Insurance Decisions

From Around the State

by Gregory M. Yaffa

Citizens not required to participate in appraisal where the parties could not agree on the scope of the appraisal agreement. *Citizens Property Insurance Corporation v. Casar*, So.3d , 38 FLW D85 (Fla. 3d DCA 1-2- 2013).

Citizens' insured (Casar) filed a claim with Citizens for damage to their home allegedly attributable to a water leak that originated from a defective refrigerator line. According to the homeowners' public adjuster, all of the damage to the home was caused by the leak. Citizens, however, concluded that some of the items damaged were related to the leak and others were not. Additionally, Citizens evaluated the damages of the covered items significantly lower than the homeowners' public adjuster.

In light of the disagreement, the homeowners, through their public adjuster, sent a written demand for appraisal of the entire claim. Citizens then forwarded an Appraisal Agreement wherein Citizens listed for appraisal only those items that it alleged were covered under the policy. Citizens specifically excluded from the appraisal agreement the items that it believed were not damaged by the defective refrigerator line.

The homeowners refused to sign the agreement and filed a motion to compel appraisal of the entire claim. The trial court granted the motion.

The Third District Court of Appeal reversed, relying solely on language contained within the policy. Specifically, the insurance policy provided:

> b. Appraisal. If you and we fail to agree on the amount of the loss, either may request an appraisal of the loss by presenting the other party with a written request for appraisal of the amount of the loss. If the other party agrees in writing to participate in appraisal, then appraisal shall proceed pursuant to the terms of the written agreement between the parties.

The Third District reasoned that this language was unambiguous, in that it required a written request for appraisal and a written agreement between the parties in order for the appraisal to take place. Here, in response to the homeowners' request for appraisal, Citizens provided a written agreement that was not agreed to by the homeowners. Citizens was not required to participate in appraisal because there was no written agreement between the parties.

Insurance carrier's claim file is not discoverable prior to a determination of coverage. *State Farm Florida Insurance Company v. Desai*, So.3d , 38 FLW D85 (Fla. 3d DCA 1-2- 2013).

State Farm sought certiorari review of a discovery order compelling it to produce claim file documents and a claim handler to sit for deposition, regarding the claim file documents, during a declaratory judgment action.

The Third District Court of Appeal granted the petition and quashed the discovery order because there had not yet been a determination of coverage. Florida law prohibits insureds from obtaining discovery into an insurer's claims files and claims handling materials until there has been a determination of coverage. See *Gen. Star Indemn. Co. v. Atl. Hospitality of Fla.*, 93 So. 3d 501 (Fla. 3d DCA 2012).

Fourth District Court of Appeal rules that a crossclaim for third party bad faith against an insurer joined to an action pursuant to the nonjoinder statute is prohibited and that a third party bad faith claim must be brought in a separate action. *GEICO General Ins. Co. v. Harvey*, So.3d , 38 FLW D178 (Fla. 4th DCA 1-23-2013).

In 2006, James Harvey (insured by GEICO with Bodily Injury Liability limits of $100,000) caused a crash that resulted in the death of a motorcyclist. The litigation resulted in an $8,000,000 excess verdict that was entered against Harvey. Prior to the entry of Final Judgment (while the trial court still retained jurisdiction), the decedent's attorneys filed a motion to join GEICO to the action pursuant to Florida Statute §627.4136, the nonjoinder statute. Once GEICO was added as a party to the pending action, GEICO's insured filed a crossclaim against GEICO, alleging that GEICO had acted in bad faith for failing to settle the wrongful death claim made against him when GEICO could have and should have done so, had GEICO been acting fairly and honestly toward Harvey and with due regard for Harvey's interests.

GEICO then removed the bad faith action to Federal Court, based on diversity of citizenship and the fact that the amount in controversy exceeded the jurisdictional requirement of $75,000. Harvey filed a Motion to Remand, arguing that GEICO's removal was untimely because it had been filed more than one year from commencement of the action.[1] GEICO filed a Memorandum of Law in Opposition to Harvey's Motion to Remand, arguing that its removal was timely because the one year clock should start to run on the date that it was added to the underlying lawsuit and that the bad faith action was "separate and independent" from the underlying tort claim, and therefore subject to removal.

District Judge Kenneth Marra remanded the action to State Court, holding that GEICO's removal was untimely, as it was not filed within one year of the commencement of the action. Addressing the "separate and independent action" argument, Judge Marra correctly held that 28 U.S.C. §1441(c) limits the removability of separate and independent claims to those arising under a federal question, not those based on diversity. Since GEICO's removal was based on diversity, this argument was unavailing.

Once the action was back in State Court, GEICO filed a Motion to Dismiss the bad faith crossclaim, again arguing that the claim was not a part of the same transaction or occurrence as the tort claim. GEICO's Motion to Dismiss was denied, and GEICO subsequently filed a petition for certiorari.

The Fourth District noted that, "Generally, a non-final order denying a motion to dismiss is not subject to interlocutory review through a petition for certiorari," but allowed the petition because the ruling "defeated GEICO's right to have the action removed to federal court." Focusing on the language of the nonjoinder statute, the Fourth District quashed the trial court's order denying GEICO's Motion to Dismiss. Specifically, the Court held that "the nonjoinder statute permitted GEICO to be joined as a party solely for the purpose of entering final judgment against it," and that "The provision in the nonjoinder statute was not intended to allow a party to inject an insurance bad faith claim into the tort action." Additionally, the Court ruled that allowing the crossclaim for bad faith would violate Florida Rule of Civil Procedure 1.170(g), because the bad faith claim accrued at a different time than the wrongful death claim and Fla.R.C.P. 1.170(g) allows a crossclaim by one party against another of a claim "arising out of the transaction or occurrence that is the subject matter of either the original action or a counterclaim therein."

The Court concluded its opinion by noting, "the trial court departed from the essential requirements of law by denying the insurer's motion to dismiss. A third party bad faith claim against an insurer for failure to settle may not be brought in the underlying tort action but must be raised in a separate cause of action."

Counsel for GEICO's insured has filed a Motion for Rehearing and Certification.

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[1] The great weight of the case law supports the conclusion that "commencement of the action" under §1446(b) occurs when the original complaint is filed and that the addition of a new party or claim does not reset the one-year limitation period.

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