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Florida Supreme Court Rules Incorrect Denial of Insurance Benefits Can Trigger Award of Attorneys' Fees to Insured

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On September 29, 2016, the Florida Supreme Court held, in ***Johnson v. Omega Insurance Company*** (No. SC14-2124), that a homeowner is entitled to an award of attorneys' fees after an improper denial of insurance benefits. The homeowner made a claim for the benefits after a sinkhole allegedly damaged her home. The Court found that the appellate court first improperly applied a presumption of correctness meant for the initial claims process in sinkhole cases to the litigation process. The Court then found that, under section 627.428, Fla. Stat., bad faith or malicious conduct is not a prerequisite for an attorneys' fee award. The Court emphasized that, once an insurer denies benefits and a policyholder files an action in dispute of that denial, the insurer cannot abandon its position without repercussion.

The Claim

The plaintiff, a policyholder, was covered under a homeowners' insurance policy that included sinkhole coverage. In January 2010, the policyholder filed a claim to recover damages resulting from sinkhole activity. The insurer retained a consulting company to perform an initial sinkhole investigation. Although the consulting company conceded that the home had been damaged, it attributed the damage to causes that were not covered under the policy. Based on this, the insurer denied the policyholder's claim for insurance coverage.

During the initial claim process in sinkhole cases, the findings and recommendations of the insurer's experts receive a statutory "presumption of correctness" under section 627.7073(1)(c), Fla. Stat. that shifts the burden to refute the report to the insured. Either party can request a neutral evaluation pursuant to section 627.7074, Fla. Stat. and the insurer bears the cost for it.

The Legal Proceedings

In this case, since there were potential damages in the hundreds of thousands of dollars, the policyholder retained an attorney who, in turn, retained a different consulting company to perform a

second evaluation of the damages. That company noted that the insurance company's report was incomplete and concluded that the damage to the home was due to sinkhole activity. The policyholder spent $15,000 to retain the consultant.

The policyholder then sued the insurer for breach of contract, requesting benefits to which she was entitled and attorneys' fees, pursuant to section 627.428, Fla. Stat. During the discovery process, the insurer requested a neutral evaluation. The neutral evaluator also concluded that sinkhole activity was present on the property and caused the damage. As a result, the insurer accepted the neutral evaluation and tendered payment to the policyholder for the damage to her home. The insurer also filed an Answer and Affirmative Defenses, admitting that sinkhole activity caused the damage, that it had denied coverage and that Ms. Johnson was entitled to benefits to cover the damages.

The policyholder then filed a motion for confession of judgment (when a party admits to liability and a quantification of damages) and a motion for attorneys' fees. In opposing the attorneys' fees motion, the insurer argued that the policyholder's entitlement to attorneys' fees under section 627.428 turned on her establishing that the insurer had acted in bad faith. The trial court rejected the insurer's argument, finding that there had been a confession of judgment and that the policyholder did not have to prove bad faith.

The appellate court reversed the trial court's decision, holding that precedent required a "wrongful" denial of benefits, and that "wrongful" meant that the insurer had denied the claim in bad faith. The appellate court further concluded that the confession of judgment doctrine only applies when the insurer wrongfully forces an insured to pursue litigation, and that the policyholder had not rebutted the presumption of correctness afforded to the original report.

The Florida Supreme Court Decision

The policyholder sought discretionary review of the appellate court decision from the Florida Supreme Court, which agreed to hear the case. The Florida high court reversed the appellate court's decision and sided with the policyholder.

In its decision, the Florida Supreme Court first dealt with the "presumption of correctness" for sinkhole cases. The Court explained that the presumption of correctness for sinkhole losses established in section 627.7073 was designed to protect the public during the claims process, not the insurance companies during litigation. The Court cited one of its own decisions, *Universal Insurance Co. of North America v. Warfel*, 82 So. 3d 47 (Fla. 2012), wherein it had specifically held that the statutory presumption of correctness described in the sinkhole statute does not extend to the litigation context. The Court found that the insurer and the appellate court had blurred the lines between the reliance on reports of insurance company experts made during the claims process and the attorneys' fees to which policyholders are entitled under section 627.428 when a policyholder prevails. Thus, once the policyholder filed suit, there was no presumption of correctness as to the initial report by the insurer's expert.

Bad Faith Not Required

The Court next looked at the issue of whether section 627.428 requires a showing of bad faith before attorneys' fees can be awarded. The Court found that the appellate court's decision was in conflict with its prior ruling in *Ivey v. Allstate Insurance Co.*, 774 So. 3d 679 (Fla. 2000). The Court explained that the Legislature created a statutory provision in section 627.428 that simply allows insureds who prevail against an insurance company to recover attorneys' fees, regardless of whether the insurer

acted in bad faith. Further, it is well settled that the payment of a previously denied claim following the initiation of an action but prior to final judgment is the functional equivalent of a confession of judgment. The *Ivey* court specifically held that “the bad faith or degree of ‘wrongfulness’ of the insurance company is *not relevant* to the recovery of attorneys’ fees under section 627.428.” [Emphasis supplied.]

Applying these principles, the Court found that the policyholder submitted a claim, which the insurer denied. Thereafter, the policyholder filed an action seeking recovery. In its answer, the insurer conceded that it had incorrectly denied benefits based on an inaccurate report. Even though there was no evidence that the insurer’s disclaimer was wrongful or in bad faith, the Court ruled that those facts warrant the awarding of attorneys’ fees under section 627.428.

Public Policy Considerations

The Florida Supreme Court emphasized the need to “level the playing field” between the more sophisticated insurance company and the individual citizen. Without the funds to compete with an insurer, often the insured’s only means to take protective action is to retain legal counsel. That attorney then has the ability and knowledge to hire an expert to refute the insurer’s report. When the insurer denies benefits and the insured retains counsel, additional costs that require relief have been incurred. The Court reasoned that, were it not for the policyholder’s action in obtaining her own evaluator, she would have lost hundreds of thousands of dollars in benefits.

The Court summed up its decision by stating:

> Once an insurer has incorrectly denied benefits and the policyholder files an action in dispute of that denial, the insurer cannot then abandon its position without repercussion. To allow an insurer to backtrack after the legal action has been filed without consequence would essentially eliminate the insurer’s burden of investigating a claim.

Pointers

Although this case does not break new ground as to the current law, the ruling does not appear to be limited to sinkhole cases. In fact, the *Ivey* case, used to explain that bad faith is not necessary for an attorneys’ fee award, was not a sinkhole case. As a practical consequence of this decision, insurers may be less inclined to deny claims, knowing that if their disclaimer is later determined to be erroneous, they will be responsible for paying their policyholder’s attorneys’ fees ? even if they did not act wrongfully or in bad faith.

The insurer here attempted to use the sinkhole statute to sidestep the attorneys’ fee provisions of section 627.428. However, the Florida Supreme Court made it clear that the analysis does not turn on whether the conduct of the insurer was wrongful or in bad faith, but rather on the consequences of being wrong in making a business decision. Although no extra-contractual exposure will be at risk, the insurer will be responsible for the policyholder’s attorneys’ fees if it is determined that the insurer erroneously denied coverage. To challenge an incorrect denial, the policyholder must hire an attorney and retain an expert. The Court found that it would be unfair for that policyholder to then be responsible for the cost of challenging a decision that was determined to be incorrect. Therefore, the insurer is basically betting the potential attorneys’ fees that it is right when making a coverage

decision.

In high-stakes situations where attorneys' fees are likely to be great, it remains to be seen whether insurers will become "gun shy" in their approach to coverage decisions. The reasoning of the Florida Supreme Court could extend to other jurisdictions that may find the focus on the business risk of the insurer to be compelling. If an insurer's coverage decision is incorrect, then the consequences must fall somewhere. The Florida Supreme Court has decided that they will fall to the insurer.

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