INSURANCE DECISIONS
FROM AROUND THE STATE

[BY GREGORY M. YAFFA]

Despite already accepting jurisdiction, Florida Supreme Court declines review concerning bad faith discovery alleged to fall within the attorney-client privilege. *Stally v. Boozer,* So.3d , 40 FLW S221 (Fla. 4-17-15).

In *Boozer v. Stally*, 146 So.3d 139 (Fla. 5th DCA 2014) the Fifth District Court of Appeal receded from its precedent, disallowing discovery of attorney-client communications in a third-party bad faith claim. While the Court disallowed the discovery, it recognized "the uncertainty of the law in this important area" and therefore certified the question of whether attorney-client privileged communications are shielded from discovery in third-party bad faith litigation in light of the holdings in *Allstate Indemnity Co. v. Ruiz,* 899 So.2d 1121 (Fla. 2005) and *Genovese v. Provident Life & Accident Ins. Co.*, 74 So.3d 1064 (Fla. 2011).

By a vote of five to two, the Florida Supreme Court accepted jurisdiction, recognizing that the question certified was of great public importance. Following removal of the bad faith claim to federal court, both parties moved to dismiss the petition for review. The Florida Supreme Court dismissed the case.

In their dissenting opinions, Justices Pariente and Lewis, opined that the Court should have exercised its discretion to retain jurisdiction "in order to ensure clarity and consistency in the application of Florida law." Citing to *Boston Old Colony Ins. Co. v. Gutierrez*, 325 So.2d 416 (Fla. 3d DCA 1976), Justice Pariente noted that "the insurer's file and the attorney's file are generally critical to determining the issue of bad faith in a third-party *bad faith action" and the fact that the case was removed is even more of a reason for the Florida Supreme Court to retain jurisdiction, so as to give guidance to federal courts when facing bad faith claims that arise solely under Florida law. Justice Lewis expressed his dismay that by dismissing the petition for review, the Court "has allowed a decision below to stand without review that has radically altered forty years of well-established jurisprudence regarding essential discovery in third-party bad faith insurance actions in Florida."*

Citizens immune from bad faith – statutory cause of action for first-party bad faith does not fall within the "willful tort" exception under 627.351(6)(s), Florida Statutes. *Citizens Property Insurance Corp. v. Perdido Sun Condominium Association,* So.3d , 40 FLW S265 (Fla. 5-14-15).

With its ruling, the Florida Supreme Court ended the debate of whether Citizens can be found guilty of bad faith.

After prevailing in a breach of contract claim against Citizens, the Perdido Sun Condominium Association brought a first-party bad faith claim against Citizens pursuant to 624.155, Florida Statutes. In response, Citizens moved to dismiss the complaint, citing its immunity from suit under 627.351(6)(s), Florida Statutes – "There shall be no liability on the part of, and no cause of action of any nature shall arise against, any assessable insurer or its agents or employees, the corporation or its agents or employees, members of the board of governors or their respective designees at a board meeting, corporation committee members, or the office or its representatives, for any action taken by them in the performance of their duties or responsibilities under this subsection. Such immunity does not apply to: (a) Any of the foregoing persons or entities for any willful tort. . ."

Perdido Sun argued that the bad faith claim fell within this "willful tort" exception and that Citizens was not immune. The trial court disagreed and dismissed the case. Perdido Sun appealed, and the First District Court of Appeals reversed, concluding that "Citizens' immunity does not extend to the 'willful tort' of failing to attempt in good faith to settle claims as provided by section 624.155." As the ruling conflicted with *Citizens v. Garfinkel,* 25 So.3d 62 (Fla. 5th DCA 2009), the First District Court of Appeal certified the conflict. Specifically, the Florida Supreme Court addressed the following: Whether the immunity of Citizens Property Insurance Corporation, as provided in Section 627.351(6)(s), Florida Statutes, shields the corporation from suit under the cause of action created by Section 624.155(1)(b), Florida Statutes, for not attempting in good faith to settle claims?

Finding no support that the Legislature intended for *Citizens* to be liable for a breach of the duty to act in good faith by allowing its policyholders to bring a statutory bad faith cause of action, the Court answered the question in the affirmative. Citing to *Garfinkel,* the Court noted that with the 1982 adoption of 624.155, Florida Statutes, "statutory first-party bad faith causes of action now exist in Florida, not because they are torts, but because they are a statutory cause of action. Accordingly, a first-party bad faith claim cannot be wedged into the statutory exception for willful torts because it is not a tort of any variety."

Additional insured (wife of named insured) listed on auto policy had authority to reject Uninsured Motorist coverage. *Progressive American v. Grossi*, So.3d , 40 FLW D1289 (Fla. 5th DCA 5-29-15).

Over a three year period, while the Progressive insurance policy was in effect, Judy Grossi made numerous coverage modifications to the policy. Judy was listed on the policy as an additional insured, with her husband, John, listed as the named insured. The last modification made by Judy prior to the subject crash was a rejection of UM limits. Each time that a modification was made, Progressive sent a policy declaration reflecting the changes. John never challenged the changes made by his wife.

Following Progressive's denial of UM benefits, the Grossis sued Progressive, alleging that Judy, as an additional insured and not the named insured, lacked actual or apparent authority to reject UM coverage. The trial court agreed and entered summary judgment finding coverage.

The Fifth District Court of Appeal reversed, holding that the evidence supported that Judy was acting as her husband's agent in rejecting the UM coverage and "at the very least, there are disputed issues of material fact," which precluded the entry of summary judgment.

Insured cannot compel appraisal of insured's supplemental hurricane damage claim where insured failed to comply with contractual post-loss obligations. *State Farm Florida Ins. Co. v. Hernandez,* So.3d , 40 FLW D1433 (Fla. 3rd DCA 6-17-15).

This appeal stems from a supplemental claim made due to damages alleged to have occurred in Hurricane Wilma (October 24, 2005). The supplemental claim was filed five years after State Farm paid the original claim ($36,858.80). After receiving payment of the original claim, Hernandez waited nearly a year to perform repairs to the damaged roof. Hernandez alleged that the delay in repair was due to his inability to acquire the proper roof tiles. During that year of delay, and due to the delay, Hernandez alleges that more damage was done to the house, which now required renovation of the entire home. Hernandez did not contact State Farm before or during the renovations, despite the fact that the renovations were completed in 2007. In November of 2010, after seeing a television ad, Hernandez contacted a public adjuster and made a supplemental claim ($201,038.84).

When State Farm denied the supplemental claim, Hernandez filed suit for breach of contract and moved to compel appraisal pursuant to the policy language. Specifically, the policy provided "Appraisal. If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal." State Farm objected to the appraisal based on the insured's failure to comply with the post-loss obligations, including his failure to give State Farm timely notice of his supplemental claim, failure to cooperate, failure to provide documents substantiating his claimed losses, and his concealment and/or fraud in the presentation of his claim.

After conducting an evidentiary hearing, the trial court found that Hernandez "sufficiently" complied with his post-loss obligations and granted his motion to compel appraisal. The Third District Court of Appeal reversed, holding that State Farm was severely prejudiced by its insured's failure to comply with the post-loss obligations. Specifically, the Court noted that "State Farm has been denied a meaningful opportunity to investigate Hernandez's supplemental claim to determine if the claimed losses were, in fact, based on damages as opposed to the owner's mere desire to renovate his home. Further, if the claimed losses were based on actual damages to the house, State Farm did not have the opportunity to investigate whether the damages were as a result of Hurricane Wilma, negligence by Hernandez, negligence by the roofer who installed the new roof, or due to some other cause."

Carrier wanting to write in Florida cannot require written approval as a prerequisite to an insured assigning his/her post-loss rights. *Security First Insurance Company v. State of Florida, Office of Insurance Regulation,* So.3d , 40 FLW D1449 (Fla. 1st DCA 6-22-15).

Before delivering or issuing policy forms in Florida, Security First was required by statute to file all forms it intends to use in Florida with the Office of Insurance Regulation for approval. The carrier submitted the forms in June of 2013, filing three proposed forms that would amend the assignment language in its "Homeowner's, Tenant Homeowner's, and Dwelling Fire Insurance" policies. The proposed amended language was, "Assignment of this policy or any benefit or post-loss right will not be valid unless we give our written consent."

The OIR issued notices of disapproval of the changes because they were contrary to Florida law. The carrier requested an informal hearing to address whether post-loss rights under an insurance policy are freely assignable without the consent of the insurer. The hearing officer upheld OIR's decision. The carrier appealed.

Relying on "an unbroken string of Florida cases over the past century holding that policyholders have the right to assign such claims without insurer consent," the First District Court of Appeal affirmed the decision, noting that the carrier's public policy considerations would be more properly addressed by the legislature.

Sinkhole Claims

There was no shortage of sinkhole claim appeals in the last few months. To report on each of them would encompass the entire article. For those of you interested, please see the following cases: *Florida Insurance Guaranty Association, Inc. v. Maya,* So.3d , 40 FLW D941 (Fla. 2d DCA 4-22-15); *Florida Insurance Guaranty Association, Inc. v. Lustre,* So.3d , 40 FLW D968 (Fla. 2d DCA 4-24-15); *Sanchez v. Royal Palm Insurance Company,* So.3d , 40 FLW D1387 (Fla. 2d DCA 6-12-15); *and Florida Insurance Guaranty Association, Inc. v. Monaghan,* So.3d , 40 FLW D1508 (Fla. 5th DCA 6-26-15).

Gregory M. Yaffa
joined Slawson Cunningham Whalen & Gaspari in 2004 and currently practices in the areas of insurance company bad faith, personal injury and wrongful death. Greg is admitted to practice law not only in the State Courts of Florida, but also in the Florida Federal Courts, including the United States District Court, Middle District Court of Florida, the United States District Court, Southern District of Florida and the United States District Court.