted coverage and offered payment of approximately $4,000.00. Gamero disagreed with the amount and invoked the policy's appraisal provision. The appraisal panel determined that the tile in the entire house needed replacement and awarded almost $19,000. When Foremost refused to pay the full appraisal award (alleging that the total amount was not covered), Gamero filed suit for breach of contract. Foremost filed an answer, denying any breach of contract and asserted as an affirmative defense that the policy's marring exclusion applied and that there was no coverage for the claim. Gamero did not file a Reply to the affirmative defense.

The trial court granted Foremost's Motion for Summary Judgment, holding that there was no coverage as a matter of law in that the loss clearly constituted marring, which was expressly excluded under the policy. The Third DCA rejected Gamero's argument that Foremost waived its right to rely on the exclusion because it initially acknowledged coverage and paid for a portion of the loss. Relying on Fla.R.Civ.P. 1.100(a), the Third District Court of Appeal held that even if Foremost's actions amounted to a waiver, Gamero failed to preserve the issue because Gamero failed to reply to or avoid the affirmative defense. Gamero raised the waiver issue for the first time in opposition to the carrier's Motion for Summary Judgment.

Unambiguous PIP policy language was sufficient notice of the insurer's election to use permissive Medicare fee schedules to limit reimbursements for medical expenses. *Allstate Insurance Co. v. Orthopedic Specialists*, So.3d , 42 FLW S38 (Fla. 1-26-17).

In this case, the Florida Supreme Court considered whether a PIP policy provided legally sufficient notice of Allstate's election to use the Medicare fee schedules identified in §627.736(5)(a)2, Florida Statutes (2009), to limit reimbursements for medical treatment. Finding ambiguity in the policy, the Fourth District Court of Appeal held that the policy language was not legally sufficient to authorize Allstate to apply the Medicare fee schedules. However, because the Fourth's ruling conflicted with the decision of the First District Court of Appeal in *Allstate v. Stand-Up MRI of Tallahassee*, 188 So.3d 1 (Fla. 1st DCA 2015), the Fourth District certified the question.

The Allstate policy language in question is as follows:

> Limits of Liability
> …
> Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law*, including, but not limited to, all fee schedules.* (Emphasis added).

The Florida Supreme Court quashed the Fourth District's decision, finding "Allstate's PIP policy provides legally sufficient notice of Allstate's election to use the permissive Medicare fee schedules identified in section 627.736(5)(a)2 to limit reimbursements." Allstate's policy gave sufficient notice allowing it to pay pursuant to the Medicare fee schedule.

Where carrier refused to defend and its insured entered into a *Cobentz* agreement, carrier could not later intervene in the probate proceedings or raise liability defenses that it could have raised had it not refused to defend its insured. *The Estate of Arroyo v. Infinity Indemnity Ins. Co.*, So.3d , 42 FLW D192 (Fla. 3rd DCA 1-18-17).

Following a tragic car crash that resulted in the death of one person (Arroyo) and severe incapacitating injuries to another (Reyes), the Arroyo family petitioned the probate court to open an estate, which the probate court granted. Shortly thereafter, Reyes sued the Estate of Arroyo. Reyes never filed a written claim in the probate court. Infinity (carrier for Arroyo) declined to defend the action and the Estate, left to fend for itself, entered into a *Coblentz* agreement. In exchange for

an agreement not to execute on the judgment, the Estate assigned its rights under the policy to Reyes, including the right to pursue the Estate's bad faith claim against Infinity.

Reyes filed the bad faith claim in circuit court. Infinity moved for Summary Judgment, arguing that the statute of limitations on the negligence action had run with Reyes failing to file a statement of claim in the probate court. Infinity alleged that because of this, the Estate was immune from the negligence lawsuit and therefore not exposed to an excess judgment (a prerequisite to bad faith).

Infinity then moved to intervene in the Estate proceedings in the probate court for the purpose of determining whether the Estate had the authority to settle the negligence lawsuit in the circuit court by entering into the *Coblentz* agreement. Not only did the probate court allow Infinity to intervene, but it also entered an order finding that the Estate did not have the authority to enter into the settlement agreement and that the *Coblentz* agreement was unenforceable.

While this was going on in the probate court, the circuit court granted Summary Judgment in favor of Infinity, finding that there could be no bad faith where Reyes failed to file the requisite written notice of claim against the Estate, which relieved the Estate of any excess exposure.

The Third District Court of Appeal consolidated the appeals of both the circuit court and the probate court orders and reversed on all fronts. The Court reversed "the probate court's order permitting Infinity to intervene in the Estate's probate proceedings because Infinity's interest was not at issue before the probate court prior to the filing of the motion to intervene." The Court also reversed the probate court's ruling on Infinity's motion to determine that the Estate did not have standing to enter into the settlement agreement, because it was based on defenses that Infinity was prohibited from raising as a matter of law. Finally, the Court also reversed the circuit court's order granting Summary Judgment in favor of Infinity because the motion was premised on defenses that Infinity could have raised but failed to in the underlying litigation that led to the *Coblentz* agreement.

If Infinity had defended the Estate when the lawsuit was filed in circuit court, it could have raised the failure of the plaintiff to timely file his claim in probate court, and asserted defenses including statutory limitations to bar recovery. Infinity's failure to defend stripped it of any standing to assert these defenses.

Discovery of facts under 627.736(6)(c) - (PIP pre-litigation discovery) - is limited to the production of the documents described in 627.736(6)(b) and does not allow for deposition of carrier representative. *State Farm Mutual Automobile Ins. Co. v. Shands Jacksonville Medical Center, Inc.*, So.3d , 42 FLW S176 (Fla. 2-16-17).

The certified conflict issue in this case concerns the extent of permissible discovery under §627.736(6)(c), Florida Statutes (2015). Without going into all the facts, the First District Court of Appeal held that discovery of facts under this section is limited to the production of the documents described in §627.736(6)(b). The Fourth District Court of Appeal, however, in *Kaminester v. State Farm Mutual Automobile Ins. Co.*, 775 So.2d 981 (Fla. 4th DCA 2000), held that the discovery methods provided for in the Florida Rules of Civil Procedure are available to insurers that institute proceedings pursuant to §627.736(6)(c), including the taking of depositions. In approving the reasoning of the First District and disapproving *Kaminester*, the Florida Supreme Court held that the scope of permissible discovery under §627.736(6)(c) is limited to the production of documents described in subsection (6)(b), "a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person and why items identified by insurer were reasonable in amount and medically necessary, together with a sworn statement," as well as production, inspection and copying of "records regarding such history, condition, treatment, dates, and costs of treatment." Subsection (6) provides limited pre-litigation discovery into specified information about treatment and charges for treatment provided to injured party, and discovery tools found in rules of civil procedure are not triggered until litigation over reasonableness of those charges has ensued. Nothing in subsections (6)(b) or (c) contemplates requiring PIP provider to submit any of its representatives to deposition. It was error for the trial court to order State Farm to make a designated corporate representative available for deposition.

New trial granted where trial court allowed potentially prejudicial evidence of insured's health condition to be presented to the jury. *State Farm Florida Ins. Co. v. Figueroa*, So.3d , 42 FLW D339 (Fla. 4th DCA 2-8-17).

State Farm raised two issues in this appeal of final judgment entered in favor of State Farm's insured. First, State Farm argued that the trial court erred in denying Summary Judgment and a directed verdict because its insured failed to timely comply with policy obligations following the loss (Hurricane Wilma – 2005). Second, State Farm argued entitlement to a new trial based on highly prejudicial evidence admitted in trial relating to the insured's health issues. The Fourth District Court of Appeal rejected the first issue, holding that the insured's post loss compliance obligations involved issues of fact that were properly resolved by the jury. However, the Court reversed and granted a new trial to State Farm because the insured's health never should have been introduced as it may have led the jury to infer that her health was a factor to be considered in determining whether she substantially complied with her post loss contractual obligations.

No need to file a new action against FIGA where first-party suit was filed before the predecessor carrier became insolvent. *Morrison v. Homewise Preferred Ins. Co. and Florida Insurance Guaranty Association*, So.3d , 42 FLW D365 (Fla. 5th DCA 2-10-17).

Following sinkhole damage to her home, Morrison filed suit against her carrier, Homewise. During the pending lawsuit, Homewise became insolvent. Due to the insolvency, FIGA was activated to handle covered claims. When Morrison subsequently filed the motions to amend her complaint and for substitution of parties to name FIGA as a defendant in the pending lawsuit, the time limitation provided in sections 95.11(5)(d) and 631.68 had expired. After the trial court denied the motions and dismissed the lawsuit with prejudice, Morrison appealed.

The Fifth District Court of Appeal reversed, holding, "If a first-party suit is not filed against the insurer before insolvency occurs, the insured is required to file its action against FIGA before the limitation periods in sections 95.11(5)(d) and 631.68 expire. However, where a first-party suit was filed before the insurer became insolvent, the statutes of limitation by their own terms do not apply."

Gonzalez v. Homewise Preferred Ins. Co. and Florida Insurance Guaranty Association, So.3d , 42 FLW D405 (Fla. 2nd DCA 2-15-17).

In a fact pattern similar to the above case, the trial court dismissed with prejudice the insured's action against FIGA, despite the homeowners having filed suit against Homewise prior to the carrier becoming insolvent. Like the Fifth District Court of Appeal above, here, the Second District reversed, holding that the homeowners were not required to file a new action against FIGA or separately serve FIGA with the pending action.

Failure to comply with post loss contractual obligations voids coverage. *State Farm Florida Insurance Co. v. Fernandez*, So.3d , 42 FLW D407 (Fla. 3rd DCA 2-15-17).

Trial court erred in entering an order compelling appraisal where the insureds failed to comply with post-loss obligations by failing to give immediate notice of alleged additional damage, failing to keep an accurate record of expenditures, failing to provide the insurer with any requested records and documents to support supplemental claims and failing to submit sworn proof of loss within 60 days.

No UM coverage for employee that was not in a "covered auto" at the time of the crash. Additionally, because the policy in question was an excess policy and not a primary policy, it was not subject to the waiver of UM coverage mandate imposed by §627.727(1). *Zurich American Insurance Company v. Cernogorsky*, So.3d , 42 FLW D476 (Fla. 3rd DCA 2-22-17).

Cernogorsky, an employee of Zurich's named insured, was struck by an underinsured motorist while walking in front of his employer's office while walking into the building. After recovering the underinsured motorist's policy limits of $100,000, Cernogorsky made a claim for UM benefits under his employer's policy ($1,000,000). Cernogorsky alleged entitlement to coverage because 1) he was a covered individual under the company's policy because the policy covered autos not owned by the company, which per Cernogorsky included vehicles owned by the employees; and 2) the policy provided primary coverage which included UM coverage that extended to him because the company had failed to execute a UM coverage waiver as required by §627.727(1) of the Florida Statutes.

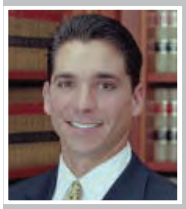
Zurich argued that Cernogorsky was not entitled to UM coverage because: 1) he was not a named insured under the policy; 2) the policy was not a primary liability auto insurance policy, but an excess policy, and thus not governed by §627.727(1), but by §627.727(2), which does not require a written rejection of UM benefits; and 3) because Cernogorsky was a pedestrian at the time of the accident, he could not recover UM benefits under the policy even had such coverage been provided.

The parties' summary judgment motions were denied and a jury found for Cernogorsky, determining that coverage existed under the policy.

The Third District Court of Appeal reversed and remanded with instructions to enter judgment in favor of Zurich. The Court found that Cernogorsky was not an insured under the policy because he was not in a "covered auto" at the time of the crash (either company owned, hired or even his own auto, if being used for company purposes). The only named insured under the policy was the employer, The Green Companies.

Additionally, the Court agreed with Zurich that because the policy at issue was not a primary liability policy, it was not subject to the waiver of UM coverage mandate imposed by §627.727(1). Section 627.727(2) provides, "the provisions of subsection (1) which require uninsured motorist coverage to be produced in every motor vehicle policy delivered or issued for delivery in this state, do not apply to any policy which does not provide primary liability insurance that includes coverage for liabilities arising from the maintenance, operation, or use of a specific insured motor vehicle."

Finally, the Court held that even if there was UM coverage under the excess liability policy, Cernogorsky did not qualify as an insured because he was not a named insured or a resident family member (Class I insured). At best, he was a Class II insured. Pursuant to *Mullis v. State Farm Mutual Auto Ins. Co.*, 252 So.2d 229 (Fla. 1971), individuals may recover UM benefits as a Class II insured only if they are lawfully occupying or driving a covered automobile. ■



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