BSED&K
BUCKNER, SHIFRIN, ETTER, DUGAN & KOHLMAN, P.A.
ATTORNEYS AT LAW

46 S.W. FIRST STREET
SECOND FLOOR
MIAMI, FLORIDA 33130

TELEPHONE: (305) 679-9744
FAX: (305) 679-9745

ROBIN S. BUCKNER
DEANNA S. SHIFRIN
CHARLES W. RICE (1946 -2012)
JEANNIE M. ETTER*†
ROBERT O. DUGAN
ROBERT F. KOHLMAN

EMILY M. BRADFUTE†
ISABEL M. GUELL
IRENE MOLDAVER◊
AGUSTIN J. ALVAREZ
LUISA MARQUES DOS SANTOS
MICHELLE B. SEALEY

*BOARD CERTIFIED IN MARITAL & FAMILY LAW

†ADMITTED TO PRACTICE IN DISTRICT OF COLUMBIA

◊ADMITTED TO PRACTICE IN NEW YORK

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From time-to-time things happen which may relate to your area. To that extent we have prepared a short newsletter discussing a recent appellate court decision, as well as some successful outcomes of cases we have recently defended, which may prove of interest.

WHAT DOES THE *CURRAN* DECISION REPRESENT FOR FUTURE LITIGATION OF EUO OR PROMPT NOTICE PROVISIONS IN HOMEOWNERS' INSURANCE CASES? AND CAN THE INSURER CONTINUE TO OBTAIN SUMMARY JUDGMENTS IN THESE ISSUES WITHOUT PLEADING AND PROVING PREJUDICE?

In first party property cases, the insurer usually relies on the failure of insureds to comply with post-loss conditions, such as the prompt notice and EUO provisions, to obtain a summary judgment. Florida caselaw establishes that once the insured fails to comply with these provisions, namely conditions precedent to the right to coverage, there is a rebuttable presumption that the insurer has been prejudiced by this breach of the insurance contract. The burden is on the insured to show a lack of prejudice. *See*, *Bankers Insurance Co. v. Macias*, 475 So.2d 1216 (Fla. 1985).

Recently, the Florida Supreme Court released their opinion on *State Farm v. Curran,* 2014 WL 1010658 (Fla. March 13, 2014), approving the judgment of the Fifth District Court of Appeal and affirming the trial court's finding of judgment for the insured. The Florida Supreme Court held that a policy provision that the insured undergo a compulsory medical examination (CME) was not a condition precedent to coverage under the policy irrespective of showing of prejudice, and thus, the insurer had the burden of pleading and proving that it suffered prejudice from the breach.

The *Curran* decision was dependent on whether the CME provision was a condition subsequent or condition precedent. State Farm made the argument that the CME provision in the policy is a condition precedent to coverage (analogous to a prompt notice or EUO provision) and to suit, the breach of which constituted a material breach of

the policy resulting in forfeiture of coverage irrespective of any showing of prejudice. Curran argued that the provision is a condition subsequent requiring proof of prejudice.

Discussing the intent and purpose of the UM statute (Fla. Sat. 627.727), as well as public policy considerations, the Court found that the CME provision was a condition subsequent to coverage, analogous to a cooperation clause, and should not result in forfeiture of insurance benefits without regard to prejudice. Furthermore, the Court held that the burden of pleading and proving prejudice is on the insurer as an element of its affirmative defense.

The Fifth DCA, relying on their decision in *Curran,* had ruled that an insurer's failure to plead and prove prejudice, thwarted its ability to obtain summary judgment on the EUO provision, a condition subsequent. *See, Whistler's Park v. FIGA,* 90 So. 3d 841 (Fla. 5th DCA 2012). The Florida Supreme Court accepted jurisdiction on April 23, 2013, but has not issued an opinion at this time.

Attorneys for insurance companies would argue that the *Curran* decision changes nothing. After all, we have decisions from the Third, Fourth, and Second DCA suggesting that an insurer does not need to plead prejudice to obtain summary judgment in that jurisdiction. We had a Motion for Summary Judgment on a late notice case granted upon the Court's finding that late notice of the claim over four (4) years after the loss was a condition precedent to coverage under the policy and that the insured failed to rebut the presumption of prejudice to the insurer, placing therefore the burden on the insured to prove there was no prejudice. The Third DCA issued a per curiam affirmance. *See, Quinteros 77th LLC Properties v. Citizens,* No. 3D12-1786 (Fla. 3d DCA October 23, 2013).

However, for Plaintiffs' attorneys, the *Curran* decision changes the entire argument. Two weeks after *Curran*, we attended a hearing on a Motion for Summary Judgment (*Nelson Nodal v. Citizens)* based on the insured's failure to comply with the prompt notice provision. Plaintiff's counsel argued at the hearing that *Curran* should be extended to property insurance prompt notice and EUO failure cases, arguing that the insurer can only assert the breach of these provisions as a complete defense to coverage under the policy but only after pleading and upon proof of the prejudice. The trial court in our case dismissed Plaintiff's argument and considered both our evidence of prejudice to the insurer and Plaintiff's evidence regarding lack thereof. In the end, the Court granted our motion for summary judgment upon a finding that the Plaintiff had failed to rebut the presumption of prejudice.

In short, although *Curran* may not represent a substantial change in the litigation of EUO or prompt notice provisions in property insurance, it does bring a change in the way that attorneys will argue and judges will consider the presentation of evidence on prejudice. Rather than considering a rebuttable presumption, we have seen a shift into a more "balancing" of the evidence of prejudice for both sides. For now and until the Florida Supreme Court issues its opinion in *Whistler Park*, insurers must pay close

attention to the jurisdiction in which their case is pending as the Fifth DCA requires that the insurer plead and prove prejudice.

RECENT WINS ON MOTIONS FOR SUMMARY JUDGMENT BASED ON FAILURE TO COMPLY WITH POLICY PROVISIONS

Insurer had previously obtained an Order granting Summary Judgment on the Court's finding that late notice of the claim over four (4) years after the loss was a condition precedent to coverage under the policy and that the insured failed to rebut the presumption of prejudice to the insurer. In that case, the Plaintiff provided note of the claim 4 years after the date of loss for a Hurricane Wilma claim with a date of loss of October 24, 2005. Insurer argued that the delay in reporting the claim prejudiced its ability to investigate the loss since the property had continued to deteriorate by the time Insurer was allowed to inspect. In opposition, the insured presented a public adjuster's estimate and testimony that Insurer had had an opportunity to inspect the property. The Court determined this argument unpersuasive and found the insured had not rebutted the presumption of prejudice and granted summary judgment for Insurer. The Third DCA issued a per curiam affirmance (PCA).

Our firm also obtained an order granting summary judgment based on the insured's failure to comply with the prompt notice provision. In this particular case, the Plaintiff argued at the hearing that the recent decision of the Florida Supreme Court in *Curran* should be extended to property insurance prompt notice and EUO failure cases, arguing that the insurer can only assert the breach of these provisions as a complete defense to coverage under the policy but only after pleading and upon proof of the prejudice. The trial court in our case dismissed Plaintiff's argument and considered both our evidence of prejudice to the insurer and Plaintiff's evidence regarding lack thereof. In the end, the Court granted our motion for summary judgment upon a finding that the affidavit of an engineer presented by the Plaintiff was conclusory in that it was based entirely on Plaintiff's statements regarding the condition of the roof and failed to address whether an earlier inspection could have been helpful in investigating the claim. Therefore, the Court found that Plaintiff had failed to rebut the presumption of prejudice to the insurer and was entitled to summary judgment.

Finally, our firm also obtained a summary judgment in favor of an Insurer, in an action for breach of contract seeking damages on supplemental Hurricane Wilma claim. In that case, the Plaintiff reported the initial claim immediately after the hurricane and the damage was found to be under the deductible. The Plaintiff conducted approximately $200,000.00 of repairs, including upgrades and complete remodeling of the property. Thereafter, he filed a supplemental claim requesting payment for the cost of the repairs. The court found that the Plaintiff had not reported the supplemental damages timely as all the damages had been repaired by the time the insurer had an opportunity to investigate the claim. As such, the insurer was prejudiced in that it was unable to properly adjust the loss and therefore, entitled to summary judgment.

FAVORABLE RULING ON MOTION TO DISMISS ASSIGNMENT OF BENEFITS SUIT IN THE MIAMI-DADE COUNTY COURT

We successfully obtained a Miami-Dade County Court Order Dismissing a Breach of Contract action filed by Epic Total Restoration, L.L.C as assignee of the insured, involving a purported "Authorization for Emergency Services" on behalf of insurer client.

Epic Total Restoration originally pled that it could maintain standing to bring suit against Insurer based upon an alleged assignment of benefits and an equitable assignment based on the conduct of the parties. While the Complaint was dismissed with leave for Plaintiff to serve an Amended Complaint within 30 days, the Court appeared to have been most interested in the fact that the Complaint was inadequately pled and contained contradictory allegations insufficient to maintain standing for the claim, i.e., Epic Total Restoration could not proceed with suit based upon the contention that there was a written assignment of benefits and there also existed an equitable assignment between the parties. In other words, Epic Total Restoration could not concurrently plead that it had standing based on the "Authorization for Direct Payment" and that it also had standing based on an equitable assignment by virtue of the parties' conduct.

We hope that you find the following information of value. And, of course, we are always available to assist as needed.

Sincerely,

BUCKNER, SHIFRIN, ETTER, DUGAN
& KOHLMAN, P.A.

BY: _____
ROBERT O. DUGAN

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