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Client Update

Property and Casualty Sub-Group of Insurance Practice Group

Nicole M. Nowlin
Cosgrave Vergeer Kester LLP
Portland, Oregon
503.276.6082
nnowlin@cosgravelaw.com

Jhanelle A. Graham
Semmes, Bowen & Semmes
Baltimore, MD

jgraham@semmes.com

David W. Prasifka
Lorance & Thompson
Houston, Texas
713.868.5560
dwp@lorancethompson.com

William K. McVisk
Johnson & Bell LTD
Chicago, Illinois
312.372.0770
mcviskw@jbltd.com

James N. Hurley
Fowler White Burnett, P.A.
Miami, Florida
305.789.9218
JHurley@fowler-white.com

Robert L. Hebb
Co-Chair, Property & Casualty Subgroup
Semmes, Bowen & Semmes
Baltimore, Maryland
(410) 576-4862
RHebb@semmes.com

James H. Johansen
Co-Chair, Property & Casualty Subgroup
Butt Thornton & Baehr, PC
Albuquerque, New Mexico
(505) 884-0777
jhjohansen@btblaw.com

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Edited by James N. Hurley
Fowler White Burnett, P.A.
Miami, Florida
JHurley@fowler-white.com

Leaving Alleged Defamatory Material On The Internet Likely Does Not Trigger Coverage Under Later Insurance Policies

Social media, blogs, and websites have transformed the way people receive and transmit news and opinions. However, these forums also provide opportunities for people and organizations to post statements that defame another person or entity – statements which may remain on the Internet for years to come, or which may be re-posted on different websites, "shared" on Facebook, or "retweeted" on Twitter.

The question becomes, then, whether leaving an allegedly defamatory statement on the Internet or re-posting the statement constitutes a republication, thus, triggering coverage under later policies.

Under standard CGL and homeowner policies, "personal injury" refers to injury, of whatever kind, mental or physical, arising from certain offenses. Those offenses include libel, slander, and defamation of character.

Furthermore, the act resulting in the "personal injury" – i.e., the alleged defamatory statement – must take place during the policy period. But what happens, for example, when an insured posts an alleged defamatory statement on a website before the policy incepts, but the material is accessed by others during the policy period?

While no court has analyzed these exact facts in the context of insurance coverage, insurance industry professionals and insurance coverage attorneys can look to recent decisions in the Ninth and Seventh Circuits *regarding the "republication" of Internet-based defamatory statements for guidance on this issue.*

Yeager v. Bowlin

In *Yeager v. Bowlin,* 693 F.3d 1076 (9th Cir. 2012), cert den., __ US __, 133 S. Ct. 2026, 185 L. Ed. 2d 886 (2013), the Ninth Circuit, applying California law, held that leaving a statement on a website unchanged did not qualify as republication.

Plaintiffs, retired General Charles E. "Chuck" Yeager and his foundation, sued defendants for posting statements on its website in October 2003, which, according to Yeager, violated his common law right to privacy and California's statutory right to publicity, Ca. Civ. Code § 3344. Both claims were subject to a two-year statute of limitations.

There was no evidence in the record that defendants added any information about Yeager on their website after October 2003. However, Yeager argued that the website was republished, and the statute of limitations restarted, each time the defendants added to or revised content on their website, even if the new content did not reference or depict Yeager.

The district court, applying the "single-publication" rule limiting tort claims premised on mass communications to a single cause of action that accrues upon the first publication of the communication, determined that the statute of limitations accrued in October 2003, and dismissed these two claims as untimely. Yeager appealed.

In addressing whether the single-publication rule applies to postings on the Internet, the Ninth Circuit noted that "applying the single-integrated-publication test to nontraditional publications can be tricky" because one of the general rules for single-publication is that a statement is republished when it is repeated or recirculated to a new audience.

On the other hand, under California's single-publication rule, once a defendant publishes a statement on a website, the defendant does not republish the statement by simply continuing to host the website. The Ninth Circuit, however, rejected Yeager's argument and affirmed the district court's decision, holding that, under California law, a statement on a website is not republished unless the "statement itself is substantially altered or added to" or "the website is directed to a new audience."

The court also found that the statements regarding Yeager were not "republished" simply because the defendants edited other parts of their website and left the statements alone. Therefore, continually hosting alleged defamatory statements on a website does not make them "republished." *See also Shepard v. TheHuffingtonPost.com, Inc., 509 Fed.Appx. 556 (8th Cir. 2013)* (applying Minnesota law and adopting the single-publication rule for Internet posts set forth in *Yeager*).

Pippin v. NBCUniversal Media, LLC

In *Pippin v. NBCUniversal Media, LLC, 2013* WL 4450590 (C.A.7 (Ill.)), the Seventh Circuit affirmed the Northern District of Illinois' dismissal of former basketball

player Scottie Pippin's defamation lawsuit against several media and Internet companies and held that the passive maintenance of a website is not a republication.

Despite winning six championship rings with the Chicago Bulls, Pippin lost a large portion of the fortune he amassed during his playing days due to bad business decisions. The media caught wind of Pippin's struggles, and several news organization defendants reported on-line that he had filed for bankruptcy when, in fact, he had not.

The defendants also failed to remove the statements from their websites once they learned they were false. Pippin sued the defendants, contending that he was defamed and cast in a false light. Pippin also argued that every day that an unaltered defamatory statement remains online after a publisher learns of its falsity constitutes an actionable republication.

The district court dismissed the complaint concluding that the falsehoods did not fit within any of the categories of statements recognized by Illinois law, and because, as a public figure, Pippin must allege that the defendants acted with actual malice, which he failed to do.

The Seventh Circuit affirmed the district court's decision. In doing so, it held that actual malice cannot be inferred from a publisher's failure to retract a statement once it learns it to be false. It also held that if presented with the opportunity, the Supreme Court of Illinois would reach the same conclusion that many other state and federal courts have reached: the single-publication rule applies to alleged defamatory statements posted on the Internet. As the court explained: "The theme of these decisions is that excluding the Internet from the single-publication rule would eviscerate the statute of limitations and expose on-line publishers to potentially limitless liability."

Practice Point

Under *Yeager* and *Pippin, l*eaving an allegedly defamatory statement on an Internet website does not constitute republication of the statement, even if the publisher later learns that the statement is false and does not remove it from the website. However, if the statement is substantially altered or added to, or if the information is later posted to a new audience (e.g., the statement is re-posted on a different website), this may qualify as a "republication" and, thus trigger "personal injury" coverage under a later policy.

Nicole M. Nowlin
Cosgrave Vergeer Kester LLP
Portland, Oregon
nnowlin@cosgravelaw.com

What Law Should A Court Apply When The Jurisdiction With Most Significant Contacts Has Not Addressed The Issue?

While most insurance coverage law evolves slowly, with incremental advances based on case-specific facts, in some situations new causes of action are created which require courts to decide the application of insurance policies in ways that were clearly not contemplated by either party to the insurance contract.

For example, in the 1980s, courts were confronted with the question of whether CGL policies covered their insureds' liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), with some courts deciding that there was coverage and others deciding that there was no coverage.

More recently, courts have been faced with the question of whether CGL policies apply to junk fax cases under the Telephone Consumer Protection Act ("TCPA"), 47 USC § 227. *Compare, Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 363, 860 N.E.2d 307 (2006) (TCPA damages are covered as publication of material which violates the right of privacy under personal and advertising injury coverage of CGL policy); *Resource Bankshares Corp. v. St. Paul Mercury Insurance Company,* 407 F.3d 631 (4th Cir. 2005) (no coverage for TCPA damages under either property damage or personal and advertising injury provisions of CGL policy under Virginia law).

In these situations, the choice of which law is applied will be more important in determining coverage than the facts of the underlying case or the provisions of the policy.

Most states have developed rules related to choice of law in insurance coverage questions. For example, in Illinois, "insurance policy provisions are generally 'governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act to give rise to a valid contract, the place of performance, or other place bearing a rational relationship to the general contract.'" *Lapham-Hickey Steel*

Corp. v. Protection Mut. Ins. Co., 166 Ill. 2d 520, 526-27, 655 N.E.2d 842 (1995). In Tennessee, the court will apply the law of the state where the policy was "made and delivered." *Charles Hampton's A-1 Signs, Inc. v. Am. States Ins. Co.*, 225 S.W.3d 482, 485 n.1 (Tenn. Ct. App. 2006). Under Arizona law, the court will look to the location of the insured risk to determine choice of law. *Beckler v. State Farm Mut. Auto. Ins. Co.*, 987 P.2d 768 (Ariz. App. 1999).

Of course, the first question in any choice of law analysis is whether there is a conflict between the law of the forum state and the law of another interested jurisdiction. If there is no conflict, then there is no need to decide which law to apply.

What should a court do, though, when the forum state's law is clear but controversial, while the courts of another interested state have not yet decided the issue? This question was addressed recently by two Illinois appellate courts, which came to opposite conclusions.

In *Pekin Ins. Co. v. XData Solutions, Inc.*, 2011 IL App (1st) 102769, 958 N.E.2d 397 (Ill.App. 1st Dist. 2011),the insured, an Indiana corporation, faced a class action suit in Illinois for violations of the TCPA. The insured and the plaintiffs settled for $1,975,000, with an agreement that the settlement would be paid solely from the proceeds of the insured's CGL policy with Pekin Insurance Company.

Under Illinois law, there was clearly coverage under the CGL policy, as the Illinois Supreme Court had decided in *Valley Forge.* Pekin argued, however, that Indiana law, rather than Illinois law, should be applied, since the insured was an Indiana corporation. Pekin further argued that under Indiana law, there would be no coverage for the TCPA damages, based on two federal district court decisions, *Ace Mortgage Funding, Inc. v. Travelers Indem. Co. of America,* No. 1:05-cv-1631-DFH-TAB, 2008 U.S.Dist. Lexis 18696 (S.D. Ind. 2008) and *Erie Ins. Exchange v. Kevin T. Watts, Inc.*, No. 1:05-cv-867-JDT-TAB, 2006 U.S. Dist. Lexis 35828 (S.D. Ind. 2006), which had ruled that under Indiana law, there was no coverage for TCPA claims under the advertising injury coverage of a CGL policy.

The court rejected Pekin's argument, concluding that since there were no Indiana state court decisions on the issue of coverage of TCPA claims, "there can be no conflict with Illinois law." 2011 IL App (1st) 102769 at ¶21.

The court stated that the two federal court decisions Pekin relied upon were merely attempting to "predict" Indiana law because there had been no state court decisions on the issue, so the court could not conclude that the federal cases represented Indiana state law. In the absence of Indiana state court precedent, the court saw no reason to conclude that Indiana law conflicted with Illinois law.

Two years later, another panel of the same Illinois appellate court district was faced with this issue, and declined to follow Pekin. *Bridgeview Health Care Center, Ltd. v. State Farm Fire and Casualty Co.*, 2013 IL App (1st) 121920, 2013 Ill.App. Lexis 409 (Ill. App. 1st Dist. 6/19/2013).

In *Bridgeview*, the plaintiff filed suit against State Farm's insured for sending unsolicited faxes in violation of the TCPA. Bridgeview later filed an action against State Farm, which insured the defendant, arguing that State Farm had a duty to defend the TCPA action. State Farm argued that the court should apply Indiana law and that under Indiana law, TCPA claims were not covered as advertising injuries. Following the decision in Pekin, the trial court ruled against State Farm.

On appeal, State Farm conceded that the trial court had correctly followed *Pekin* in finding that there was coverage for the TCPA violations, but maintained that Pekin incorrectly refused to find a conflict between Illinois and Indiana law because there were no Indiana state court decisions on the issue.

The court in *Bridgeview* noted that when other courts have found the law of another interested jurisdiction to be uncertain, they had undertaken a choice of law analysis to decide which jurisdiction's law applies. The court cited a United States Supreme Court decision, *Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985), in which the Court reversed a decision of the Kansas Supreme Court which had applied Kansas substantive law to a dispute despite Oklahoma's contacts with the case.

Despite the lack of a clear conflict between the pertinent laws of Oklahoma and Kansas, the Court found that the application of Kansas law to the claims against an Oklahoma defendant violated the defendant's constitutional rights and remanded the case to

the Kansas court to determine anew which state's law should be applied. 472 U.S. at 823.

As the Supreme Court noted in another case, "[t]he purpose of a conflict-of-laws analysis is to assure that a case will be treated in the same way under appropriate law regardless of the fortuitous circumstances which often determine the forum." *Lauritzen v. Larsen*, 345 U.S. 571, 591 (1953).

The court in *Bridgeview* reasoned that when the courts of one state have not spoken to an issue, "their eventual resolution of the issue may conflict with the resolution reached in another state. If the forum applies its own law simply because the other interested jurisdiction has not spoken on the issue, the result of the case may well depend on the fortuitous circumstances that determine the forum." 2103 IL App (1st) 121920, at ¶21.

Thus, the court refused to follow *Pekin*, and instead found that since the application of Indiana law could potentially lead to a different result than that reached under Illinois law, the trial court was required to conduct a choice of law analysis to determine which state's law should be applied. If it found that Indiana law should be applied, it was required to predict what an Indiana court would do, using decisions from the federal courts and the courts of other states as well as law reviews, treatises and other sources to make the prediction. *Id*. at ¶22.

The *Bridgeview* decision will clearly make it more difficult for courts and litigants to determine what to do where the law of another interested jurisdiction is unclear.

While the rule in *Pekin* is easier to apply – when in doubt apply Illinois law – the *Bridgeview* decision should help to insulate parties from being subject to a different result simply because of the forum chosen.

Another lesson from the *Bridgeview* decision is that even when a decision of an intermediate appellate court is pending is directly on point against a party, it may still be worth challenging that result in the hope that another panel of the court will reach a different conclusion.

Submitted by:
William K. McVisk
Johnson & Bell, Ltd.
Chicago, IL
mcviskw@jbltd.com

The Texas Supreme Court enacted new Rules of Civil Procedure and Rules of Evidence for cases effective March 1, 2013.

Texas has joined what appears to be a growing trend by states to enact laws to promote prompt, efficient and cost effective resolution of civil actions. And to also attempt to lower discovery cost, litigation expenses and expediting trials in actions with small amounts in controversy.

Even though these rules have been in effect for 7 months, little is still known as to whether these rules will actually promote prompt, efficient and cost effective resolution of civil actions. My experience to date has been for plaintiff's counsel to contend that the value of the claim is over $100,000.

I. New Rules for cases involving less than $100,000 in controversy

EXPEDITED ACTIONS

The Texas Rules of Civil Procedure now provide for an expedited litigation path in cases filed after March 1, 2013 involving less than $100,000 in controversy.

Newly enacted Rule 169 provides a means for claimants seeking less than $100,000 (inclusive of all damages, costs, and attorneys' fees) to resolve their cases more quickly and with less expense.

The rule is not applicable to family law, tax, property, and medical liability cases. Rule 169 is further augmented by amendments to Rules 47 and 190 of the Texas Rules of Civil Procedure and Rule 902(c) of the Texas Rules of Evidence. A case may be removed from this procedure upon a showing of "good cause".

The new procedures provide as follows:

- Limited discovery processes (depositions totaling no more than six hours per side to question and cross examine all witnesses [may extend to 10 hours by agreement], and restrictions on written discovery) are detailed in amendments to Rule 190;

- Request for Disclosures now require the parties to produce all documents, electronic information and items the disclosing party may use to support its claims or defenses without a Request for

Production of Documents;

- The discovery period ends 6 months after the first request for discovery is served;

- Trials will take place nine months after suit is filed and no more than two continuances extending the trial date by no more than a total of 60 days are permitted; and

- Shortened trials (eight hours per side) for jury selection, opening statements, presentation of evidence, and closing arguments.

II. Rules applicable to all cases FILED after March 1, 2013

CLAIMS FOR RELIEF IN ALL CASES

A party that fails to plead one of the below amounts may not conduct discovery until such is amended to comply in all cases filed after March 1, 2013.

Amendments to Rule 47 require any pleading claiming damages must include a statement that the party seeks: Only monetary relief of $100,000 or less; or only monetary relief of $100,000 or less and non-monetary relief; or monetary relief over $100,000 but not more than $200,000; or monetary relief over $200,000 but not more than $1,000,000; or monetary relief over $1,000,000.

III. Rules applicable to ALL cases after March 1, 2013

DISMISSAL OF MERITLESS CASES

Rule 91a of the Texas Rules of Civil Procedure provides for early dismissal of meritless cases. This rule is applicable to all cases pending. A cause of action that has no basis in fact if no reasonable person could believe the facts pled.

A motion to dismiss must be filed within 60 days of the first pleading served with 21 days notice of the hearing. However, the Court will not rule on the motion if the respondent files a nonsuit at least 7 days before the hearing. The Court must award the prevailing party all costs and reasonable attorney's fees. This rule is in addition to other procedures that authorize dismissal of cases.

MEDICAL RECORDS AFFIDAVIT

New Rule of Evidence 902(c) has been added to provide a form affidavit for proof of medical expenses. The affidavit is intended to allow evidence of only those medical expenses that have been paid or will be paid, after any required credits or adjustments.

Submitted by:
David W. Prasifka
Lorance & Thompson
Houston, Texas
dwp@lorancethompson.com

Court of Special Appeals Of Maryland Holds That Insurer Did Not Violate Maryland Insurance Article When It Denied Coverage Under Homeowners Insurance Policy

People's Insurance v. State Farm, Court of Special Appeals of Maryland, No. 1353, September Term 2012 (Md. App. September 26, 2013).

In *People's Insurance v. State Farm*, the Court of Special Aqppeals of Maryland was asked to determine whether the Circuit Court for Baltimore City erred in finding that an insurer did not violate the Insurance Article when it denied a claim for coverage of damage to personal property under a homeowners insurance policy.

Writing for the intermediate appellate court, and deferring to the final decision of the Maryland Insurance Administration ("the MIA"), Judge Deborah S. Eyler affirmed the circuit court's decision in favor of the insurer.

During a blizzard in the winter of 2010, Moira and Gregory Taylor's carport in West River, Anne Arundel County, collapsed under the weight of ice and snow. They filed a claim under their homeowners insurance policy ("the Policy") with State Farm Fire and Casualty Insurance ("State Farm"). State Farm denied the claim on the ground that the carport was not a "building" and that the Policy only covered losses due to collapse of buildings.

In the Policy, the word "building" was used narrowly, to mean a structure that contains or encloses property. Specifically, the Policy stated at "SECTION I – LOSSES INSURED," "COVERAGE B - PERSONAL PROPERTY" that it did not cover losses to personal property "contained in a building caused by rain, snow, sleet, sand or dust" unless the damage to the personal property

resulted from "the direct force of wind or hail damag[ing] the building causing an opening in a roof or wall."

The Taylors filed a complaint with the MIA, alleging that State Farm had violated Section 27-303 of Maryland Code, Insurance Article, which prohibits unfair claim settlement practices. *Id.* at §§ 27-303(2) and (9). The People's Insurance Counsel Division ("PICD") intervened on behalf of the Taylors.

Following a hearing before the Associate Deputy Commissioner of the MIA, the Insurance Commissioner ("the Commissioner") issued a final decision ruling that State Farm had not violated Section 27-303 of Maryland Code, Insurance Article.

PICD filed a petition for judicial review of that decision in the Circuit Court for Baltimore City. PICD contended that State Farm "did not have a legal basis to deny the Taylors' claim," because State Farm's chosen definition of the word "building" was unsupported by case law, dictionary definitions, and State Farm's own past practice, making it a prohibited *ad hoc* determination in violation of Insurance Article, Section 27-303(2) and (9).

Accordingly, PICD maintained, the MIA's decision that State Farm's denial of the Taylors' claim for loss to the carport was not arbitrary, capricious, or made with a lack of good faith, was legally incorrect.

State Farm responded that the MIA's decision that it (State Farm) adjusted the Taylors' claim in good faith and that it did not deny their claim for loss to the carport for an arbitrary or capricious reason was entitled to deference as a finding on a mixed question of law and fact.

State Farm asserted, however, that, even if viewed as a pure question of law, the Policy language was plain and unambiguous and was properly construed by State Farm as not affording coverage for the loss to the carport.

Therefore, having denied the Taylors' claim in accordance with the plain language of the Policy, State Farm contended that it could not have been found to have denied the claim for an arbitrary or capricious reason or not in good faith.

The circuit court affirmed the final decision of the MIA. On appeal, the PICD presented one (1) question for review by the Court of Special Appeals: "Was the MIA's decision finding that State Farm did not violate the Insurance Article when it denied the Taylors' claim legally correct and supported by substantial evidence in the record?" For the reasons that follow, the intermediate appellate court answered that question in the affirmative and affirmed the judgment of the circuit court.

The intermediate appellate court began its analysis by examining the text of Insurance Article, Section 27-303 entitled, "Unfair claim settlement practices," which prohibits insurers from, among other things, "refus[ing] to pay a claim for an arbitrary or capricious reason based on all available information" and "fail[ing] to act in good faith in settling a first party claim under a policy of property and casualty insurance." MD. CODE. ANN., INS. § 27-303(2) & (9).

An insurer acts arbitrarily or capriciously when it refuses to pay a claim "'subject to individual judgment or discretion'" or "'based on an unpredictable whim.'" Berkshire Life Ins. Co. v. MIA, 142 Md. App. 628, 671 (2002) (quoting with approval from a decision of the MIA).

An insurer does not act in good faith if it fails to make "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim." MD. CODE. ANN., INS. § 27-1001(a).

If the Commissioner rules that an insurer violated Insurance Article, Section 27-303, a penalty of up to $2,500 for each violation maybe imposed and restitution may be ordered for each claimant suffering damages as a result of any violation. MD. CODE. ANN., INS. § 27-305.

Here, the Court of Appeals articulated that the MIA's decision turned on whether State Farm adopted an unreasonably narrow, *ad hoc* interpretation of the Policy, in particular of the operative word "building" in the Policy, or denied the claim without engaging in any honest and diligent effort to reach an informed judgment as to whether the loss was covered.

The MIA determined for several reasons that the Taylors failed to show that State Farm had done either. According to the court, the Taylors did not present any evidence that the definition of "building" used by State Farm in adjusting their claim was inconsistent with the definition of "building" it had used in adjusting other claims.

Moreover, PICD's own expert witness testified that the definition of "building" used by State Farm was consistent with that used by Allstate, the only insurer doing business in Maryland that included a definition including the word "building" in its homeowners insurance policies.

The intermediate appellate court also stated that whether State Farm refused to pay the Taylors' claim for an arbitrary or capricious reason or failed to act in good faith in denying the claim were mixed questions of law and fact in that they called upon the MIA to make first-level factual findings and then determine the ultimate legal significance of those findings.

Thus, in administrative agency cases, mixed questions of law and fact are subject to judicial review for substantial evidence. See *Charles County Dep't of Social Servs. v. Vann*, 382 Md. 286, 296 (2004).

As a function of agency deference, and because the record contained substantial evidence to support the MIA's decision that State Farm did not adjust the Taylors' claim arbitrarily or without good faith and hence did not engage in the alleged unfair claim settlement practice, the Court of Special Appeals affirmed the decision of the MIA. In fact, the court stated that it "agree[d] with State Farm's interpretation of its Policy language, as did the MIA," and also would affirm on that basis.

Submitted by:
Jhanelle A. Graham
Semmes, Bowen & Semmes
Baltimore, MD
jgraham@semmes.com

Insurance Company Owes No Duty of Good Faith to Insured Who Files an Uninsured Motorist Claim, Placing Them in an Adversarial Relationship

Hoang Do v. Liberty Insurance Corporation, Case No. 13-1063 (United States Court of Appeals for the Fourth Circuit).

In this recently issued opinion, the U.S. Court of Appeals for the Fourth Circuit affirmed the judgment of the U.S. District Court in granting Defendant Liberty Insurance Corporation's ("Liberty") motion to dismiss Plaintiff Hoang Do's ("Mr. Do") complaint for failure to state a claim.

The suit arose out of an automobile accident between Mr. Do and Gerson Arias ("Mr. Arias"). Because Mr. Arias was simultaneously at fault for the accident and uninsured, Mr. Do submitted an uninsured motorist claim to Liberty, his automobile insurance carrier.

Liberty waited months to respond to Mr. Do's claim, which it ultimately rejected. In the meantime, Mr. Do had settled and signed a release of rights with Mr. Arias and his insurer. Because of Liberty's delayed response, the statute of limitations lapsed for Mr. Do to bring any tort claims related to the accident.

Mr. Do then filed suit against Liberty claiming that the company acted in bad faith by promoting its own best interests against those of the insured (Mr. Do) when it delayed acting on, and ultimately rejected, Mr. Do's uninsured motorist claim. The district court dismissed Mr. Do's complaint for failure to state a claim against Liberty because Mr. Do had not secured a judgment against Mr. Arias.

The court further held that Mr. Do failed to state a claim for bad faith against Liberty because Liberty was Mr. Do's adversary in the uninsured motorist claim and therefore owed Mr. Do no duty to act in good faith. Mr. Do appealed only the second ground.

Therefore, the Court stated that Liberty had no duty to inform Mr. Do that uninsured motorist coverage required a judgment against the uninsured motorist.

Similarly, Liberty was not required to let Mr. Do know that if he settled and signed a release of his rights with Mr. Arias and his insurer, that Liberty would rely on that settlement to deny Mr. Do's uninsured motorist claim.

Because Liberty owed no duty of good faith toward Mr. Do, the U.S. Court of Appeals affirmed the district court's holding that Mr. Do's complaint failed to state a plausible claim for bad faith against Liberty.

Submitted by:
Semmes, Bowen & Semmes
Baltimore, MD

Florida Supreme Court Rules that Indemnity Payments Received Can Be Used to Satisfy an SIR

In *Intervest Construction of Jax, Inc. v. General Fidelity Insurance Company*, 133 So. 3d 494 (Fla. 2014), the Florida Supreme Court was faced with the following certified questions:

1.Does the General Fidelity Policy allow the insured to apply indemnification payments received from a third-party towards satisfaction of its $1 Million self-insured retention?

2.Assuming the funds received through an indemnification clause can be used to offset the self-insured retention, does the "Transfer of Rights" provision found in the General Fidelity policy grant superior rights to be "made whole" to the insured or the insurer?

Katherine Ferrin was injured on stairs built by Custom Cutting, Inc. for homes being developed by Intervest Construction Company. The contract between Custom Cuttings and Intervest had an indemnity provision but Intervest was not named as an additional insured under Custom Cuttings' GL policy with North Pointe.

Instead, Intervest maintained its own GL policy with General Fidelity. That policy contained a $1,000,000 SIR. Ferrin brought suit against Intervest but not Custom Cuttings. At mediation, which was attended by Intervest, General Fidelity, Custom Cuttings and North Pointe, the underlying claim was settled for $1,600,000.

North Pointe paid Intervest its $1,000,000 policy limits to be used towards the settlement under Custom Cutting's indemnity obligation. Intervest contended that this satisfied its SIR and demanded that General Fidelity pay the balance of the settlement. General Fidelity contended that the indemnity payment did not satisfy the SIR. Each paid one-half of the settlement balance and a declaratory relief action was commenced in Florida state court and then removed to the United States District Court for the Middle District of Florida.

The District Court granted summary judgment in favor of General Fidelity. Relying on a series of California case, the Court held that payments received from a third party could not be used to satisfy the SIR and Intervest appealed to the Eleventh Circuit.

The Eleventh Circuit noted distinctions in the policy language in the cases relied upon by the District Court and certified the questions to the Florida Supreme Court.

The Florida Supreme Court held that General Fidelity's policy did not require that the SIR be satisfied from Intervest's own funds. Instead, the Court found a distinction between a requirement that the retention be satisfied "by you" (as stated in the General Fidelity's policy)and paid "from your own account" and other similar language in the policies from the California cases. Further, the "other insurance" provision of the policy did not prohibit the use of funds received from another insurer in satisfaction of the SIR. As such, unless expressly prohibited by the language of the policy, payments received pursuant to an indemnity agreement with a third party can be used to satisfy an insured's SIR.

The Court also found that the Transfer of Rights clause merely granted subrogation rights to the insurer and did not address the priority of rights in a recovery. As such, absent specific language in the policy to the contrary, the "made whole" doctrine, which grants the insured priority to recover its damages when limited indemnity is available, still applies.

Submitted by:
James N. Hurley
Fowler White Burnett, P.A.
Miami, FL
JHurley@fowler-white.com