BOEHM BROWN
FISCHER, HARWOOD, KELLY & SCHEIHING, P.A.
ATTORNEYS AT LAW

Law News & Notes

The Newsletter of Boehm, Brown, Fischer, Harwood, Kelly & Scheihing, P.A. • Summer 2010

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2010 Florida Legislative Updates

Heather L. Komarnisky, Esquire, Ocala office

The Florida Legislature passed the following bills in the 2010 session that are of particular importance to the insurance industry:

HB 689 Premises Liability

This bill creates Florida Statute 768.0755, Premises Liability for Transitory Foreign Substances in a Business Establishment, effective July 1, 2010, which provides as follows: (1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it.

Constructive knowledge may be proven by circumstantial evidence showing that: (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or (b) The condition occurred with regularity and was therefore foreseeable. (2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

Section 2 of this Statute repeals F.S. 768.0710 (2002), the former statute addressing the burden of proof in claims of negligence involving transitory foreign objects or substances against persons in possession or control of business premises. The important difference between F.S. 768.0710 and 768.0755 is that the claimant alleging injury must now prove that the business had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. F.S. 768.0710 specifically provided that the claimant did not have to prove actual or constructive notice of the dangerous condition. F.S. 768.0755 now makes actual or constructive notice an element of proof.

In enacting F.S. 768.0710 (2002), the legislature relied upon a Florida Supreme Court decision from the previous year. In 2001, the Florida Supreme Court issued an opinion deciding the cases of *Owens v. Publix Supermarkets, Inc.* and *Soriano v. B&B Cash Grocery Stores, Inc.*, 802 So. 2d 315 (Fla. 2001). In *Owens*, a Publix employee was shopping after work when she slipped and fell on a discolored piece of banana. At trial, Publix moved for a directed verdict on liability, arguing that the plaintiff failed to present evidence that Publix had actual or constructive knowledge that the banana was on the floor. The trial court granted Publix's motion. Owens appealed and the 5th DCA ultimately affirmed the trial court's directed verdict. The court concluded that because there was more than one theory of how the banana could have gotten on the floor, it was the plaintiff's duty to prove that the aging of the banana occurred on the floor, in order to give rise to an inference that the banana had been there a sufficient time to provide Publix with constructive knowledge.

Similarly, in *Soriano*, a grocery-store patron slipped on a piece of discolored banana. The trial court granted the store's motion for directed verdict finding that the evidence was insufficient to show actual or constructive notice, since Soriano could not prove that the aging of the banana occurred on the store floor. The 4th DCA affirmed the trial court. On appeal, the Florida Supreme Court noted the general proposition that premise owners owe a duty to invitees to exercise reasonable care to maintain the premises in a safe condition. However, the Court pointed to a "rule that has developed" through case law providing that a claimant must prove that the premises owner had "actual or constructive knowledge of the dangerous condition 'in that the condition existed for such a length of

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Firm News

Attorney News & Notes

Attorney **Lincoln S. LeVarge** was recently named a firm partner. Lincoln practices in the Orlando office in the area of property insurance defense. He received his J.D. with Honors from the University of Maryland, and has been with the firm since 2008. Lincoln is admitted to the U.S. District Court for the Middle District of Florida, and is member the Florida Bar, the Orlando Bar Association, and the Windstorm Insurance Network, Inc. (WIND).

Partner **Janet L. Brown** was awarded the inaugural Presidential Recognition Award at the 2010 WIND Conference in Jacksonville, Florida. The award was established to annually recognize a member who has contributed significant knowledge, service and leadership to better WIND. Janet has served on numerous board positions with WIND and has been a workshop faculty presenter at every annual and regional WIND conference. WIND is a member association exclusively dedicated to educating its members on issues of significance to the insurance industry and related professional fields, arising from windstorms and wind-related natural disasters.

Janet L. Brown also won a summary judgment for Westchester Surplus Lines Insurance Company in a property-damage bad-faith lawsuit filed by Waters Edge Living, LLC and Waters Edge JW, LLC in the United States District Court for the Northern District of Florida. Janet was co-counsel with Wayne D. Taylor of Mozley, Finlayson & Loggins, LLP of Atlanta.

Partner **Michaela D. Scheihing** serves as this year's WIND President, and associate **Marjorie M. Salazar** was appointed as the Program Chair for the 2011 WIND Conference in Houston, Texas. For more information, please visit www.windnetwork.com.

Orlando partner **Susan B. Harwood** attended the Litigation Management College, Graduate Program at Emory University in Atlanta. She was appointed Assistant Dean of this Graduate Program for 2010-2011. This program is sponsored by the Federation of Defense and Corporate Counsel (FDCC).

Susan and Janet will also attend the annual meeting of the FDCC in Munich, Germany in July. Susan will be participating on an ethics presentation at the conference. In addition, Susan has also recently served on the planning committee for the DRI Insurance Coverage and Practice Symposium to take place in New York City on November 18-19, 2010.

TOP: Partner Janet L. Brown received the inagural Windstorm Insurance Network (WIND) Presidential Recognition Award at the 2010 Windstorm Insurance Conference in Jacksonville, Florida. LOWER LEFT: Lincoln S. LeVarge was recently appointed as partner; and LOWER RIGHT: Soobadra Gautheir is the firm's newest associate. Both practice in the Orlando office.

Ocala partner **Randy Fischer** attended the Southeastern Executives Claims Association Spring Meeting in Naples from April 18-20. In addition, Randy and associates **Juliet Stage** and **Heather Komarnisky** attended the Florida Insurance Fraud Education Conference in June in Orlando.

Associate **Soobodra Gauthier** has joined the firm's Orlando office. Having started her legal career with the firm, we are pleased to have her return to the firm to provide 18 years of experience in first-party property and contract matters.

The firm's case law seminars will resume this fall with the Adjuster-Code of-Ethics class scheduled for September. If you are not currently on the mailing list and would like to receive notice about these free CE-credited seminars, please contact Mary Martin at 407.660.0990 or email at mmartin@boehmbrown.com.

Need to keep current on the latest hot cases? Be sure to visit the firm's website at www.boehmbrown.com for important cases on property and casualty law. In addition, the firm's newsletter (and archived issues) are available for download on the site.

The firm's 2010 Hurricane Toolbox is now available. Adjuster and ethics credits are pending. Please contact any partner to arrange a class for your company.

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Property Law

Property Law Case Notes

Soobadra Gauthier, Esquire, Orlando office

> " The 2nd DCA held that the statute establishing a presumption of correctness for the expert's findings does not shift the burden of proof to the insured."

***Florida Insurance Guaranty Association, Inc. v. The Olympus Association, Inc.* (Fla. 4th DCA, May 19, 2010)**

The Florida Insurance Guaranty Association (FIGA) sought relief from the 4th DCA as a result of the trial court confirming an appraisal award and entering final judgment for Olympus without first determining FIGA's liability as to contested coverage claims. The 4th DCA reversed the order.

Southern Family Insurance Company issued a property insurance policy to Olympus which, during the policy period, sustained building damage in excess of $8 million as a result of Hurricane Wilma. Southern Family went into receivership and that insolvency triggered FIGA's obligation to pay for "covered claims." Olympus' public adjuster demanded appraisal and an appraisal award in excess of $7 million dollars was entered. The appraisal award stated that "this award is made without consideration of other terms, conditions, provisions or exclusions of the. . . policy, which might affect coverage or the amount of the insurer's liability there under." There was a separate sheet listing line-item appraisal amounts, which indicated that almost $4 million was allotted for Waterproofing/Painting. Olympus filed suit for breach of contract and FIGA raised as an affirmative defense, the "Windstorm Exterior Paint and Waterproofing Exclusion." Olympus filed a Motion to Confirm Appraisal Award and Entry of Final Judgment, which was granted. FIGA appealed the order contending that the trial court erred in failing to determine FIGA's liability with regard to the contested claim, and entering final judgment for the entire appraisal amount.

The 4th DCA relied on Florida Supreme Court precedent in *State Farm Fire & Casualty Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996), and on established case law, to conclude that the submission of a claim to appraisal does not foreclose a challenge that an element of loss is not covered by the policy. As such, the 4th DCA held that the trial court erred by entering final judgment awarding the amount set forth in the appraisal without first determining the issue of coverage liability contested by FIGA in its affirmative defenses. They further concluded that based on legal precedent, FIGA could contest part of the liability without challenging coverage as a whole and noted that the appraisal award itself in this case indicated that the amount could change, because the award was made without consideration of policy provisions as to coverage.

***Warfle v. Universal Insurance Company of North America* (Fla. 2nd DCA, May 12, 2010)**

Warfel appealed a final judgment entered in favor of Universal Insurance in a sinkhole coverage case, where the trial court instructed the jury on an evidentiary presumption that impermissibly shifted the burden of proof to him. The 2nd DCA reversed and ordered a new trial.

Florida Statute 627.7073(1)(C) provides that the respective findings, opinions, and recommendations of the professional engineer or professional geologist as to the cause of distress to the property and the findings, opinions, and recommendations of the professional engineer as to land and building stabilization and foundation repair shall be presumed correct. The trial court allowed Universal Insurance a jury instruction based on that section as a rebuttable presumption affecting the burden of proof, such that the jury was instructed that they must presume the report to be correct and that Warfel had the burden of proving, by a preponderance of the evidence, that the findings, opinions and conclusions were not correct. Warfel argued that the presumption affected the burden of producing evidence, but did not shift the burden of proof to him.

The 2nd DCA held that the statute establishing a presumption of correctness for the expert's findings does not shift the burden of proof to the insured. Rather, it found the presumption is a "vanishing" or "bursting bubble" presumption that only affects the insured's burden of producing evidence and when credible evidence comes into the case contradicting the basic facts giving rise to the presumption, the presumption vanishes and the issue is determined on the evidence just as though no presumption ever existed.

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Property Law

When Does the Clock Start Ticking? Statute of Limitations and Breach-of-Contract Lawsuits

Marjorie M. Salazar, Esquire, Daytona office

"The statute does not specify when the statute of limitations begins running; this is the real issue that must be addressed when determining whether a lawsuit is barred by the statute of limitations."

With the five-year anniversary of Hurricanes Dennis, Katrina, and Wilma approaching, more and more supplemental claims – and even new claims – are being made. New lawsuits regarding Katrina and Wilma claims are commonplace in South Florida, and we can expect many more to be filed in the coming months as the anniversaries of the landfalls of these 2005 hurricanes approach. Many policyholders are scrambling to file lawsuits before the five-year anniversaries of the hurricanes' landfalls, but is that really the deadline?

In Florida, there is a five-year statute of limitations to bring lawsuits based on contracts. The governing statute is section 95.11, which provides: "Actions other than for recovery of real property shall be commenced as follows: … (2) WITHIN FIVE YEARS. …(b) *A legal or equitable action on a contract,* obligation, or liability founded on a written instrument. . . ." Fla. Stat. section 95.11 (2001) (emphasis added in italics)(effective from July 1, 2001-September 30, 2005) (The change to the section in effect during Hurricane Wilma's Florida landfall was about the payment-bond provision.)

However, the statute does not specify when the statute of limitations begins running; this is the real issue that must be addressed when determining whether a lawsuit is barred by the statute of limitations. While some believe that the statute-of-limitations period starts on the date of the loss–in the case of Hurricane Dennis on July 10, 2005; Hurricane Katrina on August 25 or 26, 2005; and Hurricane Wilma on October 24, 2005–others believe that the period starts much later, with the date that the claim is denied or the date that the insurer breaches the contract in some manner.

The latter approach appears to be the one taken by Florida courts. Under Florida Court decisions, the five-year period for legal actions to be brought on a contract starts to run when the claim is denied or the insurer violates the contract. If the insurer paid some benefits on the policy but then stopped, the five years begins when the insurer stopped paying benefits. (See http://www.myfloridacfo.com/consumers/InsuranceLibrary/Insurance/General/Claims/General_Insurance_Claims_-_Statute_of_Limitations.htm).

Actually, there is a Florida statute that addresses the computation of time for the statute of limitations—Florida Statute section 95.031, "Computation of Time." That statute provides: "… the time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues. (1) A cause of action accrues when the last element constituting the cause of action occurs." The elements of a breach-of-contract claim are a valid contract, a material breach, and resulting damages. The last element of the claim—damages—arises simultaneously with the material breach in the case of a policy of insurance, because that is the same time that the policyholder would be entitled to payment.

Thus, Florida Statute section 95.031 appears to clarify that the statute of limitations begins running not on the date of the hurricane's impact, but on the date of occurrence of the last element of the breach of contract. In application, the issue of when the breach of contract occurred must be addressed on a case-by-case basis.

In some policies, the "Suit-Against-Us" provision provides that the lawsuit must be brought within a certain time period after the date of the occurrence that gives rise to the loss or the cause of action. Some will argue that the Florida Statutes should trump the policy provision, since all policies issued in Florida are deemed to have the Florida Statutes integrated in them, and inconsistencies in policies are void. However, if the policy provides for a five-year period to bring the lawsuit, and may therefore be in accordance with the statutue, then the result will be up to the courts to decide in that instance.

There are only a few first-party property cases in Florida in which the statute of limitations is applied, and of those only two involve lawsuits for breach-of-contract claims in which the court determined the date that the statute of limitations began to run. *Passman v. State Farm Fire & Casualty Company,* 779 So. 2d 323 (Fla. 2d DCA 1999), involved a claim for cracks in the wall of a house and a later claim for the alleged "collapse" of the

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Casualty Law

Casualty Law Case Notes

Lance Wright, Esquire, Ocala office

"On appeal, the 4th DCA held that neither Mr. Hutchinson's release, nor the lack of assignment of rights from Mr. Hutchinson, bars Vigilant's bad-faith claim."

***Bell v. State Farm Mut. Auto. Ins. Co.* (Fla. 4th DCA, March 24, 2010)**

Valda Bell was injured when her vehicle was involved in a rear-end collision with another vehicle. Ms. Bell filed a complaint against State Farm, the insurer of the motorist in the rear vehicle, among others. Ms. Bell appealed the trial court's order dismissing with prejudice her second amended complaint that alleged State Farm failed to timely disclose, in violation of section 627.4137, Florida Statutes (2007), and that it had agreed to provide coverage for any excess judgment. The 4th DCA found no reversible error. Ms. Bell was awarded a $2,690,806 verdict, which was promptly paid by State Farm under a policy of automobile insurance with bodily injury liability limits of $50,000 per person.

***Vigilant Ins. Co. v. Continental Ins. Co.* (Fla. 4th DCA, March 31, 2010)**

Joe Hutchinson was injured while using a wood chipper that was manufactured by Garden Way. At that time, Garden Way had primary liability insurance with Continental, in the amount of $1 million subject to $500,000 self-insured retention ("SIR"). Garden Way also had excess liability coverage under a policy with Vigilant in the amount of $25 million. Mr. Hutchinson sued Garden Way in 1998 for products liability and negligence. Vigilant alleged that Continental advised Vigilant that Continental's limit was $1 million and that there was self-insured retention of $500,000. Continental informed Vigilant that the claim was within its limit of liability and advised Vigilant that it could close its file. Initially, Mr. Hutchinson made demands for settlement within the SIR and primary insurance policy, which Continental rejected without providing any notification to Vigilant. By the time Continental again contacted Vigilant after three years of litigation, Mr. Hutchinson was demanding amounts in excess of the primary policy and remaining SIR, requiring contribution from Vigilant. Hutchinson's claim was settled for $1.7 million with Continental paying $469,494 and Vigilant paying $1,230,506. Garden Way did not pay any of the SIR. Mr. Hutchinson executed a release and settlement which provided for the release and discharge of Garden Way, Continental and Vigilant. Vigilant did not obtain an assignment of any bad-faith claim Garden Way may have had against Continental before the release was executed.

Thereafter, Vigilant filed a bad-faith action against Continental, and moved for summary judgment on the bad-faith claim on two bases. First, Continental maintained that because Mr. Hutchinson released Garden Way as to all claims in the underlying litigation without any assignment of a bad-faith claim to Vigilant,Vigilant could not maintain a claim for bad faith against Continental. Second, Continental argued that because an excess judgment was never entered in the underlying litigation, Vigilant could not state a claim against Continental. The trial court orally granted summary judgment in favor of Continental because Garden Way was released without paying any of the settlement out of its own pocket and there could be no bad-faith claim where the underlying claim ended in settlement. On appeal, the 4th DCA held that neither Mr. Hutchinson's release, nor the lack of assignment of rights from Mr. Hutchinson barred Vigilant's bad-faith claim.

***Holland v. Barfield,* (Fla. 5th DCA, May 7, 2010)**

Ms. Barfield, as the personal representative of Brandon Ledford's estate, filed suit against Ms. Holland and five additional defendants alleging wrongful death of Mr. Ledford when he fell from the tenth floor balcony of Ms. Holland's residence. Ms. Barfield propounded a request to produce on Ms. Holland for computer hard drives and cell phones in her possession from 24 hours preceding the incident to the present. Ms. Holland objected that the requests sought irrelevant information unlikely to lead to the discovery of admissible evidence, were overbroad in scope, were harassing and invaded her right to privacy under Article I, Sec. 23 of the Florida Constitution. Ms. Barfield moved to compel the requested items seeking evidence of communications between Ms. Holland and the decedent through text messages, Facebook, and MySpace. The trial court granted her motion. In addition, the trial court directed Ms. Barfield to agree to

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time that in the exercise of ordinary care, the premises owner should have known of it and taken action to remedy it.'" The Court further stated that constructive knowledge can be established by showing "the condition existed for a length of time that the owner should have known of it; or the condition occurred with regularity and therefore, was foreseeable."

The Florida Supreme Court concluded that the directed verdicts were erroneously entered in both *Owens* and *Soriano* since the evidence of the deteriorated condition of the bananas was enough to survive a directed verdict. The Court went on to conclude that the discolored bananas gave rise to a reasonable inference that the aging occurred while the banana was on the floor, which would provide circumstantial evidence of constructive notice to the premises owner. The fact that there are different scenarios as to how the bananas could have become deteriorated while off the floor does not render the circumstantial evidence of constructive knowledge deficient so that a directed verdict is proper.

The Court adopted a general rule to be applied to all slip-and-fall cases in business premises involving transitory substances, that "the existence of a foreign substance on the floor of a business premises that causes a customer to fall and be injured is not a safe condition and the existence of the unsafe condition creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition." The burden then shifts to the premises owner to show by the greater weight of the evidence that it exercised reasonable care in maintaining the premises. The jury must then determine whether the premises owner exercised reasonable care in maintaining the premises in a safe condition. The Court noted that shifting the burden to the premises owner will prevent premises owners from benefitting from an absence of record-keeping and will increase the likelihood that the store will take protective measures to prevent foreseeable risks. The Court further noted that the plaintiff still needs to prove that the slip and fall caused the alleged injuries.

"The burden then shifts to the premises owner to show by the greater weight of the evidence that it exercised reasonable care in maintaining the premises."

By passing F.S. 768.0755 (2010), the legislature has shifted the burden of proof back onto the claimant to show that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it, abrogating *Owens*. However, the legislature has incorporated language from the *Owens* opinion regarding the establishment of constructive notice, as can be seen in F.S. 768.0755(1)(a) and (b) (2010). Governor Crist signed the bill on April 14, 2010 and it takes effect on July 1, 2010.

CS/SB 1460 Florida Hurricane Catastrophe Fund

This bill amends Florida Statute 215.555, the highlights of which are as follows: (1) Amends the definition of "contract year" to mean the period beginning June 1 of the calendar year and ending May 31 of the following calendar year; (2) Extends the deadline for the Board of Administration to provide additional reimbursement coverage of up to $10 million to qualifying insurers from December 31, 2011 to May 31, 2012; (3) Increases the Board of Administration's obligation regarding annual contracts from $15 billion to $17 billion; and (4) Adds Subsection (18) which provides that the Board of Administration must adopt the reimbursement contract by February 1 of the preceding contract year, to be adopted as soon as possible. In addition, insurers shall execute the reimbursement contract by March 1 of the preceding contract year. Lastly, the Board of Administration shall publish the maximum statutory adjusted capacity for the mandatory coverage for a contract year, the maximum statutory coverage for optional coverage for a contract year, and the aggregate fund retention used to calculate retention multiples for the contract year in the Florida Administrative Weekly by January 1 of the immediately preceding contract year. This bill was signed by Governor Crist on April 15, 2010 and it takes effect on July 1, 2010.

CS/CS/HB 965 Real Property Assessment

This bill creates F.S. 193.1552, Assessment of Properties Affected by Imported or Domestic Drywall, which was approved by Governor Crist on June 1, 2010. The highlights are as follows: (1) Defines "imported or domestic drywall" to mean drywall containing elevated levels of elemental sulfur that results in corrosion of certain metals;

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> "Unfortunately for the insurance industry, Governor Crist vetoed this bill. Depending on the volatility of this year's hurricane season, the vetoing of this bill may proof disastrous."

(2) Provides that when a property appraiser determines that a residence is affected by imported or domestic drywall used in the construction or improvement of a property, to which the purchaser was unaware, and needs remediation, the appraiser shall adjust the assessed value of the property by taking into consideration the presence of the imported or domestic drywall and its impact on the assessed value. Further, if the building cannot be used for its intended purpose without remediation or repair, the value shall be assessed at $0.00. (This section includes an exclusion for property owners who were aware of the presence of imported domestic drywall at the time of purchase.); (3) Provides that homestead property shall be considered damaged by misfortune or calamity, to which the three-year deadline does not apply, and homestead property shall not be considered abandoned upon vacation for the purpose of remediation or repair as long as the homeowner does not establish a new homestead; (4) Provides that upon completion of the remediation and repairs, the property is to be assessed as if the drywall had not been present; and (5) Provides a repeal date of July 1, 2017 unless reenacted.

CS/CS/SB 2044 Property Insurance

The highlights of this bill approved by both houses are as follows: (1) Allows insurers to raise premiums by up to 10% for inflation or financing products to replace reinsurance without regulation; (2) Allows insurers to raise rates if they provided too high of a discount to homeowners for fortifying their homes; (3) Allows insurers to charge customers for the costs of advertising for new policyholders without regulation; (4) Allows insurers to withhold full claims payments (including replacement-cost-value policies) until the homeowner repairs the damage; (5) Requires new insurers to have $15 million in capital; (6) Allows insurers to offer fewer discounts to policyholders who fortify their homes against windstorms and hurricanes and to charge insureds whose homes have less protection against storms; (7) Restricts ability of regulators to review the finances of an insurer's related companies; and (8) Creates restrictions for public insurance adjusters and amends F.S. 626.854 providing certain statements that may be considered deceptive or misleading if made in an advertisement or solicitation and requiring a disclaimer in any written advertisement; providing limitations on the amount of compensation by a public adjuster for supplemental or reopened claims; requiring insurer to notify insured or insured's representative of an onsite inspection and authorizing the insured to deny access to the property if notice is not provided; requiring public adjusters to provide prompt notice of certain property-loss claims; providing insurer with ability to interview the insured directly about a claim; prohibiting the insurer from preventing a public adjuster from communicating with the insured; prohibiting a public adjuster from restricting persons acting on behalf of the insured from accessing the property, including the insured's adjuster; authorizing an adjuster to be present during an inspection; prohibiting a licensed subcontractor or contractor from adjusting a claim on behalf of the insured if he or she is not a licensed public adjuster; requiring public-adjuster apprentices to complete a minimum number of hours of continuing education to qualify for licensure; providing certain requirements for a public-adjuster contract; and requiring the insurer be provided notice of a claim within three years after a windstorm or hurricane occurs.

Unfortunately for the insurance industry, Governor Crist vetoed this bill on June 2, 2010. There have been reports that the legislature is going to be holding a special session to address Governor Crist's veto of SB 2044; however, as of the date of this publication, no decision had been made to do so. Depending on the volatility of this year's hurricane season, the vetoing of this bill may prove disastrous. As aptly noted by Mike Thomas of the Orlando Sentinel, "Charlie Crist has put the finishing touches on his four-year campaign to destroy the property-insurance market in Florida. And just in time for what is expected to be a wham-bam hurricane season."

SB 1196 Relating to Community Associations

This bill becomes effective July 1, 2010 and creates the "Distressed Condominium Relief Act" and other legislation, the highlights of which are as follows: (1) Creates F.S. 627.714, which requires condominium unit owners' policies to provide a minimum of $2,000.00 in property-loss-assessment

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> "These two cases suggest that the courts will use the last action of the insurer in determining when the breach of contract occurs and the statute of limitations begins to run."

house. The policyholder made the initial claim for a hairline crack in a bedroom in December 1990, which State Farm denied on January 23, 1991. Years later, in April 1995, the policyholder reported a large crack running the length of the bedroom's tile floor. 779 So. 2d at 325. On June 1, 1995, State Farm denied that claim as due to consolidation of buried debris beneath the foundation and therefore not a covered sinkhole. Later, serious damage occurred to the home, including the windows falling out, the floors separating from the rest of the residence, and the entire structure warping. The public adjuster then presented a claim for "collapse." State Farm denied that there was a collapse on June 6, 1996. On November 14, 1996, the policyholder filed a breach-of-contract lawsuit. *Id.*

State Farm moved to dismiss the lawsuit as barred by the statute of limitations, and the trial court granted the motion, finding that the five-year period began to run on January 23, 1991, with the denial of the initial claim, opining that by that time the policyholder either knew or should have known of the serious sub-slab or foundation problems. *Id.* The appellate court reversed, finding that the policyholder's knowledge of the condition was not the event that commenced the limitations period, but that State Farm's breach of its obligation to pay the claim was the triggering event. Concluding that the 1991 and 1995 claims were two separate claims, the appellate court held that the denial of the claim on June 6, 1996 was the date of the breach of contract, and that the lawsuit was therefore timely filed. *Id.* In effect, the appellate court took the last action by State Farm in the very long chain of events and used that as the date of the breach of contract.

Another case that applied the statute of limitations to a property claim is *Chimerakis v. Sentry Insurance Mutual Company,* 804 So.2d 476 (Fla. 3d DCA 2002), which involved a supplemental Hurricane Andrew claim. After Hurricane Andrew the policyholder reported damage and Sentry paid $1,000. Approximately five years later, the policyholder notified Sentry that she had discovered additional hurricane damages and complained that she had been underpaid, and demanded an appraisal. At the time of the demand for an appraisal, the law in the Third District was that neither party to the contract could refuse the demand for appraisal for failure to comply with post-loss conditions. Sentry did not appoint its appraiser within 20 days as required by the policy. The policyholder treated the failure to appoint an appraiser as a breach and filed the lawsuit to compel appraisal. Thereafter, the court issued the decision in *USF&G v. Romay*, 744 So. 2d 467 (Fla. 3d DCA 1999), holding that the insured must comply with all the conditions precedent prior to a motion to compel appraisal being granted.

Following *Romay*, the policyholder's attorney faxed a letter to Sentry's attorney requesting that the policyholder be permitted to perform the policy's conditions precedent to demanding appraisal. Sentry denied the request. 804 So.2d at 478. The trial court sua sponte determined that the action for appraisal was barred by the statute of limitations. The appellate court noted that when it issued its first opinion related to the case on November 24, 1999, that the policyholder could not compel appraisal because she had not yet complied with the policy's conditions precedent, and therefore the statute of limitations could not have begun to run. 804 So.2d at 480. The appellate court held that the statute of limitations "could only have begun to run for this action when [the policyholder] offered to perform the conditions precedent and Sentry refused to allow such performance." The court held that the lawsuit was therefore initiated before the expiration of the statute of limitations.

These two cases suggest that the courts will use the insurer's last action in determining when the breach of contract occurs and the statute of limitations begins to run. Thus, if a late claim is now made for Katrina or Wilma, and denied, or the policyholder disputes the amount paid by the insurance company, the statute of limitations would not begin to run until the contract is breached, and the policyholder *then* has five years to bring a lawsuit. In essence, then, we could see Katrina and Wilma lawsuits for many years to come. On the other hand, if the policy at issue contains a five-year limitation on lawsuits, then the courts will have to decide whether the policy provision is in compliance with the Florida Statutes or not. In any event, this issue is going to have to be addressed on a case-by-case basis depending on the particular policy at issue and the particular facts of each case.

Property Law Case Notes continued from page 3

The 2nd DCA recognized that this ruling may affect insurance claims for sinkhole losses throughout Florida and so certified the following question to the Florida Supreme Court as one of great public importance: "Does the language of Section 627.7073(1)(c) create a presumption affecting the burden of proof under Section 90.304 or does the language create a presumption affecting the burden of producing evidence under Section 90.303."

Florida Farm Bureau Casualty Insurance Company v. Mathis (Fla. 1st DCA, April 20, 2010)

In September 2004, Hurricane Ivan caused substantial wind and flood damage to the residential property of Willis and Katherine Mathis. Santa Rosa County advised the Mathises that damages to their house exceeded fifty percent of the structure's value, and therefore new construction or repairs would be required to meet the most current building code requirements. Due to this requirement, as well as the unsafe condition of the property, the Mathises chose to demolish the house.

At the time of the subject loss, the Mathis property was insured under two policies: (1) a homeowner's insurance policy with limits of $295,600, which covered windstorm damage among other perils and excluded flood damage; and (2) a flood insurance policy with limits of $250,000. The Mathises made claims under both policies. They received the flood insurance policy's full $250,000 policy limits less the deductible. The insurer of the homeowner's policy, Florida Farm Bureau Casualty Insurance Company ("Florida Farm Bureau"), issued approximately $102,000 for wind damages to the home.

The Mathises filed suit against Florida Farm Bureau for the full policy limits of their homeowner's policy, arguing that the hurricane had caused a total loss or constructive total loss of their home, and, therefore, Florida's Valued Policy Law ("VPL"), section 627.702(1), Florida Statutes (2004), entitled them to recover their policy limits under the homeowner's policy. The trial court found that the covered peril of wind had caused a total loss or a constructive loss of the insureds' home and awarded the insureds the full policy limits of their homeowner's policy, less the amounts already issued by Florida Farm Bureau. The insurer appealed.

On appeal, Florida Farm Bureau argued that the trial court committed fundamental error in failing to set off the amount paid under the flood insurance policy against the damages awarded under the homeowner's policy. The 1st DCA highlighted that while the insurer had failed to assert the defense of "set off" in the underlying case, even if this argument had been previously made, there was no evidence in the record of an actual duplication of benefits that would support such a defense. Ultimately, the court affirmed the trial court's decision that the insureds were entitled to recover their policy limits under the homeowner's policy on the basis that the Mathises had introduced evidence, which had been accepted by the jury, that the covered peril of wind caused a total loss or a constructive total loss of the subject property.

"On appeal, Florida Farm argued that the trial court committed fundamental error in failing to set off the amount paid under the flood insurance policy against the damages awarded under the homeowner's policy."

Hartford Cas. Ins. Co. v. 600 La Peninsula Condominium Association, Inc. (M.D.Fla., February 10, 2010)

600 La Peninsula Condominium Association, Inc. ("La Peninsula,") submitted a claim for Hurricane Wilma damages to its insurer, Hartford Casualty Insurance Company ("Hartford"). A Hartford adjuster was assigned to the claim and an investigation followed. As part of the investigation Hartford retained the services of TMI Construction to complete an estimate. Based on TMI Construction's estimate, a total payment of $243,921.13 was issued by Hartford and accepted by La Peninsula for the claimed damages. The insurance file was then closed.

Two and a half years after closure of the claim file, La Peninsula submitted a new estimate to Hartford through its public adjuster East Coast Appraisers for approximately $2.5 million in Hurricane Wilma damages, and the insured demanded appraisal. The new estimate included damage to items not previously observed or identified and damage for improper repairs. Hartford investigated the claimed damage under a reservation of rights. While the investigation was still ongoing, the insured filed a Civil Remedy Notice asserting wrongful denial of the latter claim or failure to agree to an appraisal. After conducting its second investigation, Hartford denied coverage on the bases that (1) there was no physical loss or damage to the property, (2) any

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physical loss or damage was caused by excluded causes such as faulty workmanship, corrosion, deterioration, and the insured's neglect, and (3) La Peninsula breached the notice and duty-to-protect-property conditions under the policy. Hartford then filed a Declaratory Action against La Peninsula seeking a declaration as to coverage under the subject policy. The insurer argued that the insured's later claim was not subject to appraisal because Hartford disputed coverage and the matter did not involve an amount-of-loss dispute.

The Court ruled under a motion-to-dismiss standard to find that the matter could plausibly involve a separate claim from the previous covered claim. The Court also found that since Hartford wholly denied this second claim, any request for appraisal was deemed premature until the judicial question of coverage was determined.

"The Court ruled under a motion to dismiss standard to find that the matter could plausibly involve a separate claim from the previous covered claim. "

American Capital Assurance Corp. v. Courtney Meadows Apartment, LLP
(Fla. 1st DCA, April 7, 2010)

An apartment complex, Courtney Meadows Apartment, LLP, incurred property damage from a hail storm and submitted a claim to its insurer, American Capital Assurance Corporation. The insured believed a majority of the complex's damaged roofs required replacement; however, the insurer's final estimate determined that only one roof needed replacement and that the other roofs could be repaired. The insurer then issued a check for the amount reflected in its final estimate and asked the insured to submit a sworn proof of loss for this amount. The correspondence accompanying the check also stated that if a dispute existed concerning the amount of loss, then the insurer might wish to proceed with appraisal. The insured completely rejected the check, refused to provide a sworn proof of loss, and notified the insurer of four additional items of loss that were not included in the insurer's final estimate. The insurer then demanded appraisal, and the insured responded by filing suit for declaratory relief and numerous breaches of contract. The insurer moved to dismiss or abate the action and to compel appraisal, arguing that it had properly invoked the appraisal process under the terms of the policy.

The trial court ruled that the appraisal demand was untimely, and, furthermore, that only the four items that had not been adjusted by the insurer were subject to appraisal. On appeal to the 1st DCA, the Court found that (1) the insurer's demand for appraisal was not untimely and (2) appraisal of the four items that had not been previously adjusted by the insurer was premature on the basis that, without adjustment, it was impossible to know whether the parties disputed the amount of loss to warrant appraisal.

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coverage; (2) Amends F.S. 718.111(11)(a) to provide that condominium associations must obtain adequate "property" insurance and not adequate "hazard" insurance, as is currently required; (3) Amends F.S. 718.111(11)(a) to provide that the replacement cost of the condominium property is to be determined every three years; (4) Provides within F.S. 718.111(11)(f) (3), that certain personal property within an owner's unit is the responsibility of the unit owner and is not covered within the association's policy; (5) Deletes the current law contained within F.S. 718.111(11)(g) (1), providing that improvements to a condominium property that benefit less than all of the unit owners must be insured by the unit owners that benefit from the improvements or insured by the association at the expense of the benefitted unit owners; (6) Deletes the current requirement pursuant to F.S. 718.111(11)(g) (2), that unit owners must present proof of insurance upon demand from the association and allowing the association to purchase insurance at the unit owner's expense for those unit owners without insurance; and (7) Creates a new F.S. 718.111(11)(g) (2), deleting the requirement that associations be listed as an additional named insured under the individual unit owner policies.

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a protective order and confidentiality agreement providing that, unless a court order was entered, the information obtained would only be viewed by the attorney; prohibited the use or sharing of any financial or social security information; and required any third party provided with discovery to sign a copy of the order.

Ms. Holland filed a petition for writ of certiorari to quash the trial court order arguing that it violated Florida Rules of Civil Procedure. Ms. Holland alleged violation of Rule 1.350 since the order gives plaintiff unlimited access to her hard drive and SIM card without satisfying the requirements of *Menke v. Broward County School Board,* 916 So. 2d 8, 11-12 (Fla. 4th DCA 2005). Ms. Holland argued that Ms. Barfield could examine every byte of information in contravention of her right to privacy and without regard to the attorney-client and work-product privileges. Further, Ms. Holland argued that the order violated Rule 1.280(b)(5) because it ordered her to give her phone and hard drive to Ms. Barfield without reviewing the information beforehand and allowed Ms. Barfield's expert to review the items outside the presence of defense counsel, depriving her of the opportunity to preserve any objections. She also alleged that the order was burdensome in that it deprived her of her phone and computer for an undetermined amount of time which would interfere with her studies at Florida Atlantic University.

The 5th DCA noted that in granting the requested certiorari relief, the irrelevancy of discovery is not enough unless the disclosure may reasonably cause material injury of an irreparable nature. In *Menke,* the trial court ordered a high school teacher accused of exchanging sexually explicit emails with students, to produce all computers in his household for inspection by the school expert. The 4th DCA held that Rule 1.350(a)(3) was broad enough to encompass hard drives; however, unlimited access to anything on the computer would cause irreparable harm since it would allow the party to view confidential and privileged information. However, the court indicated that such a request may be approved if there is evidence of destruction of evidence, a likelihood that the information exists on the devices, and if there is no less intrusive means of obtaining the information.

The 5th DCA noted that there was no evidence of destruction of evidence or the thwarting of discovery, even though Ms. Barfield alleged same in response to the petition. The court held that since the trial court order allowing Ms. Barfield's expert to examine the devices did not protect against the disclosure of confidential and privileged information, it caused irreparable harm. Accordingly, the discovery order was quashed.

Abreu v. F.E. Development Recycling, Inc., et. al. **(Fla. 5th DCA, May 7, 2010)**

Mr. Abreu alleged injury as a result of an automobile accident. He appealed a final summary judgment entered by the trial court in favor of the defendant driver and his employer, F.E. Development Recycling, Inc., which established as a matter of law the defendants' affirmative defense that the driver lost consciousness suddenly and unexpectedly before the crash.

In holding that the lower court erred in granting final summary judgment in favor of the defendants, the 5th DCA stated that in order to establish such a defense, the defendant must prove the following four elements: (1) the defendant suffered a loss of consciousness or capacity; (2) the loss of consciousness or capacity occurred before the defendant's alleged negligent conduct; (3) the loss of consciousness was sudden; and (4) the loss of consciousness was neither foreseen nor foreseeable.

The defendant driver lost consciousness when he suffered a brain aneurysm while driving. The defendants submitted an affidavit of a medical expert who opined that it would have been impossible for the driver to know prior to the impact that he was having an aneurysm. The plaintiff submitted medical notes in opposition to the summary judgment which indicated that the driver had a history of aneurysm and that further testing was recommended. Additionally, medical records revealed that the day of the accident the driver had a headache for several hours and that prior to losing consciousness his head was spinning, he had blurry vision and he felt like he was going to pass out. Accordingly, the 5th DCA held that there existed questions of material fact as to whether his loss of consciousness was foreseeable and reversed the final judgment.

Editor's Note: For additional Casualty Case Notes, please visit www.boehmbrown.com.

"The 5th DCA held that there existed questions of material fact as to whether his loss of consciousness was foreseeable and reversed the final judgment."

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