



# Insurance

## Case Law & Insurance Regulation Update

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**Week Ending April 12, 2013**

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### I. STATE APPELLATE DECISIONS

#### A. FLORIDA

- ***Benniefield v. City of Lakeland and Claims Center (Fla. 1<sup>st</sup> DCA)***. Workers' compensation. Judge of Compensation Claims (JCC) erred in denying claim for permanent total disability (PTD) benefits. Claimant sustained a compensable back injury and was determined to have reached maximum medical improvement (MMI) in January 2009, by his authorized treating provider. Claimant filed a petition for benefits (PFB) seeking PTD benefits from January 2009. Subsequently, in 2012, claimant fell when his walking cane collapsed. Claimant's treating physician testified that claimant's fall had not changed his opinion on the date of MMI, it was too soon to determine whether the fall had exacerbated the compensable injury, and further tests might indicate that additional surgery may improve claimant's condition. The employer /carrier asserted and the JCC found that, because claimant's current status, restrictions, and future treatment were uncertain, claimant's claim for PTD benefits was premature. The appeals court reversed, concluding that once a claimant has reached MMI, the claimant may be considered to be entitled to PTD benefits for continuing disability even if the claimant will likely become a candidate for additional remedial treatment in the future.
- ***Citizens Property Insurance Corporation v. River Manor Condominium Association, Inc. (Fla. 4<sup>th</sup> DCA)***. Property insurance, condominium associations; coverage; appraisal; statutory construction. Section 718.111(11), Fla. Stat., which specifies, among other things, that a condominium association is to use best efforts to procure certain insurance coverage is intended

to regulate condominium associations, and not intended to specify mandatory insurance obligation upon carriers. Therefore, subsection 718.111(11)(b), Fla. Stat. did not require the carrier to offer coverage listed therein under policy's "conformance clause," which provided that terms of the policy in conflict with the statutes of Florida are amended to conform to such statutes. The appellate court also held that the trial court should have entertained the insurer's defense to an appraisal award based on the insurer's contention that the parties reached a pre-appraisal agreement that settled the amount due for certain contested items. Although that defense did not raise a coverage issue and did not challenge the amount of the loss determined by the appraisers, it was in the nature of an accord and satisfaction, is a defense to the appraisal award that should have been entertained by the trial court.

- **GEICO General Insurance Company v. Williams (Fla. 4<sup>th</sup> DCA)**. Liability insurance; timeliness of moving to add insurer as party to suit against the insured. After verdict and judgment against the insured, in which the trial court reserved jurisdiction to decide issues of attorney's fees and costs, the prevailing plaintiff later sought to join the insurer under section 627.4136(4), Fla. Stat., which provides that "[a]t the time a judgment is entered or a settlement is reached during the pendency of litigation, a liability insurer may be joined as a party defendant for the purposes of entering final judgment," and then obtained a judgment for fees and costs against the insurer. The insurer asserted that the motion to join it was untimely, since made long after entry of the original judgment. The appellate court rejected the insurer's position, and held the motion for joinder to be timely. The appellate court held that issues regarding attorneys' fees are considered collateral to the main dispute. Because attorney's fees are collateral to the main dispute, and the fee issue is not finally resolved or ripe for appellate review until both entitlement and amount are determined, the insurer's argument that the date of the final judgment in the main dispute should be used to calculate time was without merit.
- **Tome v. State Farm Fire and Casualty Company (Fla. 4<sup>th</sup> DCA)**. Motor vehicle insurance; nonrenewal of policy; summary judgment. Insurer sent notice of non-renewal of policies before theft of vehicle. Policyholder sued, claiming breach of contract and coverage by promissory estoppel, based on insurer's pre-nonrenewal communication regarding exclusion of husband due to suspension of his driver's license. The appellate court affirmed summary judgment for the insurer, holding that there were no genuine issues of material fact as to whether provided proper nonrenewal notice was given under section 627.728(5), Fla. Stat.; that the policies were nonrenewed for the legitimate reason that husband's driver's license was suspended and therefore were not arbitrarily or capriciously nonrenewed; and, that the insurer's pre-nonrenewal communication regarding exclusion of her husband did not constitute a definite promise of coverage as to terms and time and therefore did not support a promissory estoppel claim as a matter of law.

## **B. GEORGIA**

- No Georgia state appellate cases reported.

## **II. FEDERAL APPELLATE DECISIONS**

- **ABCO Premium Finance Company v. American International Group, Inc. et al. (11<sup>th</sup> Cir. Fla.)**. Financial loss coverage. Summary judgment in favor of insurers on insured's claim of coverage for financial loss sustained due to agent's fraud affirmed on appeal. No coverage for the loss existed under a retroactive date policy rider which required that "[a]ll acts or omissions causing or contributing to [the] 'single loss . . . occur after the Retroactive Date' and that the 'Single Loss . . . [be] sustained in its entirety after the Retroactive Date.'" The undisputed evidence showed that some acts causing the loss occurred before the retroactive date.
- **New Hampshire Insurance Company v. Hill, et al. (11<sup>th</sup> Cir. Ala. - applying Florida law.)** E&O insurance. Summary judgment for the insurer affirmed. In coverage declaratory judgment action brought by insurer, the 11<sup>th</sup> Circuit held the insurer had no duty to defend or to indemnify its insured, a seller of recreational vehicles, against customers' claims of bodily injury and property damage allegedly caused by the insured's failure to discharge contractual obligations to the insured's customers to pay off loan balances on used RVs the customers traded in to

purchase new RVs from the insured. Applying Florida law, the court held the customers did not suffer "bodily injury" because the pecuniary loss and damage to credit worthiness alleged by the customers do not constitute physical injuries and Florida's "impact rule" bars the customers' claims of mental anguish. Property damage alleged by the customers is excluded by policy exclusions precluding coverage for damage to property in the 'insured's' care, custody, or control and damages for loss of use caused by the insured's failure to perform its contracts with the customers.

### III. ADMINISTRATIVE LAW/AGENCY DECISIONS

#### A. FLORIDA

- No Florida agency decisions reported.

#### B. GEORGIA

- No Georgia agency decisions reported.

### IV. NOTICES OF ADMINISTRATIVE RULEMAKING PROCEEDINGS

#### A. FLORIDA

- ***Rule 69B-220.051, F.A.C. - Conduct of Public Adjusters and Public Adjuster Apprentices.*** The proposed changes to Rule 69B-220.051 clarify the responsibilities and requirements of public adjusters and public adjuster apprentices, define the terms "direct supervision" and "adjusting services," specify the terms and conditions of contracts, require the license number on advertisements, delete provisions that reiterate or paraphrase statutory materials, and prescribe practices to ensure fair dealing between public adjusters and claimants. If requested in writing, a rule hearing will be held on **May 9, 2013**, 10:30 a.m., Room 116 of the J. Edwin Larson Building, 200 E. Gaines Street, Tallahassee, FL. Contact person regarding the proposed rule is Barry Lanier, Florida Department of Financial Services, Division of Agent & Agency Services, (850) 413-5601 or [Barry.Lanier@MyFloridaCFO.com](mailto:Barry.Lanier@MyFloridaCFO.com).
- ***Rules 69J-8.001, 69J-8.002, 69J-8.003, 69J-8.004, 69J-8.005, 69J-8.006, 69J-8.007, 69J-8.008, 69J-8.009, 69J-8.010, and 69J-8.011, F.A.C. - Definitions, Neutral Evaluator Coarse Approval; Qualification and Certification of Neutral Evaluators; Maintenance of a List of Neutral Evaluators; Notice of Program; Request for Evaluation; Selection of Neutral Evaluator; Evaluation Process; Appointment of Department Employee for Consultation for Policyholder Not Represented by an Attorney; Neutral Evaluator's Report.*** The Florida Department of Financial Services (DFS) held a rule development workshop on April 9, 2013 to amend Rule Chapter 69J-8, F.A.C., Alternative Procedures for Resolution of Disputed Sinkhole Claims. The DFS will continue to accept written comments on the proposed rulemaking until **5:00 p.m. on April 23, 2013**. Comments or requests for a draft of the rule may be submitted to Tasha Carter at (850) 413-5800 or [Tasha.Carter@myfloridacfo.com](mailto:Tasha.Carter@myfloridacfo.com).

#### B. GEORGIA

- No Georgia rulemaking proceedings reported.

### V. MEETING NOTICES OF INTEREST/MISCELLANEOUS

- ***Florida Automobile Joint Underwriting (FAJUA) Association Meetings.*** **April 22, 2013**, 2:00 p.m. - Producer Review Committee; 3:00 p.m. - Ad hoc Vendor Review Committee; 4:00 p.m. - Audit/Finance/Budget Committee; **April 23, 2013** - Annual/Board of Governors Meeting, 8:30 a.m., Intercontinental Tampa Hotel, 4860 West Kennedy Boulevard, Tampa, FL. Matters to be considered at the meetings: Producer Review Committee: Discuss procedures and duties of the Committee and any other matters that may come before the Committee. Ad hoc Vendor Review Committee: Discuss Vendor RFPs and any other matters that may come before the Committee. Audit/Finance/Budget Committee: Review and discuss matters relating to FAJUA Financial/Audit Reporting and any other matters that may come before the committee. Annual Meeting of the

Members: Approve Annual Meeting minutes of April 24, 2012; receive Association's annual report; elect member company members and consider any other matters that may come before the Members. Board of Governors Meeting: Receive reports of the general manager, committees, and counsel; to consider and take actions based on those reports; and consider any other matters that may come before the Board. A copy of the agenda may be obtained by contacting Lisa Stoutamire at (850) 681-2003 or [lstoutamire@fajua.org](mailto:lstoutamire@fajua.org).

- **Florida Surplus Lines Service Office (FSLSO) System Unavailability.** All FSLSO systems will be offline and unavailable beginning **Friday, April 12 at 6:00 P.M. EST until Monday, April 15, at 8:00 A.M. EST** for the performance of routine system maintenance. During this time, the FSLSO's website filing platforms, which are used by surplus lines agents and insurers to file Florida surplus lines policy data, will be unavailable. Upon completion of this upgrade, all FSLSO systems will be back online. Should the FSLSO encounter any issues, it will send notification to customers advising them of system availability.
- **Georgia Insurance Commissioner Hudgens Appointed Receiver of Southern Casualty Insurance Company in Receivership.** Commissioner Hudgens has issued a **Notice of Receivership** outlining important procedures concerning notice of cancellation of coverage, claims procedures, and filing proof of loss. **Proof of Claim** forms must be properly completed, mailed, and postmarked no later than **September 17, 2013**.



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