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As the year comes to an end and we reflect back on 2014 and look ahead to 2015, we want to provide you some insight on issues related to your field that may be of interest.

CLEAR AND UNAMBIGIOUS POLICY EXCLUSION RE: SEXUAL MOLESTATION/NEGLIGENT SUPERVISION CLAIM

The 5th DCA in the recent case of Dueno v. Modern USA Ins. Co., 39 Fla. L. Weekly D2383 (November 14, 2014) upheld a summary judgment entered in favor of the insurer in a declaratory action arising out of an alleged sexual battery of a minor caused by the insured's minor son.

The parents of the allegedly sexually battered child had filed suit against the homeowners claiming negligent supervision and the insurer filed a separate action to determine if the policy's sexual molestation exclusion was unambiguous thereby affording neither coverage for the alleged incident nor the necessity of providing a defense.

The appellate court held that the policy's exclusion was unambiguous and thereby excluded coverage for the minor's alleged injuries arising out of the purported sexual molestation. The court cited to Valero v. FIGA, 59 So.3d 1116 (Fla. 4th DCA 2011) in support of its decision.

Valero in a case of first impression handled by our firm, the appellate court upheld a summary judgment entered in favor of FIGA holding that the clear and unambiguous sexual molestation exclusion in the homeowner's policy at issue precluded a claim for negligent supervision of a minor who was allegedly sexually abused by another child while in the homeowner's care.

It is becoming more common for claims of negligent supervision in sexual abuse cases to be dismissed by courts where the exclusion is clear and unambiguous. The more precise the exclusion, the greater likelihood that it will be upheld by a court of law.

DISMISSAL OF A WRONGFUL DEATH ACTION

We recently secured the dismissal of a wrongful death action filed against our client in Broward Circuit Court. The death arose from an altercation between two purported friends at a strip shopping center that eventually lead to one shooting and killing the other. The decedent's estate filed suit against the strip's owner, management company and leasing broker/agent allegedly negligent security.

Discovery revealed that our client, the strip center's leasing broker/agent, had no ownership interest, or active involvement in center's management. Prior to a summary judgment motion being filed and heard, we were able to convince the Plaintiff's attorney to dismiss our client from the lawsuit and they (reluctantly) agreed.

DISMISSAL OF NEGLIGENCE AND INTENTIONAL TORT COUNTS IN A FIRST PARTY ACTION

Recently we were successful in having four counts of a seven count complaint dismissed on behalf of one of our insurance clients arising out of alleged property damage to the Plaintiffs' dwelling. Besides the breach of contract claims and a declaratory judgment count, the Plaintiff alleged counts for negligent misrepresentation, fraudulent inducement, estoppel, and fraud. Under Florida Statute §627.351(6)(s)(1), Citizens and its employees have immunity against all liability and suit "for any cause of action taken . . . in the performance of their duties and responsibilities."

The statute lists five exceptions to this immunity, which does not include negligent misrepresentation and estoppels. The trial court agreed dismissing those counts ruling that the Court lacked subject matter jurisdiction over these claims.

With regard to the counts for fraudulent misrepresentation and fraud, the Plaintiff alleged that by including the marring exclusion in the policy, the insurer in fact committed fraud. Specifically, the Plaintiff argued that the policy would operate to exclude all damage, contrary to the Plaintiff's expectations, who relied on a valid policy to provide coverage for the damage.

We argued, and the court agreed, that the Plaintiff failed to allege fraud with the requisite particularity. An exclusion in the policy is insufficient to constitute a false statement to support a fraud claim. Furthermore, the Plaintiff failed to sufficiently plead who made the false statement, the time frame in which it was made and the context in which the statement was made. The trial court dismissed the fraud counts for failure to state a cause of action.

ATTACKING ASSIGNMENT OF BENEFITS –REGULATION OF POLICY LANGUAGE

Recently, insurers have been faced with an increasing trend of "assignment of benefits" suits by vendors who provide services to insureds after a property loss. The Florida Legislature and the Florida courts have both determined that contracts are

assignable unless the assignment is forbidden by the terms of the contract, is contrary to public policy, or is prohibited by statute. In the past, our firm argued that while an insurance policy may allow a vendor to obtain a direction for payment after loss and once benefits are due, an insurance policy does not permit the vendor to step into the shoes of an insured and become the named insured under the policy for any and all rights, benefits, and obligations without the insurer's written consent. To that end, our firm has also successfully argued that if there has been no valid assignment, a vendor lacks standing and cannot pursue any claim for breach of the policy against any insurer.

Recently, Security First Insurance Company ("Security First"), confronted the "assignment of benefits" trend by attempting to change its policy language. Security First appeared before the Office of Insurance Regulation proposing a policy form endorsement that would specifically require the carrier's written approval in order for any benefit or post loss assignment to be valid. The Office of Regulation denied Security's First request, and an appeal in the First District Court has been filed by Security First.

In Security First's Initial Brief, it highlighted that insurers are now being forced to adjust losses and litigate with new entities, with whom the insurers did not contract. Additionally, these new "assignees" have a completely different profit-driven motivation than the insured's motive to promptly repair the property. Moreover, these new assignees "step in the shoes" of the insured, but have no obligation to comply with the contractual terms agreed to by the original parties – essentially creating a whole new playing field for the insurer – and materially affecting the risk the insurer assumed when it issued the policy.

Security First also pointed out that this increased trend, has in turn, caused insurers to defend two separate lawsuits seeking to recover the same insurance claim and significantly increased litigation over the vendors' invoices thereby driving up costs. Whether or not the First District Court of Appeal will affirm or reverse the decision of the Office of Insurance Regulation will be interesting to watch and a decision could come within the next several months. Hopefully, the Appellate Court will agree with Security's First position and this "trend," like all trends, will fade with time.

We hope that you find the following information of value. And, of course, we are always available to assist as needed. Wishing you and yours a happy, healthy holiday season and a prosperous new year, I am

Very truly yours,

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