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Insurance Practice

The Bad Faith Sentinel

Standing guard on developments in the law of insurance bad faith around the country

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Florida Court Holds That Insurer's Claim File, Including Log Notes And Internal Emails, Is Protected By Work Product Protection

State Farm Florida Ins. Co. v. Aloni, No. 4D11-4798, 2012 WL 5933001 (Fla. Ct. App. Nov. 28, 2012)

Florida trial court erred in ordering insurer to produce claim file while coverage was in dispute.

Meir Aloni, as personal representative of Sonja Aloni, sued State Farm to recover for roof damage to a residence allegedly caused by Hurricane Wilma. Mr. Aloni alleged that he discovered damage to the roof around February 26, 2010 and immediately notified State Farm, the insurer for the property. State Farm denied coverage because Aloni did not report the claim until years after Hurricane Wilma swept through South Florida.

In his first request for production, Aloni asked for State Farm's complete claims file. State Farm objected to the request, asserting that the file was protected work product and attorney-client privileged material, and that the request sought proprietary information that was not relevant nor likely to lead to the discovery of admissible evidence. Aloni moved to compel production, arguing that State Farm was improperly withholding documents that were created before the denial of his claim and not in anticipation of litigation. Aloni also argued that work product protection did not attach to those portions of the claim file generated in the ordinary scope of the insurer's business. In response, State Farm argued that whether the policy covered the claim was a disputed issue because Aloni did not report the damage until approximately four and a half years after the hurricane, and that the claims file was not discoverable as long as the coverage issue was still pending. State Farm also relied on an affidavit from its litigation specialist who stated that the log notes were prepared after the insurer received notice of the claim, and that the notes contained personal thoughts, evaluations, mental impressions, and recommendations regarding the claim and the possibility of litigation. The affidavit also stated that State Farm did not intend the notes to be discovered by third parties, only litigation counsel, that the notes were prepared in contemplation of litigation because the late reported claim was a foreseeable basis for litigation, and that the log notes included directives from counsel regarding the handling of litigation.

At a hearing on the motion to compel. Aloni asserted that the activity log notes, internal emails, and photographs were not protected work product. Aloni argued that in this case the possibility of litigation was not substantial and imminent until State Farm learned of the suit. Aloni also contended that the claim file materials were relevant based on State Farm's position that the claim was not timely reported. According to Aloni, this gave rise to a presumption of prejudice that Aloni had to overcome. Following the hearing, the trial court conducted an in camera inspection and granted the motion in part, ordering production of the activity log notes created between the date the claim was made and the date the lawsuit was filed, as well as all photographs and internal emails.

State Farm petitioned for a writ of certiorari seeking review of the trial court's order contending that production of the log notes, photographs and internal emails constituted improper, premature bad faith discovery. The Court of Appeals, citing to Florida precedent, noted that generally an insurer's claim file constitutes work product and is protected from discovery prior to a determination of coverage. Thus, where the issue of coverage is still unresolved at the time of the insurer's objection to the request for discovery, the law requires protection of the documents from discovery unless the moving party can establish that it needs the materials to prepare its case and cannot obtain the materials by any other means. The court ruled that in the instant case, the coverage issue was in fact still in dispute, State Farm had shown that disclosure of the file would result in irreparable harm, and Aloni had not established that he could not obtain the substantial equivalent of the materials from another source. The court therefore held that the trial court erred in ordering production of the claim file.

Southern District Of Mississippi: Insurer Has Right to Deny Life Insurance Benefits Due to Applicant's Material Misrepresentations

Pierce v. United Home Life Insurance Company, No. 3:11CV790TSL-MTP, 2012 WL 5904318 (S.D.Miss. Nov. 26, 2012)

Southern District of Mississippi holds that an insurer can deny life insurance benefits due to an applicant's material misrepresentations, despite the insurer's agent's possible knowledge of the misrepresentations and the insured's possession of a medical authorization that would have discovered the insured's misrepresentations.

On June 17, 2011, Decedent Ricky Pierce ("Pierce") obtained approval for a $75,000 Express Issue Term Plus life insurance policy from United Home Life Insurance Company ("United"). Just four days later, on June 21, 2011, United mailed Pierce the policy. Included in United's mailing was an amendment that Pierce was required to sign (the policy provided by United did not exactly match Pierce's application) and a certification for Pierce to sign confirming that his health remained unchanged since his application was submitted one month prior. Unfortunately, Pierce unexpectedly died that same day, on June 21, 2011.

Roland Pierce ("Roland"), Pierce's son and beneficiary of his policy, filed a claim for benefits. United denied Roland's claim on the basis that (1) the contract never was formed due to Pierce's failure to sign the amendment and certification, and (2) Pierce's material misrepresentations in his application voided the policy. Roland responded by filing a lawsuit against United alleging that United wrongfully and in bad faith denied his claim.

When Pierce applied for insurance on May 26, 2011, he was 5'6", weighed 261 pounds, and was a smoker. However, in his application, Pierce stated that he was 5'9", weighed 205 pounds, and that he had not consumed tobacco products in the previous twelve months.

Mississippi law allows an insurer to void or rescind an insurance policy if an insurance application (1) contains false, mis-

leading, or incomplete information, (2) the misrepresentation is material to the insured's risk, and (3) the insurer proves factors one and two "by clear and convincing evidence."

Roland first argued that United was precluded from making a misrepresentation argument because United's agent met with Pierce and completed Pierce's application, and that therefore United was not misled (at least with respect to Pierce's height and weight). Under Mississippi case law, an insurer is entitled to rely upon an insured's application, even if its agent completes the application, so long as the agent completed the application at the insured's direction. An exception to this rule is that an insurer cannot void a policy if the agent suggests or advises an applicant how to answer the questions.

Here, where there was no allegation of improper conduct by the agent, United was entitled to void the policy. The Court further noted that it would be an unreasonable burden for the agent to disregard an applicant's height and weight answers and instead force the agent to rely on his or her own judgment in filling out the application. Further, the Court concluded that the agent could not have known if Pierce was a smoker, and that a smoking misrepresentation alone would be sufficient to void the policy.

Roland also took the position that United should be estopped from asserting a misrepresentation defense because Pierce provided United with a medical authorization during the application process. Roland thus argued that United should not be able to rely on its misrepresentation defense because it could have discovered Pierce's misrepresentations by obtaining and reviewing his medical records. The Court rejected Roland's argument. Instead, it found that United only had a duty to inquire into Pierce's medical history if something in the application provided United with notice that further inquiry should be required. Because there was no evidence that United was on such notice, United was entitled to rely on his application alone, and it was under no duty to cross-check Pierce's application with his medical records prior to issuing the policy.

Florida's Fourth District Court of Appeal: Bad Faith Claim is Viable where Insurer Could Have Made Settlement Offer to Insured in Coma

Goheagan v. American Vehicle Insurance Company, No. 4D10-3781, 2012 WL 6027809 (Fla. Dist. Ct. App. Dec. 5, 2012)

In June 2012, the Bad Faith Sentinel reported the decision by Florida's Fourth District Court of Appeal to grant insurer's motion for summary judgment on Plaintiff's bad faith claim. However, upon Plaintiff's motion for rehearing, the Court determined that summary judgment was not appropriate where issues of fact remained as to whether the insurer could have made a written offer or tender of settlement to its insured, who was in a coma.

On February 24, 2007, John Perkins was driving at a high rate of speed with a blood alcohol of 0.19 when he rear-ended a car being driven by Molly Swaby. As a result of the accident, Swaby was hospitalized in a coma until she died on May 12, 2007. Perkins was insured under a motor vehicle policy issued by American Vehicle Insurance Company ("AVIC") that provided for bodily injury liability coverage in the amount of $10,000 per person and $20,000 per accident.

Two days following the accident, Perkins reported the accident to AVIC and the claim was assigned to Lee Ann Grieser, who notified Perkins of his policy limits. Within a few days, Grieser concluded that the claim should be settled and on February 28, 2007, Grieser attempted to contact Swaby's mother Olive Goheagan to discuss settlement of the claim for the policy limits. Grieser was advised by Swaby's stepfather that Goheagan had retained an attorney. Grieser subsequently made several attempts to reach Goheagan to obtain her attorney's contact information, but Goheagan never provided Grieser with her attorney's information.

On April 19, 2007, Grieser learned that a suit had been filed against Perkins. Thereafter AVIC attempted to tender its policy limits, but the offer was rejected by Goheagan. The case

went to trial and on January 20, 2009 and a jury awarded Goheagan, as personal representative of the Estate of Swaby, nearly $2.8 million.

Goheagan then filed suit against AVIC alleging breach of the duty of good faith with regard to the interests of Perkins by failing to initiate settlement negotiations with Swaby, failing to actually tender the policy limits in a timely manner, and failing to warn Perkins of the possibility of judgment in excess of the policy limits. AVIC moved for summary judgment, asserting that it was prevented from entering into settlement negotiations or consummating a settlement because: (1) Swaby was in a coma and there was no one to whom it could make the offer; and (2) because AVIC was aware that a lawyer was involved, Florida Administrative Code Rule 69B-220.201 prohibited it from communicating or negotiating a settlement with Swaby or Goheagan. In opposition, Goheagan filed the affidavit and deposition of Mark Lemke, an expert witness on insurance claim handling, who stated that AVIC breached its duty of good faith by failing to immediately tender the policy limits.

The trial court granted AVIC's motion for summary judgment and this ruling was upheld by Florida's Fourth District Court of Appeal. Goheagan thereafter moved for a rehearing, which was granted.

On rehearing, Goheagan argued that there remained genuine issues of material fact as to whether her retention of an attorney was an impediment to communication of a settlement offer and whether the fact that Swaby was in a coma prevented any possible settlement such that there was no point in making the offer or tender. The Fourth District agreed with Goheagan and found that the court had erred in granting summary judgment based on its assumption that there could be no bad faith because Swaby was in a coma and therefore there was no one to whom to make an offer. The Fourth District also noted that it found no case law support for AVIC's argument that it could not have at least made a written offer and/or tender to Swaby through her mother and that the retention of an attorney precluded an offer. Moreover, because of the clear liability, a jury could decide there was not much to negotiate and the representation by an attorney would not have been an impediment to at least make an offer to settle. Accordingly, the Fourth District reversed the grant of summary judgment and remanded the case to the trial court.

Northern District of California Rejects Insured's Argument that Insurer Acted in Bad Faith in Denying Coverage for Loss Caused by Marijuana Grow Operation

Huynh v. Safeco Ins. Co. of America, No. 12-01574-PSG, 2012 WL 5893482 (N.D. Cal. Nov. 23, 2012)

The insured argued that the insurer acted in bad faith in applying a policy exclusion that excluded loss from illegal growing of plants because California permitted growing marijuana; however, the Northern District of California found that the code section relied upon by the insured only allowed the use and possession of marijuana and therefore, the insurer properly applied the exclusion and the bad faith claim could not be maintained.

Safeco Insurance Company of America ("Safeco") issued a Landlord Protection insurance policy to Anh Hung Huynh for a residential rental property located in San Jose, California that Huynh rented out to a tenant. On December 24, 2011, the police department received a report that the driver of a Toyota Camry was striking a passenger who was trying to escape. The responding officers found the Camry parked in the driveway of Huynh's rental property and forced their way into the residence by breaking a rear patio sliding glass door. Once inside, the officers found marijuana plants and cultivation equipment. Huynh's tenant and other individuals at the residence were arrested and charged with violations of California Health & Safety Code.

On January 5, 2012, Huynh went to the property to collect the rent and discovered the broken sliding glass door as well as

damage inside the house. The following day, Huynh notified Safeco of the damage to the residence – specifically, Huynh described holes in the wall, debris, water damage and damage to the kitchen. Safeco's adjuster, John Barch, walked the property, making notes and taking photographs of the damage. Barch determined that although some damage had been caused by the officers' forced entry, the majority of the damage was caused by the marijuana grow operation.

On January 30, 2012, Safeco sent Huynh a letter explaining that only the loss caused by the officers' entry was covered and that Safeco would issue a check for that loss. Safeco denied coverage for loss caused by the growing of marijuana because of a policy exclusion that excluded coverage for loss from an "illegal manufacturing, production or operation," the definition of which included the illegal growing of plants, whether or not it was within the knowledge or control of the insured.

Huynh's counsel sent Safeco a letter disputing its coverage determination and asserted that the exclusion was invalid because, among other reasons, the growing of marijuana was legal in California. On February 29, 2012, Safeco affirmed its partial denial of Huynh's claim with respect to damages related to the growing of marijuana. Huynh filed suit alleging breach of contract and breach of the implied covenant of good faith and fair dealing. Safeco sought summary judgment, arguing that it properly denied Huynh's claim for loss attributable to the marijuana grow operation. Huynh maintained that the exclusion relied upon by Safeco was invalid because California permitted the growing of marijuana under California Health & Safety Code § 11362.765.

The panel found that the code section relied upon by Huynh had no application to the present case. California Health & Safety Code § 11362.765 provided that certain individuals, such as qualified patients or their caregivers, are not subject to criminal liability for possession or transportation of marijuana. However, there was no suggestion in the record that Huynh's tenant fell within the scope of § 11362.765. Instead, the record reflected that Huynh's tenant was arrested and charged with violations of California Health & Safety Code §§ 11358 (cultivation of marijuana) and 11359 (possession of marijuana for sale). Accordingly, the Court found that the grow operation was illegal and that Safeco properly applied the exclusion to deny coverage. Moreover, the Court found that Huynh's bad faith claim could not be maintained because no policy benefits were due and because Safeco established that it had properly denied coverage for the loss.

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