PLUNKETT COONEY

Assignment of Benefits, Duty to Defend, Adjuster Malpractice Coverage Update

September 17, 2018
Florida, Pennsylvania, Kentucky Coverage Update
The e-POST

Assignment of Benefits – Florida

Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co.
--- So. 3d ---, 2018 WL 4211750 (Fla. Dist. Ct. App. Sept. 5, 2018)

In a decision that could have a lasting impact on first-party claims in Florida, the Fourth District Court of Appeals (Fourth District) found that a homeowner, under a first-party property policy, may not be able to assign the benefits of the policy without the consent of all insureds and mortgagees. The Fourth District acknowledged that its decision might create a conflict within the state, specifically with the U.S. Court of Appeals for the Fifth District (Fifth District).

Ark Royal Insurance Co. (Ark Royal) issued a homeowners policy, which contained an assignment of benefits clause stating that any assignment must have "the written consent of all 'insureds,' all additional insureds, and all mortgagee(s) named in this policy." After the home suffered water damage, one of the homeowners hired Restoration 1 of Port St. Lucie (Restoration 1) to perform cleanup work and, as part of the contract, assigned the benefits under the Ark Royal policy without obtaining the consent of another insured and the mortgagee. Ark Royal denied benefits under the policy because the homeowner did not comply with the assignment provision.

The Fourth District found that the policy was not ambiguous and allowed for other insureds and the mortgagee, both of which have "a vested interest that a reputable, legitimate third-party contractor perform repairs on the home," to have the opportunity to consent. Restoration 1 argued that the condition created a restriction that Florida law had already rejected: that an insurer could not require an insured to obtain the insurer's consent before assigning the insured's benefits. The Fourth District disagreed, saying that while an insurer has no vested interest in where the benefits are paid, other insureds and mortgagees have a vested interest in the property and should have a say. The Fourth District acknowledged that its ruling conflicts with a prior ruling of the Fifth District (*Security First Ins. Co. v. Florida Office of Insurance Regulation*) which rejected the insurer's request to add a similar provision to its policy under the common-law rule. The Fourth District disagreed with the Fifth District's finding, saying that it ignored the fact that the common-law rule applies with respect to the insurer's

consent, not that of other insureds or mortgagees. As the Fourth District acknowledged, the issue is one that will ultimately need to be addressed either by the Florida Supreme Court or the state Legislature.

Duty to Defend – Third Circuit (Pennsylvania Law)

Lupu v. Loan City, LLC
--- F.3d ---, 2018 WL 4290048 (3d Cir. Sept. 10, 2018)

The U.S. Court of Appeals for the Third Circuit ruled that the "in for one, in for all" rule – whereby a single-covered claim triggers an obligation for the insurer to defend the entire action – does not apply to cases involving title insurance policies in Pennsylvania. In the underlying action, Adrian Lupu (Lupu), a former Pennsylvania homeowner alleged that: (1) the use of MERS – a private mortgage registry that allows its members to avoid the need for county-level public recordation when transferring mortgage interests – violates Pennsylvania's recording laws and (2) because MERS is merely an electronic recording system, it's unrecorded mortgage loan assignments were improper and, therefore, broke the chain of title to the property at issue. Lupu's fourth amended complaint made the additional claim that Loan City, LLC (Loan City), the original mortgage holder, created, notarized and recorded forged mortgage documents. Ocwen Loan Servicing, LLC (Ocwen), the current mortgage holder, sought defense coverage under the title insurance policy issued by Stewart Title Guaranty Company (Stewart Title) for the claims made by Lupu. The policy stated that Stewart Title only had the duty to defend covered claims.

The trial court applied the "four corners" rule – whereby an insurer's duty to defend can be triggered only by an allegation within the four corners of the complaint – and held that Stewart Title's duty to defend did not arise until the filing of the fourth amended complaint, which contained the covered forgery allegation. However, the trial court also applied the "in for one, in for all" rule to hold that because Stewart Title was obligated to defend against the forgery claim, it was obligated to defend against all claims contained in the fourth amended complaint. On appeal, the appellate court ruled in favor of Stewart Title. The appellate court first affirmed the trial court's strict application of the "four corners" rule under Pennsylvania law, but then created an exception to the "in for one, in for all" rule to hold that Stewart Title, as a title insurance carrier, was only obligated to defend covered claims. In creating the exception, the appellate court highlighted the plain language of the policy disclaiming the duty to defend non-covered claims, and noted that "title issues are discreet, [and] they can be bifurcated fairly easily from related claims." The appellate court further stated that "[g]iven the relatively modest title insurance premium, if we force Stewart Title to cover more than it promised, Ocwen will receive a windfall."

Adjuster Malpractice – Fifth Circuit (Kentucky Law)

Bloom v. Aftermath Pub. Adjusters, Inc.
--- F.3d ---, 2018 WL 4203601 (5th Cir. Sept. 4, 2018)

The U.S. Court of Appeals for the Fifth Circuit held that a Texas rule suspending the statute of limitations for filing legal malpractice claims did not extend to actions against public insurance adjusters. After Hurricane Ike damaged the insured's home, she filed a claim under her flood insurance policy with Fidelity National Property and Casualty Co. (Fidelity). The insured was dissatisfied with Fidelity's damage assessment and retained Aftermath Public Adjusters, Inc. (Aftermath) to perform a second examination.

Aftermath prepared a proof of loss and repair estimate calling for more than $93,500 in additional coverage. Fidelity denied the claim because Aftermath had not timely submitted the proof of loss and estimate. The insured sued Fidelity over the claim denial, but Fidelity prevailed on summary judgment. Two years later, she sued Aftermath and its adjuster, alleging professional negligence and breach of contract based on Aftermath's failure to timely submit a proof of loss, and arguing that insurance adjusters are essentially "lawyers in disguise," so malpractice claims against them could be tolled under a state rule. The trial court disagreed and dismissed the suit, concluding that it was untimely because the insured did not file it until more than seven years after Fidelity denied her claim, well beyond Texas's two-year statute of limitations for negligence claims and a four-year deadline for breach of contract claims.

The appellate court affirmed, noting the Texas Supreme Court had held on several occasions that the tolling rule set forth in *Hughes v. Mahoney & Higgins Hughes*, 821 S.W.2d 154 (Tex. 1991), which "suspends the statute of limitations on legal malpractice claims until the completion of the litigation" giving rise to the claims, is only meant to apply to malpractice claims against lawyers. "Even assuming Texas law previously classified public adjusting as legal practice, under the relevant regime, these defendants are non-lawyers who were not engaged in legal practice." The appellate court panel pointed out that the Texas justices have issued several opinions, including in the case of *Murphy v. Campbell*, 964 S.W.2d 265 (Tex. 1997), regarding accounting malpractice, expressing the intent to limit the rule to legal malpractice claims.

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