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Too Little, Too Late: Late Notice Claims + Hurricanes

I. Post-Loss Duties: Notice Requirement

The purpose of a notice provision in an insurance policy is to allow an insurer "to evaluate its rights and liabilities, to afford it an opportunity to make a timely investigation, and to prevent fraud and imposition upon it." *LoBello v. State Farm Fla. Ins. Co.*, 152 So. 3d 595 (Fla. 2d DCA 2014). A two-step analysis determines whether an insured's untimely reporting of loss results in the denial of coverage. *1500 Coral Towers Condo Ass'n v. Citizens Prop. Ins. Corp.*, 112 So. 3d 541 (Fla. 3d DCA 2013). "[A] failure to give timely notice creates a rebuttable presumption of prejudice to the insurer." *PDQ Coolidge Formad, LLC v. Landmark Am. Ins. Co.*, 566 Fed. Appx. 845, 849 (11th Cir. 2014) (*citing Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1217–18 (Fla. 1985)). The failure of an insured to give timely notice of loss in contravention of a policy provision is a legal basis for the denial of recovery under the policy. *Boyd v. Pennsylvania National Mut. Cas. Ins. Co.*, 195 So. 2d 259 (Fla. 4th DCA 1967).

Certain policies also contain a three-year limitation to report a claim, supplemental claim or reopened claim for loss or damage caused by windstorm, Named Windstorm, or Hurricane. Irrespective of the peril, Florida Statute § 627.70132 contains a two-limitation to report a claim or re-opened claim (a claim that an insurer has previously closed, but that has been reopened upon an insured's request for additional costs for loss or damage previously disclosed to the insurer), and three-year limitation to report a supplemental claim ("a claim for additional loss or damage from the same peril which the insurer has previously adjusted or for which costs have been incurred while completing repairs or replacement pursuant to an open claim for which timely notice was previously provided to the insurer"). Florida Statute § 95.11 also requires a suit for breach of a property insurance contract to be filed within five years of the date of loss.

II. Determining Whether Notice is Late

The first step focuses on whether the insured provided timely notice. *Id.* at 543. Florida courts have interpreted this to mean that notice should be provided "with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case." *Yacht Club on the Intracoastal Condo Ass'n., Inc., v. Lexington Ins. Co.*, 599 Fed. Appx. 875, 879 (11th Cir. 2015). If the undisputed evidence will not support a finding that the insured gave notice to the insurer as soon as practicable, then a finding that notice was timely given is unsupportable. *LoBello*, 152 So. 3d at 600.

The issue of whether an insured provided "prompt" notice generally presents an issue of fact. *Id.* (*citations omitted*). Whether notice was prompt is a fact issue may be resolved at summary judgment where the damage is caused by a known event, such as a hurricane. *Yacht Club*, 599 Fed. Appx. at 879-80.

- Regarding a claim for damage due to a tropical storm, six-month delay was not "prompt" notice as a matter of law. *PDQ Coolidge Formad, LLC v. Landmark Am. Ins. Co.*, 566 Fed. Appx. 845, 849 (11th Cir. 2014).
- Regarding a claim for loss to an aircraft, six-week delay did not constitute timely notice. *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 786 (Fla. 3d DCA 1981).
- Regarding a homeowners' claim for water damage, eight-month delay was not "prompt notice" as a matter of law. *Lehrfield v. Liberty Mut. Fire Ins. Co.*, 396 F. Supp. 3d 1178, 1182-83 (S.D. Fla. 2019).
- Regarding an automobile liability policy, report of an accident four weeks after it occurred was untimely. *Deese v. Hartford Accident & Indem. Co.*, 205 So. 2d 328, 329 (Fla. 1st DCA 1967).

III. Determining Whether there is Prejudice

If the insured breaches the notice provision, prejudice to the insurer will be presumed, but may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice. *1500 Coral Towers Condo Ass'n v. Citizens Prop. Ins. Corp.*, 112 So. 3d 541, 543 (Fla. 3d DCA 2013).

Prejudice to the insurer results if the untimely notice substantially disadvantages the insurer's ability to (1) investigate a claim, (2) defend a claim, (3) or to mitigate damages through settlement or early repairs. *Kendall Lakes Towers Condo. Ass'n, Inc. v. Pac. Ins. Co., Ltd.,* 10-24310-CIV, 2012 WL 266438 *4 (S.D. Fla. Jan. 30, 2012).

The following cases include specific rationales supporting the conclusion that delay from an untimely report resulted in prejudice as a matter of law:

- PDQ has not meet its burden to rebut the presumption of prejudice. Although Landmark's engineer, MEC, concluded that the damage at the time of the inspections was not a result of Tropical Storm Fay, there is no evidence showing that an earlier inspection would not have impacted the investigation. … Further, PDQ's reliance on "two (2) detailed estimates, affidavits and sworn testimony regarding the loss," dated February 10 and June 12, 2009, do not rebut any presumption of prejudice, since this evidence describes all of the damages, regardless of cause, at the Property and are conclusory. *PDQ Coolidge Formad, LLC v. Landmark Am. Ins. Co.*, 566 Fed. Appx. 845, 849–50 (11th Cir. 2014).
- The ability to offer testimony as to causation alone does not satisfy the purpose of prompt notice and therefore cannot vitiate the prejudice suffered by Lexington due to delayed investigation and mitigation. Here, even The Yacht Club's own expert acknowledged that the structure sustained additional damage because repairs were not made immediately after Hurricane Wilma. See Decl. of Anurag Jain, ¶ 11 [R58:Ex. 23] ("un-repaired damage to the structures, exteriors, doors, windows and roofing would make the building more susceptible to further damage from future rain and

windstorm events"). This is evidence of the prejudicial effect of the passage of time. *Yacht Club on the Intracoastal Condo. Ass'n, Inc. v. Lexington Ins. Co.*, 599 Fed. Appx. 875, 881 (11th Cir. 2015).
    - The Yacht Club undertook certain repairs before filing a claim with Lexington. Lexington was prejudiced by not being able to investigate prior to those repairs and by not participating in the repair of those damages. *Yacht Club on the Intracoastal Condo. Ass'n, Inc. v. Lexington Ins. Co.*, 599 Fed. Appx. 875, 881 (11th Cir. 2015).
- Insureds failed to rebut presumption of prejudice to property insurer from late notice of their claim of damage to bathroom involving water intrusion because of septic tank backup; insurer was unable to determine damage at time of incident given that damage due to water damage and mold would likely have increased over time, and water escape from pipes under slab would over time have caused structural instability. *De La Rosa v. Florida Peninsula Ins. Co.*, 246 So. 3d 438 (Fla. 4th DCA 2018).
    - Even though there may be disputed issues of fact as to whether the insurer was prejudiced in determining the cause of the loss, the facts, even as presented by the insured's adjuster and engineer, show that the insurer would be prejudiced by the passage of time in investigating the extent of the loss, and thus, the cost of repair. *Id.*, at 442.
- Insured's submission of a homeowner's affidavit, roofer's repair estimate and public adjuster's report listing various repairs necessary to the structure were conclusory and did not overcome presumption of prejudice to *Citizens. Hope v. Citizens Property Ins. Co.*, 114 So.3d 457, 460 (Fla. 3d DCA 2013).
- Presumption of prejudice was not rebutted by structural engineer's affidavit stating that roof damage was equally likely to have resulted from wind damage or foot traffic. *Kramer v. State Farm Fla. Ins. Co.*, 95 So.3d 303 (Fla. 4th DCA 2012).

To rebut the presumption of prejudice, an insured may submit evidence creating a dispute of fact as to: "(a) whether better conclusions could have been drawn without the delay" in providing notice, "(b) whether those conclusions could have been drawn more easily," "(c) whether the repairs to the affected areas that took place in the interim would complicate an evaluation of the extent of the damage or [the insured's] efforts to mitigate its damages," or (d) whether "an investigation conducted immediately following the occurrence would not have disclosed anything materially different from that disclosed by the delayed investigation." *PDQ Coolidge Formad, LLC v. Landmark Am. Ins. Co.*, 566 Fed. Appx. 845, 849–50 (11th Cir. 2014).

In *Stark v. State Farm Florida Insurance Co.*, 95 So.3d 285, 287–88 (Fla. 4th DCA 2012), the insureds hired a company to repair their roof after Hurricane Wilma in 2005, but their roof continued to leak, and their home suffered further damage. They reported their claim over three years after the storm. The insurer's inspector assessed the roof damage, but because he was unable to determine the time or cause of the loss, the insurer claimed that it was prejudiced by the delay. After the insureds filed suit for breach of contract, the insurer moved for summary judgment. In response, the insureds filed several affidavits, including those of an engineer and public adjuster. The engineer inspected the property multiple years after the hurricane, and he concluded that there was "a classic pattern of wind damage" and that "[t]he only possible event that could have caused this type of damage was Hurricane Wilma." The engineer found that the damage "would have been evident" during the insurer's inspection. The insureds' public adjuster also believed that the roof damage was caused by Hurricane Wilma, and he claimed that the insurer's investigator told him "that there appeared to be storm damage to the [insureds'] roof." The trial court

granted the insurer's motion for summary judgment, finding that the insureds did not present sufficient counterevidence to rebut the presumption of prejudice to the insurer.

On appeal, this Court found a disputed issue of fact as to whether the insurer was prejudiced by late notice. The insureds' adjuster's affidavit stated that the damage still evident showed classic hurricane damage, and the insurer's investigator told the insured's public adjuster that he had observed storm damage. The counterevidence "suggested that the insureds could convince a finder of fact that their noncompliance with the notice provision [of their insurance contract] did not prejudice the insurer by depriving it 'of the opportunity to investigate the facts.' " *Id*.

IV. Supplemental and Re-opened Claims

In *American Coastal Insurance Co. v. Ironwood, Inc.*, 330 So.3d 570 (Fla. 2d DCA 2021), a condominium association made a property insurance claim for roof damages, which its insurer paid. More than a year later, the association sought coverage for damages to the condominiums' windows and doors. A dispute arose as to whether the subsequent request for damages to the windows and doors could be subject to appraisal because the insurer had not yet determined whether it would provide coverage for those damages. The circuit court nevertheless compelled appraisal as to the windows and doors.

Based upon policy definitions, the Second District Court of Appeal distinguished between: an additional claim made for a loss that is merely an aspect of the initial claim; and an additional claim for a loss which requires a separate coverage determination (which the Court called a "supplemental claim"). The Court concluded that appraisal of a supplemental claim was premature until "the insurer has a reasonable opportunity to investigate and adjust the claim." *Id.* at 573, *quoting Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc.*, 48 So. 3d 188, 191 (Fla. 3d DCA 2010). *See also Heritage Prop. & Cas. Ins. Co. v. Veranda I at Heritage Links Ass'n, Inc.*, 334 So. 3d 373, 376–77 (Fla. 2d DCA 2022 ("Because Veranda's claim for windows and doors was a supplemental claim for coverage, *Ironwood* instructs that we must consider that claim separately from the initial roof claim that had been fully adjusted.")

However, the *Ironwood* Court also reasoned that appraisal might be appropriate where the insurer has already completed its investigation of the initial claim, and the additional claim requires no separate coverage determination ("re-opened" claim). *Ironwood* at 573. In doing so, the *Ironwood* Court appears to doubt whether the untimeliness of a re-opened claim would be a defense to coverage, because the insurer would have already had a reasonable opportunity to investigate and adjust the claim based upon the insured's initial report of it. In other words, *Ironwood* suggests that, in the context of a re-opened claim, no further investigation should be necessary because the insurer has already reached a coverage determination and compliance with post-loss duties has already been addressed.

In *Heritage Prop. & Cas. Ins. Co. v. Veranda I at Heritage Links Ass'n, Inc.*, 334 So. 3d 373 (Fla. 2d DCA 2022), the insured submitted a claim to its insurer in September of 2017 for damage sustained in the wake of Hurricane Irma. The insured's first claim was comprised solely of damage to the roofing of the condominium building and garage. In December 2017, the insurer determined that the roof damages were a covered claim under the insured's policy. A dispute arose concerning the extent of repairs that were needed to fix the roof damage. In March 2019, the insured, now represented by a public adjuster, submitted a new estimate and sworn proof of loss. This new proof of loss sought an outright roof replacement. It also included a new claim to replace all the windows and doors of the condominium complex. The dispute eventually became a lawsuit. On October 16, 2020, the insured filed a complaint against the insurer alleging counts for breach of contract and declaratory relief. The complaint also

requested the circuit court to compel the parties to participate in the appraisal process set forth in the insurance policy.

The Second District found that the facts and policy language at issue were "virtually indistinguishable" from those at issue in *Ironwood*. *Id*. at 376. Finding the Insured's claim for windows and doors to be a supplemental claim for coverage, the court concluded that it must be considered separately from the initial roof claim that had been fully adjusted. *Id*. at 377.

V. Late Notice and Appraisal

Before a court can compel appraisal under an insurance policy, it must make a preliminary determination as to whether the demand for appraisal is ripe. *Citizens Property Ins. Corp. v. Admiralty House, Inc.*, 66 So. 3d 342 (Fla. 2d DCA 2011). Therefore, the dual-track approach is only available once the trial court determines a demand for appraisal is ripe. *Am. Coastal Ins. Co. v. Villas of Suntree Homeowner's Ass'n, Inc.*, 47 Fla. L. Weekly D1202 (Fla. 5th DCA June 3, 2022) *quoting American Capital Assurance Corp. v. Leeward Bay at Tarpon Bay Condominium Ass'n*, 306 So. 3d 1238, 1242 (Fla. 2d DCA 2020) (quotation omitted).

However, appraisal can be ripe only as to certain buildings. Where buildings are listed separately on the declarations page and subject to different premiums and coverage amounts, the court found that they were "effectively covered by separate insurance contracts, meaning that the amount recoverable for a loss affecting one property must be determined independently of any loss affecting the other. An independent coverage determination for each property is thus required." *Pernas v. Scottsdale Ins. Co.,* 1:15-CV-21506-KMM, 2016 WL 471949 (S.D. Fla. Feb. 8, 2016) *quoting Florida Ins. Guar. Ass'n v. B.T. of Sunrise Condo. Ass'n, Inc.*, 46 So. 3d 1039, 1042 (Fla. 4th DCA 2010) ("A distinction must be made between a policy which speaks in terms of a lump-sum obligation or value of the property and one which separately schedules different items of property. In the latter case, each separately treated item of property is in effect covered by a separate contract of insurance and the amount recoverable with respect to a loss affecting such property is determined independently of other items of property.")

An insured must fulfill all post-loss obligations imposed by the policy before appraisal may be compelled. *Jacobs v. Nationwide Mut. Fire Ins. Co.*, 236 F.3d 1282 (11th Cir. 2001). An insured's "sufficient compliance" with post-loss obligations under an insurance policy requires that all post-loss obligations be satisfied before a trial court can properly exercise its discretion to compel an appraisal. *State Farm Florida Ins. Co. v. Cardelles*, 159 So. 3d 239 (Fla. 3d DCA 2015).

In order to make a preliminary determination that there is a disagreement between an insurer and the insured regarding the amount of loss (so as to warrant an appraisal of the loss), the trial court must be satisfied of the insured's compliance with the policy's post-loss conditions; where the insurer reasonably disputes such compliance and raises a question as to the sufficiency of the insured's compliance with post-loss obligations, a question of fact is created that must be resolved by the trial court before compelling appraisal. *United Property and Cas. Ins. Co. v. Concepcion*, 83 So. 3d 908 (Fla. 3d DCA 2012).