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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

In *Simmons v. State Farm Florida Ins. Co.*, the Fifth District Court of Appeal held that uninsured motorist coverage shall not be stacked based on the amount of vehicles covered by the policy unless a separate premium was paid for each vehicle.

In *Illinois National Ins. Co. v. Bolen*, the Fifth District Court of Appeal held that a bad faith action may not proceed until all appeals relating to the underlying action have been resolved.

In *Citizens Prop. Ins. Co. v. Ashe*, the First District Court of Appeal held that the "other insurance" provision in a wind-only insurance policy was not applicable to insurance covering damages caused by flooding; that the so-called "total loss recovery rule" did not bar a property owner's recovery of an amount of damages from a property owner's wind-only and flood insurers that collectively totaled more than the value of the property; and that evidence of recovery under a flood policy should not be excluded from evidence during a trial regarding coverage for damages resulting from the same incident under a wind-only policy.

In *Harco National Insurance Co. v. Hammond*, the Third District Court of Appeal held that the trial court abused its discretion in finding coverage when the claim was excluded from coverage pursuant to a clear and unambiguous exclusion.

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UPDATES

I. *Simmons v. State Farm Florida Ins. Co*, 55 So. 3d 636 (Fla. 5th DCA 2011).

FACTS AND PROCEDURAL HISTORY

In *Simmons*, the claimant, Nathan Simmons, was severely injured in a car accident. At the time of the accident, Mr. Simmons was insured under a State Farm umbrella policy which provided $5 million liability coverage and $1 million of uninsured motorist ("UM") coverage. The tortfeasor had lower coverage limits, so Mr. Simmon's made a claim against State Farm for declaratory relief.

The umbrella policy provided coverage for four automobiles and three operators. The make and model of the covered automobiles were not listed in the policy. The policy set forth an annual premium separated into two components – one for liability coverage and the second for UM coverage. Mr. Simmon's claimed that the umbrella policy provided $4 million of coverage- $1 million each for each of the four vehicles covered under the policy. State Farm contended that the policy provided only $1 million of UM coverage, and the trial court agreed. This appeal followed.

APPELLATE COURT DECISION

The appellate court narrowed in on the premiums paid for the policy.[1] The court found the ruling in a Fourth District of Florida case similar to the instant action. In that decision, the court ruled that where an individual premium was not paid for each automobile, there would be no stacking of UM benefits.

Here, the policy set forth an annual premium, which was separated into two components: liability coverage and UM coverage. The amount of premium depended on the number of ratable exposures listed in the policy. The ratable exposures were determined by the lesser of the number of vehicles or drivers. Since the policy listed three operators in the exposure section, there were three ratable exposures. The court concluded that the policy issued by State Farm was essentially the same policy issued by *United States Automobile Ass'n v. Roth*, the insurer in the Fourth District Court of Appeal opinion - therefore, concluding that when there is a single premium paid for the coverage – with one component for liability coverage and one for UM coverage - the policy is not a stacking policy by law.

II. *Illinois National Ins. Co. v. Bolen*, 53 So. 3d 388 (Fla. 5th DCA 2010).

FACTS AND PROCEDURAL HISTORY

Ms. Bolen was involved in a motor vehicle accident on May 28, 2005. At that time of the accident, Ms. Bolen was insured under an automobile insurance policy with Illinois National Insurance Company ("INIC') which carried uninsured motorist ("UM")

[1] *See United States Automobile Ass'n v. Roth*, 744 So. 2d 1227 (Fla. 4th DCA 1999).

limits of $25,000. Ms. Bolen filed a complaint against INIC alleging: (1) a claim for UM benefits, and (2) a claim for bad faith for INIC's alleged breach of its fiduciary duty in the handling of the UM claim. INIC filed a motion to dismiss the bad faith count on the grounds that it was premature because there had been no final determination of liability and damages. The trial court abated the count pending a final determination of liability and damages.

Count I proceeded to trial, and a verdict in the amount of $870,366.90 was rendered in favor of Ms. Bolen. INIC filed a timely appeal. Ms. Bolen then sought to dissolve the abatement of her bad faith count, contending her bad faith claim was ripe for prosecution. The trial court granted her request and dissolved the abatement of Ms. Bolen's bad faith count. This appeal followed.

APPELLATE COURT DECISION

The court found that Ms. Bolen's bad faith claim could not proceed until the UM carrier's appeal had been resolved. The court cited case law holding there can be no discovery regarding a bad faith claim until the underlying claim has been completely resolved as to a final determination of liability and damages, and that an underlying claim could not be completely resolved when an appeal was still pending.[2]

III. *Citizens Prop. Ins. Co. v. Ashe,* 50 2d 3d 645 (Fla. 1st DCA. 2011).

FACTS AND PROCEDURAL HISTORY

The residence of Mr. Ashe was completely destroyed by Hurricane Ivan on September 16, 2004. At that time, Mr. Ashe had insured the home with a Citizens wind-only insurance policy with limits of $188,000. Because Citizens' policy expressly excluded flood damage, Mr. Ashe obtained a separate flood insurance policy through National Flood Insurance Program ("NFIP") with policy limits of $225,200.[3] Citizens and NFIP used the same adjuster to inspect the property and determine the cash value of the home and total replacement cost value. The adjuster found the actual cash value of the house was $233,720., and the replacement cost value was $258,716.51. Mr. Ashe received full payment of the NFIP flood insurance policy-- $225,200. Additionally, the adjuster estimated the wind damage at $30,530.32 after deductible. Citizens paid Mr. Ashe $26,770.30. In total, between the two policies, Mr. Ashe was paid $251,970.

Mr. Ashe argued that the home was a total loss because of wind damage and that he was entitled to recover a total loss under his Citizens policy. Citizens disagreed, and Mr. Ashe filed suit.

Florida Statute § 627.702(1) provides that in the event of a total loss of any building caused by a covered peril, the amount of liability for the insurer shall be the

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[2] *XL Specialty Ins. Co. v. Aircraft Holdings, LLC,* 292 So. 2d 1st DCA 2006); citing *Allstate Indemnity Co. v. Ruiz,* 899 So. 2d 1121 (Fla. 2005).

[3] The flood insurance policy was issued through United Service Automobile Association (USAA).

amount of money the property was insured for under the policy and for which a premium was paid. The trial court granted summary judgment for Mr. Ashe on the authority of a Fourth District Court of Appeal case finding that Mr. Ashe was entitled to the payment of the policy limits under the Citizens "wind-only" policy. However, subsequent to the trial court's entry of summary judgment, the case upon which the trial court relied was disapproved.[4] In disapproving the Fourth District's holding, the Florida Supreme Court held that where a total loss is caused by a combination of covered and non-covered perils, the total loss recovery rule does not apply.[5] Based on the Florida Supreme Court's holding on appeal, the trial court's summary judgment was reversed.

On remand, the case was set for trial. Mr. Ashe filed a motion in limine asking the court to exclude any reference to flood insurance coverage or payments made to him. Mr. Ashe argued that the fact that he was paid pursuant to his flood insurance and the amount he was paid was irrelevant and immaterial, and would be highly prejudicial. The trial court granted the motion in limine excluding all references to Mr. Ashe's flood insurance coverage payments.

Thereafter, Citizens filed a motion for summary judgment based upon the total loss recovery rule as applied in other jurisdictions. Under the rule, when an insured had coverage under both flood and wind policies, the insured's recovery is limited to the total amount of flood and wind insurance coverage or the pre-storm value of the structure, whichever is less. Citizens argued that Mr. Ashe had been paid more than the pre-storm value of his house and was therefore not entitled to any further recovery. The trial court denied Citizens' motion.

After the jury was chosen, the court announced its intention to apply the "Other insurance" clause in the Citizen's policy, that provides that if other insurance applies, each policy will pay the proportion of the loss that its limit bears to the total amount of insurance coverage. Based upon the policy limits, the trial court determined that Mr. Ashe would be entitled to recover from Citizens 45 % of the pre-storm value of the house, and entered an order finding that Mr. Ashe was entitled to recover from Citizens $109,729.48, together with prejudgment interest.

APPELLATE COURT DECISION

The appellate court held that the trial court's application of the "Other insurance" provision was erroneous, explaining that other insurance exclusions are only applicable when two or more insurance policies are on the same subject matter, risk and interest, but not applicable when the insured has a "wind" policy and a "flood" policy, each covering a different peril. Because there were two theories advanced – one claim for wind loss and one for flood loss – application of the other insurance provision was erroneous. Thus, no error in denying Citizens' motion for summary judgment.

[4] *Florida Farm Bureau Casualty Insurance Co. v. Cox*, 967 So. 2d 815 (Fla. 2007).
[5] *Id.* at 819.

Although the court determined that its ruling on the "other insurance" was dispositive, the appellate court addressed the remaining issues.

The court agreed with Citizens that the trial court erred in granting Mr. Ashe with limine excluding all evidence of Ashe's demand for flood insurance payments, and said demands resulted in payment of $225,000 in benefits, except as to the amount of benefit received. The court determined that evidence of flood insurance payment received was relevant to the issue of whether flood or wind caused the loss; therefore, the trial court abused its discretion in excluding such evidence.

IV. *Harco National Insurance Co. v. Hammond*, 2011 Fla. App. LEXIS 5558 (Fla. 3d DCA 2011).

FACTS AND PROCEDURAL HISTORY

The Hammonds were involved in a motor vehicle accident when they collided with a freightliner truck driven by Mr. Brito. At the time of the accident, Mr. Brito was an employee of Tiles and Stones, Inc., who leased the freightliner from Gator. Gator had two insurance policies with Harco: a $1 million primary policy and a $20 million umbrella policy.

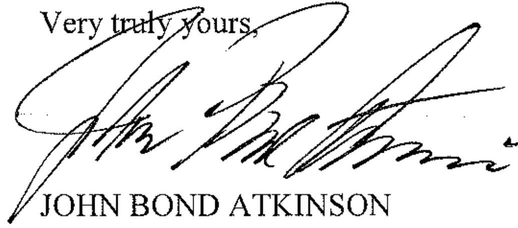
Harco paid out to the Hammonds, the $1 million primary policy limits, acknowledging that Tiles & Stones was covered under its primary policy. Harco, however, denied coverage under its $20 million umbrella policy, contending that it was written only for the protection of its insured, Gator. The trial court disagreed, holding that under the umbrella policy, Tiles & Stones was an insured and that the freightliner driven by Mr. Brito was a covered automobile and, therefore, covered under the policy. Harco's appeal followed.

APPELLATE COURT DECISION

The appellate court reviewed the terms of the umbrella policy and held that an exclusion in the policy precluded coverage. The policy contained an exclusion for "leased autos," which excluded coverage for any "covered auto" while leased or rented. Although the motor vehicle involved in the accident was a "covered auto," the exclusion for leased vehicles eliminated any coverage. The court found that it was undisputed that the vehicle involved in the accident was leased and was being operated by the lessee's driver at the time of the accident. Therefore, the court concluded the claim was excluded from coverage under the umbrella policy. Accordingly, the court reversed and remanded for entry of judgment in favor of Harco.

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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