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FLORIDA COURTS CLARIFY WHEN INSURERS WILL BE LIABLE FOR INSURED'S ATTORNEYS' FEES IN COVERAGE LITIGATION

JOHNSON V. OMEGA INS. CO.

200 SO.3D 1207 (FLA. 2016)

W&J GROUP ENTERPRISES, INC. V. HOUSTON SPECIALTY INS. CO.

— FED.APPX. — (2017), 2017 WL 1279045, 11TH CIR., APRIL 6, 2017

On September 29, 2016, the Florida Supreme Court issued a decision clarifying Fla. Stat. Ann. § 627.428, which provides that an insured may recover attorney's fees incurred as a result of recovering on a valid claim for insurance benefits. The decision clarified what an insured must demonstrate in order to recover its attorney's fees in a coverage dispute with an insurer.

The case of *Johnson v. Omega Insurance Company*, 200 So.3d 1207 (Fla. 2016), involved damage to an insured residence that the insured claimed was caused by a sinkhole. The insurer retained an expert who opined that the damage was caused by excluded factors, including volumetric changes of clay-based soil, concrete shrinkage, and defective construction processes. Based on this expert report, the insurer denied coverage.

The insured retained her own expert who opined that the property damage was caused by a sinkhole, a covered peril under the policy. The insurer rejected this expert report, maintained its denial, and the insured filed suit. After suit was filed, the insurer eventually retained a different engineering firm. This firm concurred with the insured's expert that the loss was caused by a sinkhole. After receipt of this report, the insurer accepted coverage and agreed to issue payments for repair of the covered property damage. The insurer also acknowledged its coverage obligation when it filed its answer to the insured's complaint.

The insured then filed a motion for confession of judgment and sought recovery of her attorney's fees and expert costs. The trial court granted the motion and awarded the insured her attorney's fees and costs, pursuant to Fla. Stat. Ann. § 627.428.

The insurer appealed and the Fifth District Court of Appeals reversed the trial court reasoning that an award of attorney's fees pursuant to Fla. Stat. Ann. § 627.428 requires a showing of bad faith by the insurer. The Court of Appeals based its decision on the statute's language that an insured may recover its attorney's fees if an insurer "wrongfully" denies the claim.

The Florida Supreme Court disagreed with the Court of Appeals and reinstated the trial court's award of attorney's fees. In reaching this decision, the *Johnson* Court rejected the determination that an award of fees pursuant to Fla. Stat. Ann. § 627.428 is only permissible upon a showing of bad faith conduct. Instead, the *Johnson* Court reiterated that if an insurer loses a dispute with its insured, then the insured is *always* entitled

to recover its attorney's fees, relying upon the prior decision in *Ivey v. Allstate Ins. Co.*, 774 So.2d 679 (Fla. 2000).

On April 6, 2017, the 11th Circuit Court of Appeals further clarified when an insurer will be held responsible for the attorney's fees of its insured in *W&J Group Enterprises, Inc. v. Houston Specialty Ins. Co.*, — Fed.Appx. —, 2017 WL 1279045. In *W&J*, an insurer had brought a declaratory judgment action to determine its coverage obligations in a liability claim against its insured. While the declaratory judgment action was pending, the insurer settled the underlying tort action with the claimant for $653,000. The insurer paid $650,000 of this settlement, with the insured funding the remaining $3,000.

The insurer then voluntarily dismissed its declaratory judgment action and the insured moved for recovery of its attorney's fees pursuant to Fla. Stat. Ann. § 627.428. The district court denied the motion based on the insured's contribution to the settlement.

The 11th Circuit reversed the district court's decision and awarded the insured its attorney's fees pursuant to Fla. Stat. Ann. § 627.428. In reaching this decision, the 11th Circuit relied on *Wollard v. Lloyd's & Cos. Of Lloyd's*, 439 So.2d 217 (Fla. 1983), which determined that this statute applies to provide an insured attorney's fees when the insured and the insurer settle an action before judgment is entered. The Florida Supreme Court reasoned in *Wollard* that when an insurer settles a disputed claim, it has declined to defend its position in the pending suit, thus warranting an imposition of attorney's fees under the statute.

The 11th Circuit rejected the insurer's arguments that attorney's fees were not recoverable because the insured contributed to the settlement. The insurer argued that Florida courts had previously determined that attorney's fees under Fla. Stat. Ann. § 627.428 are triggered by the insurer's unilateral decision to enter a settlement and dismiss a declaratory judgment action. *Mercury Ins. Co. of Fla. v. Cooper*, 919 So.2d 491 (Fla. Dist. Ct. App. 2005). The 11th Circuit interpreted the term "unilateral" in *Cooper* to refer to a circumstance where the insurer settles a third-party claim without also reaching an agreement with its insured about the payment of attorney's fees.

The *W&J* Court determined that the award of attorney's fees to the insured was consistent with Florida's jurisprudence interpreting Fla. Stat. Ann. § 627.428. It further held that the Insured's contribution of less than 2% of the total settlement amount did not distinguish this case from other Florida decisions holding that the insured was entitled to recover its attorney's fees.

The *Johnson* and *W&J* cases demonstrate that an insurer involved in a coverage dispute with its insured in Florida will likely have to pay its insured's attorney's fees if it does not prevail in the action or resolve its insured's attorney's fees in any settlement agreement. An insurer wishing to settle with a liability claimant while it has an ongoing coverage action with its insured should consider engaging in global settlement negotiations to resolve any issue with its insured's attorney's fees. Failure to do so may result in unanticipated exposure.

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