Insurance
Case Law & Insurance Regulation Update

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Weeks Ending March 22 and 29, 2013

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I. STATE APPELLATE DECISIONS

A. FLORIDA

- ***Bon Secours Health System and Gallagher Bassett Services, Inc., v. Bonanno (Fla. 1st DCA).*** Worker's Compensation. Order entered by the Judge of Compensation Claims (JCC) that awards Claimant and E/C-paid penalties and interest based on the untimely payment of benefits reversed and remanded for further proceedings. The payment of penalties is excused where nonpayment results from conditions over which the Employer/Carrier had no control. the JCC made no findings as to whether the untimely payment resulted from conditions over which the E/C had no control.

- ***Cheetham v. Southern Oak Insurance Company (Fla. 3rd DCA).*** Homeonwers' insurance; water damage due to plumbing deterioration. The insured's all-risk policy provided coverage for accidental discharge of water within a plumbing system on the residence premises caused by deterioration, but excluded water damage caused by water or water-borne material which backs up through sewers or drains. A pipe within the plumbing system of the insureds' residence premises broke due to deterioration, causing debris to enter the pipe and forming a blockage. As a result, waste water and/or material backed up through the blocked pipe into the residence premises through drains. The court held that the exclusion did not apply on these facts, and the insureds were entitled to coverage.

- ***CVS Caremark Corporation and Gallagher Bassett Services, Inc., v. Latour (Fla. 1st DCA).*** Worker's Compensation; discovery. Order by Judge of Compensation Claims allowing Claimant

to take the adjuster's deposition elsewhere than of the county where the Servicing Agent has its principal place of business reversed. Rule that deposition of a defendant's corporate representative is to be taken in the county where the corporation has its principal place of business if the defendant is seeking no affirmative relief applies in Workers" Compensation proceedings.

- ***Felder v. King Motor Co. (Fla. 4th DCA).*** Workers' Compensation; exclusive remedy; tort immunity. Under section 440.10(10(b), Fla. Stat., automobile dealership was statutory employer of employee of subcontractor on dealership premises who prepared vehicles for sale, when the employee was injured in the course and scope of his work for the subcontractor. Suit by employee claiming tort damages against the automobile dealership properly dismissed by trial court on motion for summary judgment.

- ***Jossfolk v. United Property & Casualty Insurance Co. (Fla. 4th DCA).*** Homeowner' insurance; appraisal; law and ordinance coverage. Trial court erred in granting summary judgment to insurer in declaratory judgment action in which the insured contended entitlement to law and ordinance coverage because of roof damage caused by windstorm. Factual disputes existed as to whether law and ordinance coverage was encompassed in original appraisal. Summary judgment reversed and remanded for further proceedings.

- ***Knight, v. Walgreens and Sedgwick CMS (Fla. 1st DCA).*** Worker's Compensation. Order of Judge of Compensation Claims (JCC) reversed and remanded on the basis that the JCC erred by denying Claimant's entitlement to the requested benefits based on a defense untimely asserted.

- ***Whitney v. Milien and Esurance Insurance Company (Fla. 4th DCA).*** Motor vehicle accident; damages. Action by plaintiff rendered quadriplegic when motor vehicle in which she was rear-seat passenger was struck in rear by vehicle driven by defendant. No abuse of discretion in denying motion for new trial based on improper arguments by plaintiff's counsel. No error in denying motion for new trial or remittitur on ground that verdict was excessive and against manifest weight of evidence.

B. GEORGIA

- ***Facility Investments, LP v. Homeland Ins. Co. of New York (Ct. of App. Ga.).*** Professional liability insurance; waiver of rights by insurer. Professional liability policy excluded coverage for dishonest, fraudulent, criminal or intentionally malicious acts and willful violations of law. Insured was sued for professional negligence in the care of a patient at its nursing home. The complaint in the underlying case alleged that the insured engaged in fraud, intentional misconduct and willful and wanton conduct. The insurer defended under a reservation of rights. The insurer expressly reserved its rights with regard to losses or defense expenses arising out of allegations of fraud, malice or violations of State and Federal regulations. The insurer did not reserve a right to pursue claims for breach of contract, recoupment, allocation or contribution for payment of settlement sums attributable to conduct within the policy's exclusions. The appeals court held the insurer waived such claims by not including the right to pursue them in the original reservation of rights, and could not rely on a subsequent reservation of rights issued after defense was undertaken, which included the right to pursue such claims after settlement.

- ***Sikes v.Great Lakes Reinsurance (UK) PLC (Ct. of App. Ga.).*** Homeowner's insurance. Rescission for material misrepresentations in application; summary judgment for insurer reversed and remanded for further proceedings. Trial court did not make determination concerning whether insured's affidavits opposing summary judgment were directly contrary to his testimony in examination under oath (EUO) and if so, whether the insured provided reasonable explanations for any contradictory testimony. The record was therefore unclear as to what standard of review of summary judgment should be applied under Georgia law and whether insured's affidavits should be discounted and construed against him. Reversed with instructions to the trial court to make such rulings.

- ***Villanueva v. First American Title Insurance Company (S.Ct. Ga.).*** Title insurance; legal malpractice claim against attorney/closing agent may be assigned to title insurer under Georgia statute governing assignment of choses in action. Villanueva acted as the closing attorney for a mortgage-refinance transaction in which the lender supplied funds to pay off earlier mortgages on the secured property. The title insurer issued title insurance on the transaction. The lender's funds were diverted by an employee of the lawyer. The title insurer paid off the earlier mortgages and, pursuant to its closing protection letter to Homecomings, became subrogated to all rights and remedies the lender had against any person or property. The title insurer filed suit against closing attorney for the lender, seeking damages for legal malpractice and breach of a contract with the lender. The court held that legal malpractice claims are not per se unassignable, and that the legal malpractice claim in question was one for breach of contract rather than a personal tort, and therefore was assignable to the title insurer under a Georgia statute (O.C.G.A. § 44-12-241) governing the assignment of choses in action.

- ***Zurich American Ins. Co. v. Heard (Ct. of App. Ga.).*** Commercial general liability insurance, construction defects; insurer's right to recover in contribution or indemnity from third parties after paying to settle claims against its insured. Insurer sued architect and engineering firm after settling claims against its insured, the general contractor. Trial court entered summary judgment against the insurer. The appeals court reversed, holding that: (1) O.C.G.A. § 51–12–33(b) (which eliminated contribution rights where a trier of fact apportions damages), does not abolish the right of contribution among joint tortfeasors when there has been no apportionment of damages by a trier of fact; (2) the architect and engineering firm were joint tortfeasors under Georgia law regardless of contrary assertions in settlement agreements; and, (3) the insurer's settlement payment was not a voluntary payment that precluded the insurer's contribution and indemnity claims.

II. FEDERAL APPELLATE DECISIONS

- ***Collegiate Licensing Company v. American Casualty Co. of Reading Pennsylvania, et al. (11th Cir., Ga.).*** Commercial General Liability (CGL); competing declaratory judgment actions; intervention; first-filed rule; exceptions; All Writs Act. Collegiate Licensing Company (CLC) was named as a defendant in multiple class action lawsuits. CLC was insured under several insurance policies issued by different insurers through different brokers. It sought coverage for the class actions. A different insurer brought suit in California (the "California Action") against CLC seeking a declaration as to coverage under a different policy with similar policy language. CLC subsequently filed suit in the Northern District of Georgia (the "Georgia Action") against several of its primary insurers seeking a declaration of coverage. The defendant insurers in the Georgia Action then filed motions to intervene in the California Action. The California court allowed defendant insurers in the Georgia Action to intervene in the California Action by way of filing complaints in intervention seeking declarations of coverage under their separate policies. The Georgia District Court enjoined the Georgia defendant insurers from proceeding with their intervention complaints in the California Action, under the first-filed rule. The injunction was affirmed on appeal.

  The 11th Circuit held that the Georgia district court did not err in finding it was the court "initially seized" of the action instituted by CLC's complaint. The intervention complaints were filed in the California Action after the Georgia Action was instituted. Before the California Action intervention complaints were filed, the California Action did not involve the Georgia Action defendants' policies. The fact that the form coverage language was identical among the policies at issue in the Georgia Action and the California Action did not establish that the California district court, where interpretation of the language was first urged, is the court first seized of the "action." A first-filed analysis looks to the character of the suits and the parties to the suits, not simply to the similarity of issues without regard to the identity of the parties asserting them. The 11th Circuit agreed that CLC was justified in suing its primary insurers in Georgia, where it had been headquartered for many years, and that the anticipatory suit exception to the first-filed rule therefore did not apply. It also agreed that the Georgia District Court did not improperly seek to overrule the California District Court's intervention order or exercise authority under the All Writs

Act to enjoin a sister court. The Georgia Action injunction operated on the Georgia Action defendants, not on the California District Court.

- ***Occidental Fire & Casualty Company of North Carolina, Inc. v. National Interstate Insurance Company. (11th Cir., Ga.).*** Motor Vehicle Insurance; Commercial General Liability (CGL). Coverage responsibility between GCL carrier and non-trucking liability carrier. Insured semi-trailer trucker had two insurance policies covering his tractor: a "bobtail" policy providing non-trucking liability coverage and a commercial general liability policy. On his way home from work, the insured was involved in a motor vehicle accident. He completed an accident report, and the firm with which he contracted instructed him to bring the report to the trucking terminal office on the next work day. While bobtailing to the terminal the morning of the next working day on which he reported for duty, the trucker was involved in a second accident about one-quarter mile from the terminal. The "bobtail" carrier's policy excluded coverage when the vehicle is being "[u]sed to carry property in any business or in route for such purpose." The CGL policy provided coverage for a covered auto when that auto "[i]s being used exclusively in [C&K's] business as a 'trucker," and defined "trucker" as "any person . . . engaged in the business of transporting property by 'auto' for hire." Following the accident, and a subsequent suit against the trucker by the other party involved in the second accident, the "bobtail" carrier filed a declaratory action against the CGL carrier and others, alleging that its policy did not provide coverage to second accident. Summary judgment for the "bobtail" carrier affirmed on appeal because the accident occurred during the trucker's normal work pattern, and thus fell within the coverage exclusion in the "bobtail" policy.

- ***Mt. Hawley Insurance Company v. Dania Distribution Centre Ltd., et al., (11th Cir. Fla.).*** Commercial General Liability (CGL); pollution exclusion. Insureds bought property that had been used historically as an illicit dumping site for construction and demolition debris, medical waste, fuel tanks, gasoline, other petroleum products, and various chemicals. Groundwater assessments and soil samples before the effective date of the policy confirmed the presence of many hazardous contaminants. When the insureds cleared and prepared the property for construction, they dispersed these contaminants inadvertently into adjacent neighborhoods where the residents lived. The residents sued the insureds for negligence, nuisance, trespass, and violations of the Florida Pollutant Discharge Prevention and Control Act. The CGL carrier brought a coverage declaratory judgment action against the insureds and the residents. Summary judgment of no coverage was affirmed on appeal, based on a pollution exclusion, which the appeals court found to be not ambiguous, that excluded coverage for bodily injury or property damage arising out of: a) the actual, alleged or threatened discharge, dispersal, seepage, migration, release, escape, contamination, growth, inhalation, ingestion, absorption of or exposure to pollutants at or from any premises owned or occupied by, or rented or loaned to, any insured; (b) at or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste; or, c) at or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations.

- ***Westport Insurance Corporation v. VN Hotel Group, LLC, et al. (11th Cir. Fla.).*** Commercial General Liability; duty to defend. Applying Florida law, death of hotel guest allegedly caused by contracting bacterium causing Legionnaires' disease held not to be within pollutants exclusion or bacteria exclusion of CGL policy as written. Insurer had duty to indemnify hotel owner insured in wrongful death suit.

III. ADMINISTRATIVE LAW/AGENCY DECISIONS

A. FLORIDA

- ***In the Matter of Premier Group Insurance Group, Case No. 130437-12, Final Order.*** Florida Office of Insurance Regulation (OIR) enters Final Order finding that Premier Group Insurance Group ("Premier") may deduct $2,406,312.10 for federal income tax expense incurred or allocated to Florida for purposes of section 627.215, Fla. Stat. and further orders Premier must return $660,907.90 in excessive profits to its policyholders.

B. GEORGIA

- ***Georgia Office of the Insurance Commissioner Issues Bulletin 13-EX-1 to All Health Insurers.*** All health insurance policies with an effective date on or after January 1, 2014 should use the geographic rating region map issued with the bulletin for rating purposes.

IV. NOTICES OF ADMINISTRATIVE RULEMAKING PROCEEDINGS

A. FLORIDA

- ***Rule 69B-221.051, F.A.C. - Actively Engaged in Business; Place Suitably Designated; Accessible to Public.*** A second notice of change published concerning changes to the proposed rule for bail bonds. The noticed changes are made to address comments and concerns expressed and following a public hearing held on December 17, 2012.

- ***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, 69J-8.011, F.A.C. – Alternative Procedures for Sinkhole Claims.*** The Florida Department of Financial Services (FDFS) proposes to amend the agency's rules for alternative procedures for sinkhole claims to conform the rules to the present wording of section 627.4074, Fla. Stat. If requested in writing and not deemed unnecessary by the agency head, a rule development workshop will be held on **April 9, 2013**, 9:30 a.m., 116 Larson Building, 200 East Gaines Street, Tallahassee, FL.

- ***Rule 69O-149.003, F.A.C. – Rate Filing Procedures.*** The Final Public Hearing on the adoption of proposed amendments to the rule published on July 20, 2012 in Vol. 38, No. 29, of the Florida Administrative Register has been changed from **April 2, 2013**, to **April 23, 2013**, during a regular meeting of the Financial Services Commission, Cabinet Meeting Room, Lower Level, The Capitol, Tallahassee, Florida.

- ***Rule 69O-157.302, F.A.C. – Long Term Care Facility Only Rates.*** The Office of Insurance Regulation (OIR) seeks to amend this rule to move the rates from the body of the Rule to the OIR's website to facilitate more rapid updating of the most recently published new business rates and consolidate the rates for facility only, non-facility only and comprehensive categories into one rule. If requested in writing and not deemed unnecessary by the agency head, a rule development workshop will be on **April 17, 2013**, 9:30 a.m., 116 Larson Building, 200 East Gaines Street, Tallahassee, FL.

B. GEORGIA

- ***Regulation Chapter 120-2-72 – Special Insurance Fraud Fund.*** The Office of the Commissioner of Insurance (OCI) seeks to amend this regulation chapter to change the timeline for the OCI to collect an assessment from each foreign, alien, and domestic insurance company doing business in Georgia to fund the OCI's Special Insurance Fraud Fund. The amendments propose that payment of the assessment is due thirty (30) days after OCI declares the assessment. The amendments also correct typographical errors in the regulation chapter. The deadline for OCI to receive written comments concerning the proposed amendments is **April 26, 2013 at 4:30 p.m.** A public hearing is scheduled for **May 1, 2013**, 9:00 a.m., Hearing Room of the Office of Commissioner of Insurance, 7th Floor, West Tower, Floyd Building, Two Martin Luther King, Jr. Drive, Atlanta, GA. Click here for a copy of the proposed regulation chapter amendments.

V. MEETING NOTICES OF INTEREST/MISCELLANEOUS

- ***Florida Self-Insurer Guaranty Association Board Meeting.*** **March 29, 2013**, 10:30 a.m., Florida Self-Insurers Guaranty Association, Inc., 1427 E. Piedmont Drive, 2nd Floor, Tallahassee, FL. General subject matter to be discussed: general business of the Association. A copy of the agenda may be obtained by contacting Brian Gee, Executive Director, Florida Self-Insurers Guaranty Association, Inc., 1427 E. Piedmont Drive, 2nd Floor, Tallahassee, FL 32308,(850) 222-

1882.

- ***Florida Automobile Joint Underwriting Association Operating Committee Call.*** **April 12, 2013**, 10:00 a.m. The general subject matter of the call is to review proposed changes in the FAJUA Underwriting Manual for recommendation to the Board of Governors and any other matters that may come before the Committee. Conference call dial-in information and a copy of the agenda may be obtained by contacting Lisa Stoutamire at (850) 681-2003 or at lstoutamire@fajua.org.
- ***Florida Surplus Lines Service Office Board of Governors Meeting.*** **April 15, 2013**, 1:00 p.m., 1441 Maclay Commerce Drive, Suite 200, Tallahassee, FL. A copy of the agenda may be obtained by contacting Georgie Barrett at gbarrett@fslso.com.
- ***Florida Board of Employee Leasing Companies Board Meeting.*** **April 17, 2013**, 1:00 p.m. or soon thereafter and **April 18, 2013**, 9:00 a.m. or soon thereafter, Ritz-Carlton Golf Resort, Naples, 2600 Tiburon Drive, Naples, Florida 34109, (239) 593-2000. Matters for discussion at the meeting: General Business of the Board. A copy of the agenda may be obtained by contacting the Department of Business and Professional Regulation, Board of Employee Leasing Companies at 1940 North Monroe Street, Tallahassee, FL, 32399-0767, or at (850) 487-1395.
- ***Florida Surplus Lines Service Office Board Meeting.*** **July 23, 2013**, 1:00 p.m., Ponte Vedra Inn & Club, 200 Ponte Vedra Blvd, Ponte Vedra, FL. A copy of the agenda may be obtained by contacting Georgie Barrett at gbarrett@fslso.com.
- ***HHS Accepts OIR Proposed Health Insurance Geographic Rating Areas - Exhibit Showing the Established GRAs and Rating Area IDs Assigned for Use in Federal Systems.***
- ***In re Receivership of Armor Insurance Company – Distribution Checks Mailed.*** On March 20, 2013, 1,149 checks were mailed to Class 2 claimants representing 48.43% of the adjudicated claim amount owed each Class 2 claimant. A total of $148,876.43 was distributed. Funds were not available to pay Class 3 through Class 11 claimants. At this time, the Receiver does not anticipate any further distributions.
- ***In re Receivership of Champion Healthcare, Inc. – Final Distribution Checks Mailed.*** On March 27, 2013, final distribution checks were mailed, which paid 100% of Class 4 and 21.49% of Class 6 claims. No further distributions are anticipated, and the estate is scheduled to be closed by the end of June 2013.
- ***In re Receivership of First Commercial Insurance Company – Notices of Determination Mailed.*** On March 25, 2013, 31,638 Notices of Determination letters were mailed to all known claimants. Due to insufficient assets, only Class 1 and 2 were evaluated. The Amount Recommended Claimant field will be blank for Classes 3 through 11. The objection filing deadline is **May 6, 2013.**
- ***In re Receivership of First Commercial Transportation & Property Insurance Company.*** On March 20, 2013, 1,093 Notices of Determination letters were mailed to all known claimants. All classes of claims were evaluated. The Class of each claimant and the recommended amount are recorded on the notice. The objection filing deadline is **May 6, 2013**.
- ***Universal Health Care Insurance Company Ordered into Receivership Effective March 22, 2013.***
- ***Universal Health Care, Inc. Ordered into Receivership Effective March 22, 2013.***

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