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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

OLYMPUS INSURANCE COMPANY,

Plaintiff,

vs. **Case No.** 2021 CA 001694

THE FLORIDA OFFICE OF INSURANCE REGULATION,

Defendant.
_____/

COMPLAINT

Plaintiff, Olympus Insurance Company ("Olympus" or "Plaintiff"), hereby files this Complaint for declaratory relief against Defendant, the Florida Office of Insurance Regulation ("OIR" or "Defendant"), and alleges as follows:

Background

Olympus files this action to seek an order declaring its rights with respect to section 626.9744, Florida Statutes (the "Statute"), and its application to Olympus' recent form filing submitted to the OIR. OIR has posited that section 626.9744, Florida Statutes, prohibits the inclusion of certain language within Olympus' homeowner's insurance policy as it relates to coverage for repairing and replacing items that do not match in quality, color, or size ("matching"). This interpretation, however, is contrary to law and severely harms Olympus and its ability to operate its insurance business. As such, Olympus seeks a declaration that section 626.9744, Florida Statutes, permits Olympus to include a reasonable limitation in its homeowner's policy related to matching costs, which language would then control.

Jurisdiction and Venue

1. This is an action for declaratory judgment. This Court has jurisdiction pursuant to sections 86.011, 86.021, and 26.012, Florida Statutes.

2. Venue is proper in Leon County, Florida under section 47.011, Florida Statutes, because OIR is located in Leon County, Florida and because all or part of the claim for relief at issue in this action arose in Leon County.

Parties

3. Plaintiff, Olympus Insurance Company, is a licensed Florida property and casualty insurer, NAIC code 12954, Florida code 03719, FEIN 26-0211369, with its principal place of business located at 4200 Northcorp Parkway, Suite 400, Palm Beach Gardens, Florida, 33410.

4. Defendant, OIR, is a Florida state agency located at 200 East Gaines Street, Tallahassee, FL 32399.

General Allegations

I. Olympus' Form Filing

5. In December, 2020, Olympus submitted form filing #20-031040[1] ("Form Filing") to OIR for approval, for the purpose of providing homeowner's insurance to Florida residents.

6. Form OL HO 100 12 20[2] included a provision entitled "Matching Sub-Limit." *See* **Exhibit A**.[3]

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[1] This is the OIR filing number.

[2] This is the Olympus form number. The last four numbers indicate the date, *i.e.*, 12 20 means December, 2020.

[3] Only an excerpt of the original filing is attached hereto because the filing was submitted to OIR under trade secret protection. Moreover, the use of the excerpt herein is not prejudicial to OIR because OIR has the original filing in its entirety.

7. In general, matching concerns the requirement of an insurer to pay a claim to match covered, damaged property to the adjacent undamaged property in order to return the subject property to its previous uniform appearance. For example, if several roof tiles are damaged and such damage is covered by the policy, matching is related to the requirement to replace the undamaged, adjacent tiles to the new tiles to create a uniform appearance.

8. The proposed Matching Sub-Limit provision in form OL HO 100 12 20 ("Matching Sub-Limit Provision") states as follows:

> **2. Matching Sub-limit**
>
> We will repair or replace undamaged property due to mismatch between undamaged material and new material in adjoining areas if repairs or replacement are reasonable. In determining the extent of the repairs or replacement of items in adjoining areas, we will consider:
>
> a. The cost of repairing or replacing the undamaged portions of the property; and
>
> b. The degree of uniformity that can be achieved without such cost; and
>
> c. The remaining useful life of the undamaged portion; and
>
> d. Other relevant factors.
>
> The total limit of liability for Coverages A and B (Coverage A in form HO 00 06) is 1% of the Coverage A limit of liability for repairs or replacements of any undamaged part of the building or its components solely to match repairs made to damage as a result of a covered loss.
>
> This limitation does not increase the Coverage A or Coverage B (Coverage A in form HO 00 06) limits of liability shown on the Declarations page, nor does it apply to damage otherwise limited or excluded.

9. The Matching Sub-Limit Provision was included to specify a maximum limit of coverage for repairs or replacement of undamaged property, and limits coverage to a percentage of Coverage A.

10. Olympus desired to set a specific maximum limit for matching because it has historically paid out large amounts in matching costs, particularly related to roof repairs and the costs paid to match roof tiles and shingles, beyond coverage that was contemplated by the coverage offered by Olympus and the actuarially sound rates that Olympus is required to charge in connection with such coverage.

11. The Matching Sub-Limit Provision was modeled after the concept of a matching limitation that was approved by the OIR for another Florida insurer, in Tower Hill Insurance Group's ("THIG") form HP-0074-00, in filing number 18-08908. A true and correct copy of THIG's approved form HP-0074-00 is attached as **Exhibit B**.

II. Disagreement as to the Interpretation and Application of Section 626.9744, Florida Statutes

12. Prior to its submission, Olympus and OIR engaged in multiple conversations concerning the Form Filing, and specifically the proposed Matching Sub-Limit Provision.

13. The OIR expressed concern that the Matching Sub-Limit Provision did not comply with section 626.9744, Florida Statutes.

14. The Statute, in relevant part, provides:

> Unless otherwise provided by the policy, when a homeowner's insurance policy provides for the adjustment and settlement of first-party losses based on repair or replacement cost, the following requirements apply:
>
> (2) When a loss requires replacement of items and then replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, the insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.
>
> (emphasis added).

15. The OIR expressed its belief that the Statute creates a "floor" benefit, and sets forth minimum requirements that must be provided by an insurer. Under the OIR's interpretation, the insurer may only provide above and beyond what is set forth in the Statute. (*See* paragraph 40, below.)

16. Olympus, on the other hand, contends the plain language of the Statute permits an insurer to set its own limits of coverage for matching material being repaired; only if the policy is silent as to coverage, is the Statute the default and sets the requirements.

17. Indeed, the Statute's initial qualifying language states: "unless otherwise provided by the policy." This language places the pen in the hand of the insurer to draft language that may "otherwise provide."

18. Under Florida law, if a statute is clear and unambiguous, then the Court in interpreting the statute "does not look beyond the plain language or employ the rules of construction to determine legislative intent—it simply applies the law." *McCloud v. State,* 260 So. 3d 911, 914-15 (Fla. 2018) (citation omitted).

19. The Statute here is clear and unambiguous. The Statute permits an insurer to "otherwise provide" reasonable limitations within its policy, and, if the insurer chooses not to include such limitations, the Statute establishes the default requirements.

20. Olympus' interpretation of the Statute is also supported by Florida case law.

21. In *Vazquez v. Citizens Property Insurance Corporation,* 304 So. 3d 1280 (Fla. 3d DCA 2020), the Third District Court of Appeal stated the following about the Statute:

> Ms. Vazquez's interpretation further disregards the plain text of the matching statute, which clearly defers to the policy as controlling. (emphasis added).

22. In *Vazquez*, the appellate court affirmed the trial court's finding regarding the Statute, which stated:

> The statute begins by stating "Unless otherwise provided in the policy." The Court cannot ignore this language. The language is clear, and it basically refers back to the policy as controlling and only after the policy language allows can the Court continue back to the statute. That is what the statute is saying.

Vazquez v. Citizens Prop. Ins. Corp., No. 2016-002262-CA-01, 2017 WL 9250268, at *2 (Fla. Cir. Ct. Oct. 30, 2017) (emphasis added) (affirmed in part and reversed in part by *Vazquez*, 304 So. 3d 1280). True and correct copies of the appellate and trial court decisions from the *Vazquez* case are attached hereto as **Exhibit C**.

23. Similarly, the Circuit Court in Miami-Dade County in *Pedroso v. Citizens Prop. Ins. Corp.,* No. 2017-25313-CA-01, 2019 WL 10631233 (Fla. Cir. Ct. May 31, 2019), found that, with respect to the Statute, the language of "unless otherwise provided in the policy" was instructive, meaning "the policy controls the recovery." A true and correct copy of the *Pedroso* opinion is attached hereto as **Exhibit D**.

24. Olympus' interpretation is likewise supported by Federal case law, which has adopted the *Vazquez* holding and its interpretation of the Statute. *See, e.g., CMR Construction & Roofing, LLC v. ASI Preferred Insurance Corporation,* No. 2:19-cv-442-FtM-29MRM, 2021 WL 877560 (M.D. Fla. Mar. 9, 2021) (finding the policy language trumped the Statute's minimum requirements). A copy of the *CMR Construction* opinion is attached hereto as **Exhibit E**.

25. Olympus' interpretation, that the policy language controls regarding matching limits for repairs, and the statutory requirements do not apply if the policy provides otherwise, is further supported by the intent of the Florida legislature.

26. Under rules of statutory construction, "legislative intent is the polestar that guides a court's statutory construction analysis." *McCloud,* 260 So. 3d at 914 (citations omitted).

27. The Statute was enacted in 2004 and introduced through Senate Bill 2038. The Senate Staff Analysis for Senate Bill 2038 expressly provided that Section 9 of the Bill created

section 626.9744, "mandating that insurers follow two new requirements, unless the insurance policy provides otherwise." ***See*** **Exhibit F** (emphasis added).

28. If the Florida legislature intended the Statute to create a "floor" benefit or mandatory minimum requirements, and then permitted an insurer to offer more, but not less than such requirements, the legislature could have done so. In fact, the Florida legislature has previously enacted such statutes in the Florida Insurance Code.

29. For example, section 627.674(3), Florida Statutes, provides:

> (3) A policy may not be filed with the office as a Medicare supplement policy unless the policy meets or exceeds the requirements of 42 U.S.C. s. 1395ss, or the most recent version of the NAIC Medicare Supplement Insurance Minimum Standards Model Act, adopted by the National Association of Insurance Commissioners. (emphasis added).

30. As another example, section 624.4031(8), Florida Statutes, provides:

> (8) The Florida Insurance Code does not apply to a church benefits board that has operated more than 5 years in its state of domicile and has more than $2 million in reserves. This exemption extends to the programs plans, benefits, activities, or affiliates of the church benefits board. A church benefits board may qualify for this exemption if an authorized representative of the church benefits board submits to the office an affidavit stating that the church benefits board meets or exceeds the requirements of this section. If the office believes the information provided on the affidavit is inaccurate, the office has the burden of proving that the church benefits board fails to meet the requirements of this section. (emphasis added).

31. As an additional example, section 627.414(3), Florida Statutes, provides that a policy "may contain additional provisions not inconsistent with this code and which are desired by the insurer and neither prohibited by law nor in conflict with any provisions required to be included therein."

32. The OIR also knows how to craft rules that plainly provide for a "floor benefit." For example, Rule 69B-156.103(10) provides:

> A "brief description of coverage" in an invitation to inquire may consist of an explanation of Medicare benefits, minimum benefits, standards for Medicare

> supplement policies, the manner in which the advertised Medicare supplement insurance policy supplements the benefits of Medicare and meets or exceeds the minimum benefit requirements. An invitation to inquire shall not refer to cost or the maximum dollar amount of benefits payable. (emphasis added).

33. Compare the above examples, which set a floor benefit or minimum requirements, with the following provisions in the Insurance Code where the legislature, like in the instant Statute, uses the phrase "unless otherwise provided:"

> Unless otherwise provided by the policy of insurance or by law, within 10 working days after an insurer receives proof of loss statements, the insurer shall begin such investigation as is reasonably necessary unless the failure to begin such investigation is caused by factors beyond the control of the insurer which reasonably prevents the commencement of such investigation.

§ 627.70131(3), Fla. Stat. (emphasis added).

> A life or health agent with an appointment in force may solicit applications for policies of insurance on behalf of an insurer with respect to which he or she is not an appointed life or health agent, unless otherwise provided by contract, if such agent simultaneously with the submission to such insurer of the application for insurance solicited by him or her requests the insurer to appoint him or her as agent.

§ 626.341(2), Fla. Stat. (emphasis added).

> Unless otherwise provided in the policy or certificate, a preexisting condition, regardless of whether it is disclosed on the application need not be covered until the waiting period described in paragraph (b) expires.

§ 627.9407(4)(d), Fla. Stat. (emphasis added).

34. Likewise, Florida Administrative Code Rule 69O-167.001(1), provides that:

> Unless otherwise provided in the contract, upon cancellation of a fire and casualty policy by the company or the insured, the return of gross unearned premium is to be mailed within fifteen (15) working days after the date of cancellation, except where the provisions of Section 627.7283 and 627.848(6), F.S. apply.

(emphasis added).

35. It is therefore clear that the legislature, and even OIR, knows how to either provide for a "floor benefit" or to create law which permits parties to contract around minimum

requirements. *Mesen v. State,* 271 So. 3d 164, 169 (Fla. 2d DCA 2019) ("[U]nless it can be said with absolute confidence that no reasonable legislature would have intended for the statute to carry its plain meaning, courts should presume that [our] legislature says in a statute what it means and means in a statute what it says there.") (citations omitted).

36. Nevertheless, the OIR maintained its position that the Statute creates a mandatory minimum requirement, ignoring the plain language of the Statute which permits the policy to provide otherwise.

37. It appears that the parties do not disagree on the substance of the matching provision generally. Rather, this dispute relates to whether an insurer's policy can contain terms that provide a sub-limit with respect to coverage related to such matching, which would then be the controlling coverage terms.

III. The July 22, 2021, OIR Letter

38. On July 22, 2021, OIR sent Olympus a letter regarding the Matching Sub-Limit Provision (the "Letter"). A true and correct copy of the Letter is attached hereto as **Exhibit G**.

39. The Letter provides that OIR "does not have statutory authority to render interpretations of statutes, except in rules for interpretations of general applicability or in declaratory statements for interpretation of a more limited applicability, assuming the requirements for such a statement are met."

40. Nevertheless, the Letter then goes on to expressly provide OIR's interpretation of the Statute. In particular, the Letter states:

> You are correct that the statute does allow for the policy to "provide otherwise," however, the statute provides the minimum acceptable level of coverage that is to be provided and then the insurer is free to "provide otherwise" over and above that. Interpreting the clause at the beginning of the statute to mean that an insurer may establish a sublimit or otherwise reduce coverage set forth in the statute would in essence nullify and defeat the regulatory purpose of the statute.

IV. Olympus Removed the Sub-Limit Matching Provision to Avoid Being Found Noncompliant

41. On January 25, 2021, Senate Bill 76 was filed. Senate Bill 76, which became effective on June 1, 2021, implemented multiple changes to the Florida Insurance Code. Some of these amendments are directly applicable to Olympus as a Florida property and casualty insurer.

42. Among other things, Senate Bill 76 created section 627.70152, Florida Statutes, requiring that, as a condition precedent to filing suit under a property insurance policy, a claimant must provide the Department of Financial Services with written notice of intent to initiate litigation within ten days before filing suit.

43. Senate Bill 76 also amended section 627.70132, Florida Statutes, to revise the definition of the terms "reopened claims" and "supplemental claims," and to provide that claims, reopened claims, and supplemental claims, are barred unless notice is given within specific time frames.

44. The OIR communicated to Olympus that the above revisions to the Florida Insurance Code (the "SB 76 Revisions"), would need to be included in Olympus' Form Filing. A true and correct copy of the electronic correspondence, June 14, 2021 – June 17, 2021, between Jeff Young, Olympus' Forms Analyst assigned to the Form Filing and Cindy Walden, OIR's Government Analyst II in the Property & Casualty Product Review section, assigned to the Form Filing and Olympus' contact person at OIR for the Form Filing, is attached hereto as **Exhibit H**.[4]

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[4] *See*, for example, the following statements by OIR in **Exhibit H**: "You should also review SB 76 for any impacts or requirements the approved bill may have on your current filing and make revisions accordingly." "Also, with the signing of SB 76 into law with an effective date of 7/1/21, you may wish to review with your team as there will be some areas of the current form impacted." "We are still working through SB 76 and what will need to be revised in the forms, etc. so I am waiting on something definitive there from Management/Legal." "I have received some initial feedback on some of the SB 76 language and what we would look for to be included in the forms at present."

45. Given the requirements to timely implement the SB 76 Revisions and the continued disagreement about the proper interpretation of the Statute and its application to Olympus' Form Filing, Olympus was faced with a difficult choice: (1) cease discussions about the Statute and drop the proposed Sub-Limit Matching Provision in order to implement the SB 76 Revisions for OIR approval; or (2) include the Sub-Limit Matching Provision and force disapproval from the OIR which, in turn, would result in the failure to implement the SB 76 Revisions.

46. The failure to implement the SB 76 Revisions, however, could result in Olympus being held in noncompliance and possibly subject to penalties and market conduct examinations.

47. Thus, to avoid the detrimental consequences of forcing disapproval and being found noncompliant, Olympus ultimately removed the proposed Matching Sub-Limit Provision and instead, included the matching language reflected in form OL HO 100 09 21[5], which allows for higher amounts of matching costs with no sub-limits for matching. *See* **Exhibit I**.[6]

48. The approved language in form OL HO 100 09 21 specifically states:

> **Matching of Undamaged Property**
>
> We will repair or replace undamaged property due to mismatch between undamaged material and new material if repairs or replacement are reasonable. In determining the extent of the repairs or replacement of items in adjoining areas, we will consider:
>
> 1. The cost of repairing or replacing the undamaged portions of the property; and
>
> 2. The degree of uniformity that can be achieved without such cost; and
>
> 3. The remaining useful life of the undamaged portion; and

[5] This is the Olympus form number for the revised form that was approved. The last four numbers indicate the date, *i.e.*, 09 21 means September, 2021.

[6] Only an excerpt of the original filing is attached hereto because the filing was submitted to OIR under trade secret protection. Moreover, the use of the excerpt herein is not prejudicial to OIR because OIR has the original filing in its entirety.

4. Other relevant factors.

49. Absent a reasonable limitation on matching costs, Olympus will continue to face high matching costs that are not contemplated in the coverage offered or the rates charged, and which will impose a significant strain and burden on Olympus' business.

50. Because OIR has already proffered its interpretation of the Statute, Olympus cannot now seek to revise its forms with the OIR to include the Matching Sub-Limit Provision without facing disapproval.

51. Therefore, Olympus now seeks a declaration from this Court as to the proper interpretation and application of the Statute.

52. All conditions precedent to bringing this action have been performed, waived, or excused.

COUNT I – DECLARATORY JUDGMENT

53. Olympus realleges and incorporates paragraphs 1-52 above as if fully set forth herein.

54. This is an action for declaratory judgment pursuant to chapter 86, Florida Statutes.

55. Olympus is uncertain as to its rights and a judicial declaration is required to resolve this dispute.

56. A bona fide, actual, present controversy exists between Olympus and OIR as to whether the Statute provides that the policy language controls regarding matching limits for repairs, and the statutory requirements in the Statute do not apply if the policy provides otherwise.

57. The plain language of the Statute, which governs this Court's interpretation of the same, clearly provides that unless the policy provides otherwise, certain requirements related to matching apply. Stated otherwise, the requirements set forth in the Statute apply only if the policy

does not provide otherwise. The Statute permits insurers, such as Olympus, to "provide otherwise" as it relates to matching. This interpretation is further supported by the intent of the Florida legislature and Florida case law, as discussed herein.

58. Olympus is affected by OIR's attempt to incorrectly interpret and apply the Statute and is entitled to a declaration of its rights.

59. Specifically, Olympus' duties and responsibilities with respect to matching under the terms of its policy are dependent upon the OIR's interpretation and application of the Statute, as explained above.

60. Due to the OIR's incorrect interpretation of the Statute, Olympus was required to eliminate its Matching Sub-Limit Provision, which limited matching based on a certain percentage that was tied to the policy's Coverage A, and instead utilize language that contains no dollar limit on matching costs.

61. If OIR's interpretation controls, Olympus will be irreparably injured because it will be forced to pay out an unknown amount of matching costs. Accordingly, injury is certainly impending based on OIR's interpretation of the Statute, which does and will continue to constitute direct and immediate substantial and economic hardship to Olympus.

62. Olympus is entitled to have doubt as to the proper interpretation and application of the Statute removed.

63. Olympus seeks a declaration that section 626.9744, Florida Statutes, does not set a floor benefit, as OIR contends, but instead permits the policy language to control regarding matching limits for repairs, and the statutory requirements do not apply if the policy provides otherwise.

WHEREFORE, Olympus respectfully requests an order declaring that section 626.9744, Florida Statutes, permits Olympus to set certain matching limits within its policy, and any other relief as this Court deems just and proper.

Respectfully submitted this 29th day of September, 2021.

/s/ Karen Asher-Cohen
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COUNSEL FOR OLYMPUS INSURANCE COMPANY

Exhibit A

This coverage does not increase the limit of liability to which this coverage applies..

The following in added:

F. Special Limits of Liability for Coverages A and B (Coverage A in form HO 00 06)

1. Cosmetic and Aesthetic Damage to Floors

The total limit of liability for Coverages **A** and **B** (Coverage **A** in form **HO 00 06**) combined is $10,000 per policy period for cosmetic and aesthetic damages to floors.

a. Cosmetic or aesthetic damage includes but is not limited to:

(1) Chips;

(2) Scratches;

(3) Dents;

(4) Discoloration;

Or any other damage to less than 5% of the total floor surface area and does not prevent typical use of the floor.

b. This limit includes the cost of tearing out and replacing any part of the building necessary to repair the damaged flooring.

c. This limit does not increase the Coverage **A** or Coverage **B** limits of liability shown on the Declarations Page, nor does it apply to a loss otherwise excluded or limited in this policy.

d. This limit does not apply to cosmetic or aesthetic damage to floors caused by a Peril Insured Against as named and described under Coverage **C** Personal Property in form **HO 00 03** and **SECTION I – PERILS INSURED AGAINST** in form **HO 00 06**.

2. Matching Sub-limit

We will repair or replace undamaged property due to mismatch between undamaged material and new material in adjoining areas if repairs or replacement are reasonable. In determining the extent of the repairs or replacement of items in adjoining areas, we will consider:

a. The cost of repairing or replacing the undamaged portions of the property; and

b. The degree of uniformity that can be achieved without such cost; and

c. The remaining useful life of the undamaged portion; and

d. Other relevant factors

The total limit of liability for Coverages A and B (Coverage A in form HO 00 06) is 1% of the Coverage A limit of liability for repairs or replacements of any undamaged part of the building or its components solely to match repairs made to damage as a result of a covered loss.

This limitation does not increase the Coverage A or Coverage B (Coverage A in form HO 00 06) limits of liability shown on the Declarations page, nor does it apply to damage otherwise limited or excluded.

SECTION I – PERILS INSURED AGAINST

Paragraph **A.1.** in form **HO 00 03** is deleted and replaced by the following:

1. We insure for sudden and accidental direct physical loss to covered property described in Coverage **A** and Coverage **B** unless the loss is otherwise excluded or limited in this policy. However, loss does not include and we will not pay for any "diminution in value".

Paragraph **A.1.** in form **HO 00 03** is deleted and replaced by the following:

1. We insure for sudden and accidental direct physical loss to covered property described in Coverage **A** and Coverage **B** unless the loss is otherwise excluded or limited in this policy. However, loss does not include and we will not pay for any "diminution in value".

The first paragraph in **SECTION I – PERILS INSURED AGAINST** in form **HO 00 04** is deleted and replaced by the following:

We insure for sudden and accidental direct physical loss to covered property described in Coverage **C** caused by any of the following perils unless the loss is otherwise excluded or limited elsewhere in this policy. However, loss does not include, and we will not pay for, any "diminution in value".

The first paragraph in **SECTION I – PERILS INSURED AGAINST** in form **HO 00 06** is deleted and replaced with the following:

We insure for sudden and accidental direct physical loss to covered property described in Coverages **A** and **C** caused by any of the following perils unless the loss is otherwise excluded or limited in this policy. However, loss does not include, and we will not pay for, any "diminution in value".

Paragraph **8. Vandalism or Malicious Mischief** in Forms **HO 00 04** and **HO 00 06** is deleted and replaced by the following:

8. Vandalism Or Malicious Mischief

This peril does not include loss to property on the residence premises", and any ensuing loss caused by any intentional and wrongful act committed in the course of the vandalism or malicious mischief, if:

a. The loss arises out of or results from "premises-sharing activities"; or

b. The dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;

Exhibit B

THIS ENDORSEMENT CHANGES YOUR POLICY. PLEASE READ IT CAREFULLY.

DAMAGE CAUSED BY WATER LIMITATION

The total limit of liability for Coverages **A**, **B**, and **C** combined is the amount shown on the Declarations Page for Damage Caused by Water Limitation.

1. This limitation applies to damage caused by:
   - **a.** Accidental discharge or overflow of water, or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance;

     For purposes of this provision, a plumbing system or household appliance does not include:

     (1) A sump, sump pump, irrigation system, or related equipment; or

     (2) A roof drain, gutter, down spout, or similar fixtures or equipment.
   - **b.** Constant or repeated seepage or leakage of water or steam or the presence or condensation of humidity, moisture or vapor; which occurs over a period of 14 or more days, if the resulting damage:

     (1) Is unknown to all "insureds"; and

     (2) Is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.

     For the purpose of this provision:

     (1) Damage is not unknown if it would have been discovered during a reasonable inspection by any "insured"; and

     (2) Damage is not hidden:

     (a) If visible on the surface of walls, ceilings, or floors, or located within cabinets or similar structures; or

     (b) If the damage would be visible on the surface of the walls, ceilings, or floors or located within cabinets or similar structures but for contents blocking visibility.

     In the event this limitation applies, the limitation shown on the Declarations Page for Damage Caused By Water is the most we will pay for any damages sustained starting from the 1st day and instance the constant or repeated seepage or leakage of water or steam, or the presence or condensation of humidity, moisture or vapor began;
2. This limitation includes, but is not limited to:
   - **a.** The cost to repair or replace any non-damaged part of the building or its components to match the damaged property; and
   - **b.** The cost of tearing out and replacing any part of the building necessary to repair any damaged property.
3. This limitation does not:
   - **a.** Increase the Section **I** Coverage limits of liability shown on the Declarations.
   - **b.** Apply to damage caused by water otherwise limited or excluded.

All other policy provisions apply.

Exhibit C

304 So.3d 1280
District Court of Appeal of Florida, Third District.

Glendys VAZQUEZ, Appellant/Cross Appellee,
v.
CITIZENS PROPERTY INSURANCE CORPORATION, Appellee/Cross Appellant.

Nos. 3D18-779, 3D18-769
|
Opinion filed March 18, 2020.

Synopsis

Background: Insured homeowner brought action for breach of contract against insurer alleging insurer failed to pay actual cash value of loss following water intrusion in residence's kitchen, and filed for declaratory relief. Insurer filed motion in limine to preclude evidence and testimony related to matching damages and to limit the evidence on damages to direct physical loss. The Circuit Court, 11th Judicial Circuit, Miami-Dade County, Antonio Arzola and David C. Miller, JJ., granted insurer's motion in limine, entered judgment in favor of insurer on breach of contract claim, and entered declaratory judgment in favor of homeowner. Homeowner appealed and insurer cross-appealed.

Holdings: The District Court of Appeal, Gordo, J., held that:

[1] matching costs were not part of actual cash value of damage to residence;

[2] trial court committed procedural error in summarily concluding homeowner could not recover for breach of contract; and

[3] homeowner's requested declaration was rendered moot.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal; Motion in Limine; Judgment; Motion for Judgment as a Matter of Law (JMOL)/ Directed Verdict; Motion for Declaratory Judgment; Motion for Reconsideration; Motion for Clarification.

West Headnotes (11)

[1] **Appeal and Error** ⇐ Motions in limine

Generally, the standard of review of a trial court's ruling on a motion in limine is abuse of discretion; such discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an erroneous view of the law.

[2] **Appeal and Error** ⇐ Statutory or legislative law

Appeal and Error ⇐ Insurers and insurance

Where trial court's ruling on motion in limine presents questions of insurance policy interpretation and statutory construction, appellate review is de novo.

[3] **Insurance** ⇐ Plain, ordinary or popular sense of language

When interpreting an insurance contract, court is bound by the plain meaning of the contract's text.

[4] **Insurance** ⇐ Construction or enforcement as written

Insurance ⇐ Plain, ordinary or popular sense of language

If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written.

2 Cases that cite this headnote

[5] **Statutes** ⇐ Language and intent, will, purpose, or policy

Statutes ⇐ Plain Language; Plain, Ordinary, or Common Meaning

When construing a statute, court attempts to give effect to the legislature's intent, looking first to

the actual language used in the statute and its plain meaning.

[6] **Insurance** ⇐ Risks or Losses Covered and Exclusions

Terms "direct" and "physical," in property insurance policy provision covering "direct loss to property" only if "that loss is a physical loss," modify the term "loss" and impose the requirement that the damage be actual to be recoverable costs of loss under the policy.

17 Cases that cite this headnote

[7] **Insurance** ⇐ Real property

Matching costs were not part of actual cash value of damage to homeowner's residence, as would have required insurer to cover matching costs prior to repairs being made, where plain language of homeowner's insurance policy and statutes regulating replacement cost coverage and matching costs limited initial payment of actual cash value of loss to direct physical loss. Fla. Stat. Ann. §§ 626.9744, 627.7011.

17 Cases that cite this headnote

[8] **Judgment** ⇐ Motion or Other Application

Trial court committed procedural error in summarily concluding that insured homeowner could not recover for breach of contract, based on legal rulings in motion in limine order precluding evidence related to matching damages and an expert affidavit filed on behalf of homeowner, where neither party moved for summary judgment following denial of reconsideration of motion in limine order. Fla. R. Civ. P. 1.510(c).

[9] **Declaratory Judgment** ⇐ Insurance

Homeowner's requested declaration that payment by insurer of an amount which it claimed to be satisfaction of the value of the loss did not create a legal presumption that the amount paid was the actual cash value owed was moot, where preceding court case specifically held there was no presumption that an insurance company's estimate of actual cash value satisfied their obligation under insurance policy.

1 Cases that cite this headnote

[10] **Declaratory Judgment** ⇐ Object and purpose

The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations.

1 Cases that cite this headnote

[11] **Declaratory Judgment** ⇐ Necessity

A declaratory judgment may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question.

***1282** Appeals from the Circuit Court for Miami-Dade County, Antonio Arzola and David C. Miller, Judges. Lower Tribunal No. 16-2262

Attorneys and Law Firms

Barnard Law Offices, L.P., Andrew C. Barnard, Erik T. Barnard, Miami, and Garrett William Haakon Clifford; Cassel & Cassel, P.A., Hillary B. Cassel, Sunrise, and Michael A. Cassel (Hollywood), Fort Lauderdale; Kula & Associates, P.A., Elliot B. Kula, Miami, and W. Aaron Daniel; Chavin Mitchell Shmuely, P.A., Valorie S. Chavin and James E. Mitchell, Lauderdale Lake, for appellant/cross appellee.

Butler Weihmuller Katz Craig LLP, Anthony J. Russo, J. Pablo Caceres and Mihaela Cabulea (Tampa), for appellee/cross appellant.

Before SALTER, MILLER and GORDO, JJ.

GORDO, J.

ON MOTION FOR CLARIFICATION

**1 Upon considering Appellant/Cross Appellee's Motion for Clarification, this Court withdraws its previous opinion filed on October 23, 2019, and substitutes the following opinion in its place.

INTRODUCTION

Glendys Vazquez appeals the trial court's order granting a motion in limine precluding evidence of matching costs and the Amended Final Judgment in favor of Citizens Property Insurance Corporation on her breach of insurance contract claim. Citizens cross-appeals the Amended Final Judgment in favor of Ms. Vazquez as to the court directing verdict on a count of declaratory action. We affirm the order on the motion in limine and the trial court's denial of reconsideration based on the trial court's adherence to the plain language of the policy and applicable statute in limiting the evidence. We reverse the trial court's entry of judgment on the breach of contract claim based on procedural error and entry of directed verdict on the declaratory judgment action as the issue was moot.

FACTS & PROCEDURAL HISTORY

In 2014, water intrusion damaged twelve ceramic tiles and one kitchen cabinet in Ms. Vazquez's home. Ms. Vazquez filed a claim under her insurance policy with Citizens. The policy required the insurer to pay the actual cash value of the insured loss.[1] Pursuant to the policy, Citizens paid *1283 $33,759.52 based on its assessment of the damages to Ms. Vazquez's tile floor and kitchen cabinet. Ms. Vazquez cashed the check.

Before beginning repairs, Ms. Vazquez hired her own loss consultant, Robert Moreno, to estimate the damages. The estimate included costs for matching the continuous tile flooring throughout her house and all of her kitchen cabinets.

Ms. Vazquez subsequently sued Citizens for breach of contract claiming that Citizens failed to pay the actual cash value of the loss because she was entitled to recover $84,542.93, which included matching costs. Ms. Vazquez also sued for declaratory relief requesting a declaration that "payment by [Citizens] of an amount which it claims to be satisfaction of the value of the loss does not create a legal presumption that the amount paid is the Actual Cash Value of a covered loss."

Prior to trial, Ms. Vazquez filed an affidavit from Mr. Moreno, who planned on testifying that approximately $70,000.00 of his $84,542.93 estimate was for matching costs. Given that Ms. Vazquez's complaint was for actual cash value, Citizens filed a motion in limine asking the court to preclude evidence and testimony related to matching damages from the trial and limit the evidence on damages to direct physical loss.

At the hearing on the motion in limine, Ms. Vazquez asserted she should be able to argue to a jury that actual cash value includes costs for matching her continuous tile flooring and kitchen cabinets. The trial court granted the motion in limine finding that, pursuant to the policy and applicable statute, Citizens was only initially required to pay the actual cash value of the property that sustained the direct physical loss. The court concluded Citizens did not yet have an obligation to pay any remaining amounts beyond actual cash value, including matching costs, because Ms. Vazquez had not begun making repairs or performing work on the property and had not incurred any expenses.

**2 The court noted that Ms. Vazquez had chosen to bring suit based on the actual cash value owed and ruled that, as a matter of law, actual cash value did not include matching. The court relied on Ocean View Towers Ass'n, Inc. v. QBE Insurance Corp., to find that matching is not a direct physical loss. No. 11-60447-Civ., 2011 WL 6754063 (S.D. Fla. Dec. 22, 2011). Thus, the court limited the evidence to the actual cash value of the physical damage and excluded evidence of undamaged items. The court also clarified that its ruling did not preclude Ms. Vazquez from seeking to recover matching costs.

On the morning of trial, Ms. Vazquez moved for reconsideration of the limine order before the successor judge, which was denied. Thereafter, the trial court entered judgment in favor of Citizens on the breach of insurance contract claim. The trial court concluded, based on the order on the motion in limine and Mr. Moreno's affidavit, that Citizens substantially overpaid the actual cash value owed to Ms. Vazquez and she could take nothing by the action.

Ms. Vazquez also moved for directed verdict on the declaratory action relying upon this Court's opinion in Servando Vazquez v. Southern Fidelity Property & Casualty, Inc., which was released during the pendency of Ms. Vazquez's case below. *1284 230 So. 3d 1242 (Fla.

3d DCA 2017). In Servando, this Court held: "Section 627.7011(3) requires payment of actual cash value—not merely the insurance company's estimate of actual cash value." Id. at 1243. Pursuant to Servando, the trial court entered judgment in favor of Ms. Vazquez and made the following declaration: "The payment by CITIZENS of an amount which it claims to be satisfaction of the value of the loss does not create a legal presumption that the amount paid is the actual cash value of the covered loss."

The final judgment was later amended. These appeals followed.

ANALYSIS

1) Motion in Limine Regarding Actual Cash Value & Entry of Judgment on the Breach of Contract Claim

[1] [2] Generally, "[t]he standard of review of a trial court's ruling on a motion in limine is abuse of discretion. Such discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an 'erroneous view of the law....' " Patrick v. State, 104 So. 3d 1046, 1056 (Fla. 2012) (citations omitted). However, where the trial court's order presents questions of insurance policy interpretation and statutory construction, our review is de novo. Trinidad v. Fla. Peninsula Ins. Co., 121 So. 3d 433, 437 (Fla. 2013).

[3] [4] [5] "When 'interpreting an insurance contract,' this Court is 'bound by the plain meaning of the contract's text.' " Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc., 141 So. 3d 147, 157 (Fla. 2013) (quoting State Farm Mut. Auto. Ins. Co. v. Menendez, 70 So. 3d 566, 569 (Fla. 2011)). "If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." Id. (quoting Menendez, 70 So. 3d at 569–70). Similarly, "[w]hen construing a statute, this Court attempts to give effect to the Legislature's intent, looking first to the actual language used in the statute and its plain meaning." Trinidad, 121 So. 3d at 439.

The coverage provision of Ms. Vazquez's policy reads: "We insure against risk of direct loss to property ... only if that loss is a physical loss to property." The loss settlement provision states: "We will initially pay at least the actual cash value of the insured loss, less any applicable deductible. We will then pay any remaining amounts necessary to perform such repairs as work is performed and expenses incurred...." This loss settlement provision directly mirrors the language of section 627.7011(3)(a), which provides:

> **3 In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs:
>
> For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred.

§ 627.7011(3)(a), Fla. Stat. (2019).

[6] The plain language of the insurance policy explicitly covers loss that is "direct loss to property ... only if that loss is a physical loss." This Court has previously interpreted the meaning of this language: "A 'loss' is the diminution of value of something, and in this case, the 'something' is the insureds' house or personal property. Loss, Black's Law Dictionary (10th ed. 2014). 'Direct' and 'physical' modify loss and impose the requirement that the damage be actual." Homeowners Choice Prop. & Cas. v. Maspons, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017).

*1285 Consistent with this plain meaning, the trial court determined that the "insured loss" is the property that was actually damaged. Accordingly, the trial court limited evidence of actual cash value to the property that was actually damaged based on the contractual and statutory language requiring Citizens to "initially pay the actual cash value of the insured loss." The court rejected Ms. Vazquez's argument—that actual cash value included costs to replace undamaged items in order to match her continuous floor—as irrelevant in this suit for actual cash value. See § 90.401, Fla. Stat. (2019) ("Relevant evidence is evidence tending to prove or disprove a material fact.").

On appeal, Ms. Vazquez argues that matching costs are part of actual cash value because actual cash value includes all costs reasonably necessary to do the repairs minus depreciation.[2] In Trinidad, the Florida Supreme Court defined "actual cash value ... as 'fair market value' or '[r]eplacement cost

minus normal depreciation.' " 121 So. 3d at 438 (quoting Black's Law Dictionary 506, 1690 (9th ed. 2009)). Ms. Vazquez, therefore, asserts that the cost of matching her floor is a "replacement cost" that must be included as part of the actual cash value calculation.

This argument ignores the plain text of the statute and is unsupported by Trinidad, which does not discuss matching costs. Moreover, Trinidad involved the interpretation of the 2008 version of section 627.7011, which provided: "In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs, the *insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property.*" 121 So. 3d at 439 (emphasis in original). In Trinidad, the Court held: "Because section 627.7011, Florida Statutes (2008), and the replacement cost policy in this case, did not require the insured to actually repair the property as a condition precedent to the insurer's obligation to make payment, the insurer was not authorized to withhold, pending actual repair, its payment for replacement costs...." Id. at 436.

**4 Critically, the current version of the statute has been changed and the provision requiring payment of replacement cost "whether or not the insured replaces or repairs the dwelling or property" has been omitted. Section 627.7011 presently reads: "The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred."

[7] Ms. Vazquez's interpretation further disregards the plain text of the matching statute, which clearly defers to the policy as controlling.[3] Thus, despite Ms. Vazquez's argument, the plain language of the statute and the policy clearly require the insurer to pay any remaining amounts as the repairs are performed. Accordingly, we affirm the trial court's order and approve the successor judge's denial of the motion for reconsideration.

*1286 [8] While we affirm the court's rulings in part, we reverse the entry of judgment as to the breach of contract action. Neither party moved for summary judgment following the denial of reconsideration of the motion in limine order, yet the court summarily concluded that Ms. Vazquez could not recover for breach of contract. The court then entered final judgment based on the legal rulings in the motion in limine order and an expert affidavit filed on behalf of Ms. Vazquez. This was procedural error. See Fla. R. Civ. P. 1.510(c) (prescribing motion and notice requirements that must be met before a movant is entitled to summary judgment); Otero v. Gomez, 143 So. 3d 1089, 1092 (Fla. 3d DCA 2014) (reversing the trial court's entry of final judgment where the motion in limine was used as a vehicle to grant summary judgment without affording the required notice); Connell v. Capital City Partners, LLC, 932 So. 2d 442, 444 (Fla. 3d DAC 2006) ("[T]he granting of relief, which is not sought by the notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process.").

2) Directed Verdict on Declaratory Action

[9] Ms. Vazquez moved for a directed verdict and requested a declaration that payment by Citizens of an amount which it claims to be satisfaction of the value of the loss does not create a legal presumption that the amount paid is the actual cash value owed. She attached this Court's decision in Servando to her motion and asserted that our opinion resolved the issue in her favor. 230 So. 3d 1242. Indeed, in Servando, we specifically held there is no presumption that the insurance company's estimate of actual cash value satisfied their obligation under the policy. Id. at 1243.

[10] [11] As our decision in Servando settled the question of law, the declaration requested was rendered moot. "The purpose of a declaratory judgment is to afford parties relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations." Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings, 661 So. 2d 1190, 1192 (Fla. 1995) (citing Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991)). A declaratory judgment "may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question." Ashe v. City of Boca Raton, 133 So. 2d 122, 124 (Fla. 2d DCA 1961). See Ready v. Safeway Rock Co., 157 Fla. 27, 24 So. 2d 808, 811 (1946) (Brown, J., concurring specially) ("It is well settled that a proceeding for a declaratory judgment must be based upon an actual controversy.... No proceeding lies under the declaratory judgments acts to obtain a judgment which is merely advisory or which merely answers a moot or abstract question.") (citation omitted). Accordingly, we reverse.

CONCLUSION

**5 Based on the record before us, we find the predecessor judge adhered to the plain language of the policy and Florida law in granting Citizens' motion in limine to preclude matching costs. However, the trial court erred in entering judgment on the breach of contract claim on the morning of trial and issuing a declaration on a settled question of law.

Affirmed in part, reversed in part for further proceedings consistent with this opinion.

All Citations

304 So.3d 1280, 2020 WL 1950831

Footnotes

1 The loss settlement provision of the policy reads:

> Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
>
> ...
>
> We will initially pay at least the actual cash value of the insured loss, less any applicable deductible. We will then pay any remaining amounts necessary to perform such repairs as work is performed and expenses incurred....

2 Oral Argument at 5:11, https://www.3dca.flcourts.org/Oral-Arguments/Video-Oral-Argument-Archives.

3 Unless otherwise provided by the policy, when a homeowner's insurance policy provides for the adjustment and settlement of first-party losses based on repair or replacement cost, the following requirements apply:

> ...
>
> (2) When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas....

§ 626.9744, Fla. Stat. (2019).

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2017 WL 9250268 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-Dade County

Glendys VAZQUEZ a/k/a Glendis Vazquez, Plaintiff,
v.
CITIZENS PROPERTY INSURANCE CORPORATION, Defendant.

No. 2016-002262-CA-01.
October 30, 2017.

Order on Defendant's Motion in Limine to Preclude Evidence and Testimony Related to Matching Damages and Limiting Evidence on Damages to Direct Physical Loss

J. Pablo Cáceres, Esq., (pcaceres@butler.legal).

Brandy E. Raulerson, (br@barnardlawlp.com).

Antonio Arzola, Judge.

***1** THIS CAUSE having come before the Court on October 16, 2017, on Defendant Citizens Property Insurance Corporation's Motion in Limine to Preclude Evidence and Testimony Related to Matching Damages and Limiting Evidence on Damages to Direct Physical Loss, and the Court having reviewed the pleadings and other filings, having reviewed the record evidence, having heard argument of counsel, and being otherwise duly appraised of the premises,

IT IS ORDERED AND ADJUDGED:

The motion is GRANTED, as set forth below.

Opinion

Plaintiff sued Citizens for declaratory judgment and breach of contract arising out of an insurance claim concerning a failed drain line. Plaintiff has not performed repairs and, in any event, has sued for breach by Citizens alleged failure "to pay or cover the Actual Cash Value of the loss." Amended Complaint, para. 25.

The Citizens' policy insures against direct physical loss pursuant to the following policy provision:

COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES

We insure against risk of direct loss to property described in Coverages **A** and **B** only if that loss is a physical loss to property. [1]

The policy's loss settlement provision states that initially ACV, actual cash value, is paid for the insured loss:

> (4) We will initially pay at least the actual cash value of the insured loss, less any applicable deductible. We will then pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred, subject to b.(1) and b.(2) above. [2]

The "insured loss" is the property that has had the direct physical loss, minus depreciation to determine the ACV. Initially, per the policy, the insurer must pay ACV minus depreciation of the "insured loss." The policy then goes forward and states: "We will then pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred." The Court notes that this passage is written with reference to repairs and expenses being performed and incurred—past tense. This Court also notes that this policy provision mirrors Florida Statute 627.7011 (3)(a) which states:

> (3) In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs:
>
> (a) For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred....

"The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed." This means that work has to begin before that obligation to pay begins.

The Court also has reviewed Florida's "matching statute," Florida Statute 626.9744, which states in pertinent part:

> **Claim settlement practices relating to property insurance.**—Unless otherwise provided by the policy, when a homeowner's insurance policy provides for the adjustment and settlement of first-party losses based on repair or replacement cost, the following requirements apply:
>
> ***2** (1) When a loss requires repair or replacement of an item or part, any physical damage incurred in making such repair or replacement which is covered and not otherwise excluded by the policy shall be included in the loss to the extent of any applicable limits. The insured may not be required to pay for betterment required by ordinance or code except for the applicable deductible, unless specifically excluded or limited by the policy.
>
> (2) When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, the insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.

***

The statute begins by stating "Unless otherwise provided in the policy." The Court cannot ignore this language. The language is clear, and it basically refers back to the policy as controlling, and only after the policy language allows can the Court continue back to the statute. This is what the statute is saying. And the policy, as discussed above, sets forth the payment obligations regarding payment of ACV first, followed by remaining amounts once the repairs are made.

Moreover, the "matching statute" goes on to state in section (2): "When a loss requires replacement of items and the replaced items" -- again, "replaced" is past tense -- "do not match in quality, color or size, the insured shall make reasonable repairs or replacement of items in adjoining areas." So it references "replaced items" -- again, past tense. Even in subsection (1) dealing with tear-out damages, which is not applicable here, the statutory language again addresses the repairs that have actually taken place—past tense.

Further support is found in the *Ocean View Towers Ass'n, Inc. v. QBE Ins. Corp.*, 2011 WL 6754063 (S.D.Fla. Dec. 22, 2011). Judge Scola observed that matching is not a direct physical loss. The Court agrees that matching is something other than direct physical loss.

This Court's ruling here does not mean that Plaintiff is not entitled to ever make a matching argument. It may be an argument that is made in a subsequent matter, but it is not going to be made in this case. This is an ACV case. As to the issue of what property was actually damaged, this will be a question of fact for the jury in this case.

Therefore, the Court GRANTS Defendant's motion in limine. The only items for which Plaintiff is entitled to ACV, under the policy and under the statute at issue, are the damaged items. Evidence of undamaged items will be excluded from the trial of this case. The Court believes that the interpretation proposed by the Plaintiff would either take us back to the old statute, or it would be requiring the Court to contradict the language in the existingstatute, which indicates that repair costs are paid once the repairs are made. Either of those latter options would mean either not following the right statute or contradicting existing statutes.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 10/30/17.

<<signature>>

ANTONIO ARZOLA

CIRCUIT COURT JUDGE

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

***3** Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

Copies furnished to:

J. Pablo Cáceres, Esq. (pcaceres@butler.legal)

Brandy E. Raulerson (br@barnardlawlp.com)

Footnotes

1 See Policy at Pl.'s Compl, Ex. "A."

2 See Policy at Pl.'s Compl, Ex. "A," Form CIT HO-3 01 14, pp. 18 of 31, ¶ 3.b.(4)

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Exhibit D

2019 WL 10631233 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Miami-Dade County

Alain PEDROSO and Haydee Porras, Plaintiffs,
v.
CITIZENS PROPERTY INSURANCE CORPORATION, defendant.

No. 2017-25313-CA-01 (CA02).
May 31, 2019.

*1 CIVIL DIVISON

Final Judgment for Defendant

Elijah Levitt, Judge.

THIS CAUSE having come before the Court on Defendant's Motion for Directed Verdict at the close of Plaintiff's case-in-chief during jury trial, and the Court having reviewed the trial evidence, the witness testimony, and the pertinent case law, it is hereby,

ORDERED and ADJUDGED as follows:

As provided in open court on May 15, 2019, the Court GRANTS Defendant's Motion for Directed Verdict. Plaintiff shall take nothing from this action, and Defendant shall go hence without day. Plaintiffs' *ore terms* Motions for Rehearing and for New Trial also are denied.

In support of this Order, the Court provides the following findings.

TRIAL EVIDENCE

This case is a first-party breach of contract action in which Plaintiffs Alain Pedroso and Haydee Porras (hereinafter referred to collectively as "Plaintiffs") allege that Defendant Citizens Property Insurance Corporation (hereinafter referred to as "Defendant") breached its homeowner's insurance contract with Plaintiffs to pay for damages resulting from a water leak in their master bathroom.

During Plaintiffs' case-in-chief, Plaintiff Alain Pedroso testified; Plaintiff Haydee Porras elected not to testify. Mr. Pedroso testified that, although the leak occurred in 2015, Plaintiffs have not made any repairs other than to close the leak and caulk the bathroom floor and shower areas. Mr. Pedroso also testified that the damages came from a sudden leak behind the vanity in the master bathroom. Plaintiffs did not introduce any photographs of the affected property.

After Mr. Pedroso's testimony, Plaintiff's expert Roberto Leyva testified that, on or about February 13, 2019, he inspected Plaintiffs' property. Mr. Leyva said that the leak was fixed with a "shark bite" plumbing tool to stop the leak. Mr. Leyva testified to his observations of the damaged areas and provided a written estimate of the amount to return Plaintiffs' property to the way that it was before the leak. Exhibit 1. Mr. Leyva's estimate included matching for items like tile and continuation of paint color. *Id.* Mr. Leyva said that the amounts on the estimate came from a computer program and that the amounts were "industry standard." Mr. Leyva did not testify to the name of the program, describe how the program arrives at its calculations, or provide

an explanation of what "industry standard" means. Mr. Leyva also never testified to an actual cash value of the damaged property and never identified any repairs other than the "shark bite." After Mr. Leyva testified, Plaintiffs then rested their case.

At the request of Plaintiffs, the Court allowed Plaintiffs to reopen their case to introduce the insurance contract. Exhibit 2. Defendant stipulated to its admissibility. [1] No witness testified to the terms contained in the insurance contract.

LEGAL STANDARD FOR DIRECTED VERDICT

In considering a motion for directed verdict, the court is required to evaluate the testimony in the light most favorable to the non-moving party and every reasonable inference deduced from the evidence must be indulged in the non-moving party's favor. If there are conflicts in the evidence or if different reasonable inferences could be drawn from the evidence, then the issue is a factual one that should be submitted to the jury and not be decided by the trial court as a matter of law.

***2** *Etheredge v. Wall Disney World Co.*, 999 So. 2d 669, 671 (Fla. 5th DCA 2008) (internal citations omitted). Further, "a motion for directed verdict should be granted when there is no reasonable evidence upon which a jury could legally predicate a verdict in favor of the non-moving party." *Tylinski v. Klein Auto., Inc.*, 90 So. 3d 870, 873 (Fla. 3d DCA 2012).

Taking the evidence in the light most favorable to Plaintiffs, the Court finds that there is no reasonable evidence or inference upon which the jury could legally predicate a of Plaintiff's case. verdict under the contract and facts introduced by Plaintiffs, Under the facts and law applicable to this case, Defendant was entitled to a directed verdict.

DIRECTED VERDICT - LACK OF REPAIRS AND EXPENSES

Plaintiffs were bound by the terms of the insurance contract. The contract provides that Defendant "will initially pay at least the actual cash value of the insured loss, less any applicable deductible. [Defendant] will then pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred," Exhibit 2. This provision of the insurance policy resembles Florida Statute 627.7011(3)(a), which provides:

> In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs:
>
> (a) For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred....

The contract and Florida Statute 627.7011(3)(a) clearly and unambiguously provide that, to be reimbursed, Plaintiffs must make repairs or incur expenses.

Unfortunately for Plaintiffs, they presented no evidence that either they made repairs or had incurred, *i.e.*, become liable for, any expenses. Plaintiffs, for example, did not introduce into evidence any bills that they received for fixing damaged properly. They also presented no evidence that they hired Mr. Leyva to repair the property in accordance with his estimate. Therefore, under the plain terms of the controlling insurance policy, Florida Statute 627.7011(3)(a), and the facts presented at trial, Plaintiffs are not legally entitled to any recovery. Directed verdict is appropriate on the lack of evidence of repairs and expenses alone.

DIRECTED VERDICT - LACK OF ACTUAL CASH VALUE EVIDENCE

Plaintiffs also did not introduce evidence to establish covered monetary damages under the contract. For the alleged insured loss, Plaintiffs introduced no evidence of the actual cash value of the loss. Pursuant to the insurance contract, Defendant would have paid actual cash value then repairs and expenses. Exhibit 2. Actual cash value is defined as replacement cost minus depreciation. *Trinidad v. Peninsula Ins. Co.*, 121 So. 3d 433, 443 (Fla, 2013), "Actual cash value" also is synonymous with "fair market value." *Am. Reliance Ins. Co. v. Perez*, 689 So. 2d 290, 291 (Fla. 3d DCA 1997).

Plaintiff's expert Mr. Leyva never testified as to how he, or his computer program, calculated the loss or how the estimate related to actual cash value or fair market value. He never explained what "industry standard" meant and never provided the amount of depreciation of any damaged items. As such, no jury could determine what the actual cash value was, and directed verdict is proper for the lack of evidence of actual cash value.

***3** The Court also reviewed "the matching statute," Florida Statute 626.9744, which provides in pertinent part:

> **Claim settlement practices relating to property insurance.**—Unless otherwise provided by the policy, when a homeowner's insurance policy provides for the adjustment and settlement of first-party losses based on repair or replacement cost, the following requirements apply:
>
> (1) When a loss requires repair or replacement of an item or part, any physical damage incurred in making such repair or replacement which is covered and not otherwise excluded by the policy shall be included in the loss to the extent of any applicable limits. The insured may not be required to pay for betterment required by ordinance or code except for the applicable deductible, unless specifically excluded or limited by the policy.
>
> (2) When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, the insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.

The Court finds the language of "[u]nless otherwise provided in the policy" to be instructive – the policy controls the recovery. The policy in this case provides that the Defendant will pay actual cash value first and then other expenses as they are incurred or repairs are made. Exhibit 2. Therefore, actual cash value must first be established. If the actual cash value is $0.00, then, under the policy, the insured must make repairs or incur expenses to recover replacement value. In this case, Plaintiffs made no repairs and incurred no expenses. Therefore, they are not entitled to recovery for matching or continuation of paint.

Further, the matching of tile and continuation of paint are not actual physical losses. *See Ocean View Towers Ass 'n, Inc., v. QBE Ins. Corp.* 2011 WL 6754063 (S.D. Fla. Dec. 22, 2011), *see also Vazquez v. Citizens Prop. Ins. Corp.*, No. 2016-002262-CA-01 (Fla. 11th Cir. Ct. Oct. 30, 2017). In this case, they are potential expenses that may be incurred. Plaintiffs introduced no testimony as to the actual cash value of the original damaged tile, the damaged vanity, or any other property. Therefore, under the insurance policy in this case, directed verdict is proper as a matter of law for the matching, the continuation of paint, and the lack of evidence of actual cash value.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 05/31/19.

<<signature>>

ELIJAH LEVITT

COUNTY COURT JUDGE

FINAL ORDERS AS TO ALL PARTIES SRS DISPOSITION NUMBER 2

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S), THIS CASE IS CLOSED AS TO ALL PARTIES.

Judge's Initials EL

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

***4** Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

Footnotes

1 The Court commends Defendant and its counsel for their professionalism in making this stipulation after the close

Exhibit E

2021 WL 877560
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Fort Myers Division.

CMR CONSTRUCTION & ROOFING, LLC a/a/o Lawrence Farrington, Plaintiff,
v.
ASI PREFERRED INSURANCE CORPORATION, Defendant.

Case No: 2:19-cv-442-FtM-29MRM
|
Signed 03/09/2021

Attorneys and Law Firms

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OPINION AND ORDER

JOHN E. STEELE, SENIOR UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on defendant's Motion for Summary Judgment (Doc. #50) filed on September 3, 2020. Plaintiff filed an Opposition (Doc. #61) on September 28, 2020, to which defendant filed a Reply (Doc. # 66) on October 5, 2020. For the reasons set forth below, the motion is granted in part and denied in part.

I.

A. Factual Background

Defendant ASI Preferred Insurance Corporation (defendant or ASI) issued a residential insurance policy (the Policy) to non-party Lawrence Farrington (Farrington or the insured) which provided coverage for Farrington's home in Bonita Springs, Florida. (Doc. #50, p. 2; Doc. #61, p. 1.)[1] Damage to Farrington's roof, allegedly caused by Hurricane Irma in September 2017, was discovered in March 2018. (Doc. #46-1, p. 77; Doc. #49-3, p. 96; Doc. #50, p. 2; Doc. #61, p. 1.) On September 11, 2018, Farrington contracted with plaintiff CMR Construction & Roofing, LLC (CMR or plaintiff) to perform roof repairs, and assigned to CMR any and all insurance rights, benefits, and proceeds under the Policy related to the roof. (Doc. #3, ¶ 7; Doc. #3-1, p. 6.)

In mid-September 2018, ASI received its first notice that there was a loss covered by the Policy.[2] (Doc. #46-1, pp. 4, 77.) CMR subsequently submitted an estimate for the needed roof repairs, determining the entire roof needed to be replaced and estimating the replacement cost value as $224,080.40. (Doc. #49-1, p. 76; Doc. #49-2, pp. 91-95.) ASI investigated the claim while reserving its rights under the Policy due, *inter alia*, to the untimely notification of the loss. (Doc. #46-1, p. 77.)

An independent adjuster inspected the roof in September 2018 and determined it could be repaired for $763.31. (Doc. #46-1, pp. 85-87.) In October 2018, ASI hired a licensed professional engineer to determine the cause and origin of the claimed roof damage. (Doc. #45-1, p. 3.) The engineer inspected the property on November 9, 2018 and observed vertically cracked roof tiles, right corner cracked tiles, loose ridge/hip tiles, and two displaced tiles. (Id. pp. 3-4.) The engineer determined the vertically cracked tiles were caused by individuals walking on the roof, the corner cracked tiles were likely the result of thermal expansion or contraction, and the displaced tiles were caused by wind. (Id. p. 4.) Regarding the latter, the engineer determined the two displaced tiles were not cracked or broken and could be reattached without needing to be replaced. (Id.)

***2** Following these inspections and its claims investigation, ASI determined that the only damage covered by the Policy was the loose cap tiles, and that the cost to repair these fell below the Policy's $17,640 hurricane deductible. (Doc. #46-1, pp. 4, 80-81.) Accordingly, the claim for wind damage was denied payment. (Id. p. 81.) The failure to provide prompt notice of the loss was not listed as a reason for denying the claim.

B. Procedural Background

In May 2019, CMR filed a one-count breach of contract Complaint for Damages in the Circuit Court for the Twentieth Judicial Circuit in and for Lee County, Florida. (Doc. #1-1.) Defendant removed the case to federal court on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a). (Doc.

#1.) Defendant filed its Answer, Affirmative Defenses and Demand for Jury Trial. (Doc. #9.) ASI asserted as an affirmative defense that recovery under the Policy was barred by the failure to comply with the Policy requirement that ASI be provided with prompt notice of a loss. (Id. pp. 4-5.)

Defendant now seeks summary judgment on a variety of issues. Specifically, ASI argues (1) recovery is barred as a matter of law due to the late notice of the alleged loss; (2) plaintiff's recovery is limited to actual cost value only; (3) plaintiff is not entitled to recovery of "matching" damages; (4) ordinance or law coverage damages are not recoverable; and (5) any damages relating to the home's screened enclosure are limited by the Policy. (Doc. #50, pp. 9- 20.) Plaintiff opposes all arguments except for the last.

II.

Summary judgment is appropriate only when the Court is satisfied that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." Hickson Corp. v. N. Crossarm Co., Inc., 357 F.3d 1256, 1260 (11th Cir. 2004) (citation omitted). A fact is "material" if it may affect the outcome of the suit under governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "A court must decide 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " Hickson, 357 F.3d at 1260 (quoting Anderson, 477 U.S. at 251).

In ruling on a motion for summary judgment, the Court views all evidence and draws all reasonable inferences in favor of the nonmoving party. Tana v. Dantanna's, 611 F.3d 767, 772 (11th Cir. 2010). However, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." St. Charles Foods, Inc. v. America's Favorite Chicken Co., 198 F.3d 815, 819 (11th Cir. 1999) (quoting Warrior Tombigbee Transp. Co. v. M/V Nan Fung, 695 F.2d 1294, 1296-97 (11th Cir. 1983)). "If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant summary judgment." Allen v. Bd. of Pub. Educ. for Bibb Cty., 495 F.3d 1306, 1315 (11th Cir. 2007).

III.

A. "Prompt Notice" of Loss

Defendant first argues that all recovery under the Policy is barred because the insured failed to provide it with prompt notice of the loss, as required by the Policy. (Doc. #50, p. 9.) The Policy requires that in case of loss to the insured property, the insured must "[g]ive prompt notice" to ASI. (Doc. #46-1, p. 32.) Defendant argues that because it was not given notice of the loss until a year after Hurricane Irma, the prompt notice requirement of the Policy was not met as a matter of law. (Doc. #50, pp. 9-13.) Plaintiff responds that this issue may not be resolved on a motion for summary judgment because there are material disputed facts, which must be resolved by a jury. (Doc. #61, pp. 4-5.)

***3** Insurance policies often require an insured to provide the insurer with "prompt notice" (or some functionally equivalent phrase) of loss to the insured property. 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, 598 (Fla. 2d DCA 2014) (citation omitted). In Florida [3] , a notice of damage is generally a pre-condition to a claim. Bankers Ins. Co. v. Macias, 475 So. 2d 1216, 1218 (Fla. 1985). An insured's failure to give timely notice under such a policy provision is "a legal basis for the denial of recovery under the policy." Ideal Mut. Ins. Co. v. Waldrep, 400 So. 2d 782, 785 (Fla. 3d DCA 1981); see also LoBello, 152 So. 3d at 599.

Most Florida cases follow a two-step analysis to determine whether an insured's notice to the insurer sufficiently complied with such a policy requirement. Rodriguez v. Avatar Prop. & Cas. Ins. Co., 290 So. 3d 560, 564 (Fla. 2d DCA 2020) (citation omitted). Essentially, the inquiry involves a determination of whether the notice of loss was timely and, if not, a determination of whether the insurer was prejudiced by the untimely notice. LoBello, 152 So. 3d at 599.

(1) Timely Notice

The first step "is to determine whether or not the notice was timely given." Rodriguez, 290 So. 3d at 564 (citation omitted). This requires the identification of the triggering event from which the time period is measured and the determination of whether the notice was sufficiently prompt. A triggering event must be of sufficient consequence to trigger an insured's duty to provide notice. See Waldrep, 400 So. 2d at 785 (""Notice is necessary when there has been an occurrence that should lead a reasonable and prudent man to believe that a claim for damages would arise."). The hurricane itself may or may not be the event that would trigger the notice requirement, Laquer v. Citizens Prop. Ins. Corp., 167 So. 3d 470, 473–75 (Fla. 3d DCA 2015), but neither awareness of the full extent of the damage nor the determination of causation are necessary for the notice requirement to be triggered. See 1500 Coral Towers Condo. Ass'n, Inc. v. Citizens Prop. Ins. Corp., 112 So. 3d 541, 543 (Fla. 3d DCA 2013) ("[A]n insured must give notice of the loss that implicates a potential claim without waiting for the full extent of the damages to become apparent."); Waldrep, 400 So. 2d at 785 ("[T]he insured could not wait until the full extent of the damage to the aircraft was apparent, because the policy covered any 'occurrence' resulting in injury to the aircraft.").

"Prompt" is undefined in the Policy, but its meaning is well settled under Florida law. "Prompt" and other comparable phrases, like "immediate" and "as soon as practicable," do not require instantaneous notice. Cont'l Cas. Co. v. Shoffstall, 198 So. 2d 654, 656 (Fla. 2d DCA 1967). Rather, these phrases 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." Laquer, 167 So. 3d at 474 (quoting Yacht Club on the Intracoastal Condo. Ass'n v. Lexington Ins. Co., 599 F. App'x. 875, 879 (11th Cir. 2015)). The determination of whether an insured provides "prompt" notice of a loss to an insurer is usually a question for the finder of fact after considering all the facts and circumstances of each particular case. Himmel v. Avatar Prop. & Cas. Ins. Co., 257 So. 3d 488, 492 (Fla. 4th DCA 2018) (citation omitted); Everett v. Avatar Prop. & Cas. Ins. Co., 2D19-1563, 2021 WL 300443, *4 (Fla. 2d DCA Jan. 29, 2021) (citations omitted). Florida courts have not created a bright line rule for when notice to an insurer is no longer "prompt." Restoration Constr., LLC v. SafePoint Ins. Co., 308 So. 3d 649, 652 (Fla. 4th DCA 2020).

***4** While resolution of a promptness issue is usually for a jury, Florida cases have recognized that "this issue of fact may sometimes be resolved by summary judgment." Laquer, 167 So. 3d at 474; see also Rodriguez, 290 So. 3d at 564.

(2) Prejudice From Lack of Timely Notice

In Florida, a failure to give timely notice creates a rebuttable presumption of prejudice to the insurer. PDQ, 566 Fed. App'x at 849 (citing Macias, 475 So. 2d at 1217-18). "The burden is 'on the insured to show lack of prejudice where the insurer has been deprived of the opportunity to investigate the facts.' " Id. (quoting Macias, 475 So. 2d at 1218).

> To carry this burden, 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."

Lehrfield, 396 F. Supp. 3d at 1184 (quoting PDQ, 566 F. App'x at 849-50); see also Yacht Club, 599 F. App'x at 882 ("[I]f an investigation conducted immediately following the occurrence would not have disclosed anything materially different from that disclosed by the delayed investigation, an insured may rebut the presumption." (marks and citations omitted)).

"Whether the presumption of prejudice to the insurer has been overcome is 'ordinarily ... a separate issue of fact.' " De La Rosa v. Fla. Peninsula Ins. Co., 246 So. 3d 438, 441 (Fla. 4th DCA 2018) (citation omitted). Prejudice is properly resolved on summary judgment, however, where an insured fails to present evidence sufficient to rebut the presumption. PDQ, 566 F. App'x at 849 (citations omitted).

(3) Application of Legal Principles

(a) Prompt Notice

The Court rejects plaintiff's suggestion that the promptness of notice "is only appropriate for a jury's determination." (Doc. #61, pp. 4-5); see Laquer, 167 So. 3d at 474; Yacht Club, 599 F. App'x at 879; PDQ, 566 F. App'x at 848.

The undisputed summary judgment facts are that Hurricane Irma passed through the Bonita Springs area in September 2017; plaintiff first became aware of the roof damage in March 2018; and the claim was not reported to the insurer until September 2018. While the record is less clear as to when the insured became aware of the damage, a reasonable inference is that he became aware of the condition of the roof at or near the time he hired plaintiff to inspect his roof. Despite defendant's focus on the date of Hurricane Irma in September 2017, the arguably applicable triggering date for the notice requirement is the date the damage was discovered, March 2018. Accordingly, the issue is whether the six-month delay between discovery of the damage in March 2018 and reporting it to the insurer in September 2018 constitutes prompt notice under the Policy.

As plaintiff acknowledges, the main issue is "whether six months is within the timeframe of a reasonably prudent person." (Doc. #61, p. 6.) While "there is no 'bright-line' rule under Florida law setting forth a particular period of time beyond which notice cannot be considered 'prompt,' " Yacht Club, 599 F. App'x at 879, several courts have found similar delays untimely as a matter of law. See, e.g., PDQ, 566 F. App'x at 849 (six months); Tamiami Condo. Warehouse Plaza Ass'n, Inc. v. Markel Am. Ins. Co., 2020 WL 1692177, *2 (S.D. Fla. Feb. 24, 2020) (seven months); Lehrfield v. Liberty Mut. Fire Ins. Co., 396 F. Supp. 3d 1178, 1183 (S.D. Fla. 2019) (eight months).

***5** Plaintiff's corporate representative testified that he had "[n]o idea" why the claim was not reported until September 2018. (Doc. #49-1, p. 44.) When asked why he waited to report the claim, Farrington testified, "Probably because I didn't think much was wrong." (Doc. #48-1, pp. 44-45.) However, even if Farrington was not aware of the full extent of the damage, "an insured's good faith belief that the damage is trivial or not covered by the policy is insufficient to justify non-compliance with the policy's notice provision." Kendall Lakes Towers Condo. Ass'n, Inc. v. Pacific Ins. Co., Ltd., 2012 WL 266438, *4 (S.D. Fla. Jan. 30, 2012); see also Yacht Club, 599 F. App'x at 880 ("Whatever concerns the Board had about the extent of damage and its deductible are not relevant under Florida law. Prompt notice is not excused because an insured might not be aware of the full extent of damage or that damage would exceed the deductible."). Having considered the evidence in the record as well as the arguments of the parties, the Court finds as a matter of law that prompt notice was not provided in this case. See Tamiami Condo., 2020 WL 1692177, *2 (finding no genuine dispute concerning whether notice was prompt where record indicated plaintiff was aware of hurricane damage seven months before reporting the claim and hired a roofing contractor shortly after the storm). Accordingly, the Court proceeds to the question of prejudice.

(b) Prejudice to Insurer

Plaintiff suggests that the evidence submitted by defendant is insufficient to demonstrate prejudice. (Doc. #61, pp. 7-8.) However, since the Court has determined prompt notice of the loss was not given, defendant's burden of demonstrating prejudice is satisfied by the presumption, and the burden is shifted to plaintiff to overcome the presumption of prejudice. See Yacht Club, 599 F. App'x at 881 ("The Yacht Club criticizes Lexington for failing to place any evidence in the record to show that it was prejudiced by the late notice. Such a requirement, however, would flip the burden from the insured to the insurer, which is contrary to Florida law.").

Plaintiff argues there is sufficient evidence in the record to show defendant was not prejudiced, thus rebutting the presumption, or at the very least enough evidence to create a jury question on the issue. (Doc. #61, p. 9.) Plaintiff asserts that prejudice is rebutted because defendant was able to determine the cause of the roof damage. (Id. p. 7.)

But defendant has presented evidence that its investigation was impacted by the delayed notice. In his declaration, the engineer hired by defendant asserts that although he was able to determine the cause of the observed damage, "the passage of time from the date of loss until [his] inspection hindered [his] ability to determine a general time-frame of when the damage occurred." (Doc. #45-1, p. 4.) The engineer also states that "[a] timely inspection would have allowed [him] to more easily determine whether the conditions [he] observed on the roof resulted from post-loss maintenance and/or repairs, or if they were present before Hurricane Irma."[4] (Id.) This was corroborated by plaintiff's own expert engineer, who testified at a deposition that "the closer you inspect to the actual event, the more data you'll be able to collect." (Doc. #47-1, pp. 77-78.) When asked if it would have assisted him to have inspected the roof closer in time to Hurricane Irma to make a better determination, plaintiff's engineer agreed that "[i]t would help." (Id. p. 77); see PDQ, 566 F. App'x at 849-50 (listing "whether better conclusions could have been drawn without the delay" and "whether those conclusions could have

been drawn more easily" as factors in determining whether an insured rebuts the presumption of prejudice).

However, although initially reserving its right to deny the claim due to the failure to provide prompt notice, defendant ultimately denied the claim solely due to its determination that the damage fell below the amount of the policy's hurricane deductible. This fact undermines defendant's suggestion that the delayed notice affected its ability to investigate the claim.

***6** The evidence is similarly contradictory as to whether the condition of the roof materially changed before defendant was alerted to the damage. On the one hand, the evidence does not suggest the damage to the roof worsened between the date of discovery and the date of notification, a factor the Eleventh Circuit has focused on in finding prejudice to an insurer. Yacht Club, 599 F. App'x at 881 ("[E]ven The Yacht Club's own expert acknowledged that the structure sustained additional damage because repairs were not made immediately after Hurricane Wilma. ... This is evidence of the prejudicial effect of the passage of time."); PDQ, 566 F. App'x at 850 ("Nor does PDQ proffer anything to indicate that the condition of the Property was in the same condition as it was after the storm. In fact, PDQ has indicated that the damages got worse over time."). On the other hand, there is also evidence that Farrington hired someone to make minor repairs to the roof, although it is unclear as to when these repairs took place. (Doc. #48-1, p. 22); see Yacht Club, 599 F. App'x at 881 ("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.").

Viewing it in the light most favorable to plaintiff as the non-moving party, the Court finds the record contains conflicting evidence as to "whether better conclusions could have been drawn without the delay," "whether those conclusions could have been drawn more easily," "whether the repairs to the affected areas that took place in the interim would complicate an evaluation of the extent of the damage," and whether "an investigation conducted immediately following the occurrence would not have disclosed anything materially different from that disclosed by the delayed investigation." Lehrfield, 396 F. Supp. 3d at 1184 (quoting PDQ, 566 F. App'x at 849-50). The Court concludes there is sufficient evidence in the record to create a jury question on this issue of whether the presumption of prejudice has been rebutted. See Kendall Lakes, 2012 WL 266438, *7 ("[W]hether a prompt investigation would have enabled Pacific to determine the cause of the damage with greater certainty or to take steps to mitigate damages and, if so, whether Pacific was placed at a substantial disadvantage as to be prejudiced by the delay, present genuine questions of material fact that cannot be resolved on a motion for summary judgment.").

B. Replacement Cost Value Damages

The Policy at issue contains a loss settlement provision stating that property losses to buildings covered by the Policy, such as dwellings, are settled at replacement cost without deduction for depreciation. (Doc. #46-1, pp. 14, 18.) However, the Policy also states that the insurer "will pay no more than the actual cash value of the damage until actual repair or replacement is complete." (Id. p. 18.) It is undisputed that none of the repairs in plaintiff's $224,080.40 estimate have been completed yet. Defendant therefore argues that plaintiff is barred from seeking replacement cost value (RCV) damages in this case. (Doc. #50, pp. 13-16.) The Court agrees.

In Buckley Towers Condominium, Inc. v. QBE Insurance Corporation, the court stated:

> In the first place, the insurance contract unambiguously requires the insured to repair its property before receiving RCV damages. The insurance contract specifically provides that QBE "will not pay on a replacement cost basis for any loss or damage (1) Until the lost or damaged property is actually repaired or replaced; and (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage." ... The insurance contract contains no allowances for advance payments to fund repairs. Both parties agree, and the record undeniably establishes, that Buckley Towers never completed repairs and, thus, would be barred from recovering RCV damages under the plain terms of the contract.

Id. at 662-63; see also CMR Constr. & Roofing, LLC v. Empire Indem. Ins. Co., 2021 WL 246201, *2 (11th Cir. Jan. 26, 2021) ("The insurance policy provides that a claim for replacement cost value will not be paid '[u]ntil the lost or damaged property is actually repaired or replaced' and '[u]nless the repairs or replacement are made as soon as reasonably possible after the loss or damage.'

***7** That 'until and unless' provision is plain and unambiguous. It means that Empire was not obligated to pay CMR the replacement cost value until CMR had actually made the repairs and incurred the costs of doing so.");

Ceballo v. Citizens Prop. Ins. Corp., 967 So. 2d 811, 815 (Fla. 2007) ("[C]ourts have almost uniformly held that an insurance company's liability for replacement cost does not arise until the repair or replacement has been completed."); Palm Bay Yacht Club Condo. Ass'n, Inc. v. QBE Ins. Corp., 2012 WL 13012457, *5 (S.D. Fla. May 8, 2012) ("The Court agrees with QBE that it owes no coverage for replacement-cost-value benefits for items that Palm Bay has not repaired or replaced. The policy states plainly that QBE 'will not pay on a replacement cost basis for any loss or damage' '[u]ntil the lost or damaged property is actually repaired or replaced.' .... Here, where repairs have yet to occur, the policy by its plain language does not afford replacement-cost-value coverage."); Ocean View Towers Ass'n, Inc. v. QBE Ins. Corp., 2011 WL 6754063, *11 (S.D. Fla. Dec. 22, 2011) ("As QBE correctly argues, the policy plainly provides RCV coverage only after 'the lost or damaged property is actually repaired or replaced,' and even then only if 'the repairs or replacement[s] are made as soon as reasonably possible after the loss or damage.' Here, the repairs have yet to occur; therefore, the policy does not afford RCV coverage." (citation omitted)).

Plaintiff relies mainly upon Citizens Property Insurance Corporation v. Tio, 304 So. 3d 1278 (Fla. 3d DCA 2020). (Doc. #61, pp. 9-11.) In Tio, the insurer argued section 627.011(3), Florida Statutes, limited the damages a jury may award for breach of an insurance contract. Id. at 1280. Here, while defendant cites to section 627.7011(3) in support, its argument is based on the language of the Policy. (Doc. #50, p. 13, 16) ("The plain language of the policy limits Plaintiff's initial recovery to ACV only, until repairs have been made.... The policy and Florida case law are clear in that Plaintiff is not able to recover the RCV amounts sought in its estimate based on the fact that the estimated repairs have not yet been performed."). Because the insurer apparently did not argue that RCV damages were precluded under the language of the policy, Tio is not applicable to this case.

The Eleventh Circuit has rejected plaintiff's argument that defendant's failure to tender ACV prevented the repairs from taking place (Doc. #61, p. 11):

> Under Florida's binding law, ... courts are not free to rewrite the terms of an insurance contract and where a policy provision "is clear and unambiguous, it should be enforced according to its terms." Acosta, Inc. v. Nat'l Union Fire Ins. Co., 39 So. 3d 565, 573 (Fla. Dist. Ct. App. 2010) (citation and quotation marks omitted). Allowing Buckley Towers to claim RCV damages without repairing or replacing entirely removes the plaintiff's obligations under the Replacement Cost Value section of the contract. The parties freely negotiated for that contractual provision and it is not the place of a court to red-line that obligation from the contract.
>
> Nor is it a defense to say that it would be costly for Buckley Towers to comply with the insurance contract as written. "Inconvenience or the cost of compliance [with contractual terms], though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful." N. Am. Van Lines v. Collyer, 616 So. 2d 177, 179 (Fla. Dist. Ct. App. 1993). Although Buckley Towers may be unable to receive the full range of benefits of their contract without an advance payment under Florida law, that cost and inconvenience may not relieve them of repairing the building prior to claiming RCV damages.

Buckley Towers, 395 F. App'x at 663.

It is undisputed that the repairs have not been completed. Accordingly, the Court will enter summary judgment in favor of defendant finding that plaintiff may not recover RCV damages at this time.

C. Matching Damages

Defendant argues that pursuant to the Policy plaintiff is precluded from seeking "matching" damages, i.e., "replacement of undamaged property to ensure that it matches replacements to physically damaged materials." (Doc. #50, pp. 16-18.) The Policy provides coverage for "direct loss" to the residence. (Doc. #46-1, p. 14.) Because replacement of undamaged property does not constitute property that suffered a "direct loss," defendant argues matching damages are inappropriate. (Doc. #50, pp. 16-18.) Plaintiff responds that because the need to replace the roof is not merely based on matching, there is a question of fact "as to the proper methodology of repair due to the physical damage to the roof itself." (Doc. #61, pp. 12-14.)

***8** The Court agrees with defendant that matching damages do not fall within the Policy's definition of "direct loss." See Palm Bay Yacht Club, 2012 WL 13012457, *4 ("[T]he Court agrees with QBE that it owes no coverage for costs related to matching or uniformity. The policy provides that QBE will pay for 'direct physical loss of or damage' to the covered property resulting from any covered cause

of loss. Palm Bay cites no policy provision showing its entitlement to matching of undamaged property to newly-repaired property."); Ocean View Towers, 2011 WL 6754063, *10 ("QBE argues that the policy provides coverage only for 'direct physical loss or damage' and does not cover the replacement of undamaged property to ensure 'matching.' The Court agrees.").

As acknowledged by defendant, section 626.9744(2), Florida Statutes, provides that in homeowner insurance claims in which a loss requires replacement of items and the replaced items do not match in quality, color, or size, "the insurer shall make reasonable repairs or replacement of items in adjoining areas." However, the statute's requirements apply "[u]nless otherwise provided by the policy." § 626.9744, Fla. Stat. Here, because the policy limits coverage to "direct" losses, section 626.9744(2) would not be applicable. See Vazquez v. Citizens Prop. Ins. Corp., 304 So. 3d 1280, 1285 (Fla. 3d DCA 2020) ("Ms. Vazquez's interpretation further disregards the plain text of the matching statute, which clearly defers to the policy as controlling."). Accordingly, the Court grants summary judgment in defendant's favor on this issue. See id. (rejecting argument that matching costs are part of actual cash value). [5]

D. Ordinance or Law Damages

For an additional premium, the Policy provides "coverage for costs associated with the enforcement of any ordinance or law regulating the construction, repair, or demolition of a building or structure" insured under the Policy. (Doc. #46-1, p. 57.) However, the coverage under this provision applies to costs "incurred" as a result of an ordinance or law. (Id.) Defendant argues that because plaintiff has not undertaken any repairs of the roof, it has not incurred any costs and, therefore, is not entitled to ordinance or law damages. (Doc. #50, pp. 18-19.)

" 'Ordinance and Law' is the cost of bringing any structure (here, the roof) into compliance with applicable ordinances or laws." Jossfolk v. United Prop. & Cas. Ins. Co., 110 So. 3d 110, 111 (Fla. 4th DCA 2013). In similar situations, several courts, including the Eleventh Circuit, have determined an insured was not entitled to such costs when the property was never repaired or replaced. See, e.g., Buckley Towers, 395 F. App'x at 665 ("[U]nder Florida law and under the terms of the contract, Buckley Towers is not entitled to law and ordinance damages because it never repaired the property and never actually incurred increased damages due to the enforcement of laws or ordinances."); Oriole Gardens Condo. Ass'n I v. Aspen Specialty Ins. Co., 875 F. Supp. 2d 1379, 1385 (S.D. Fla. 2012) (granting summary judgment on issue of whether party could recover "the increased costs of construction resulting from compliance with an ordinance or law" because "the policy makes clear that an insurer must first repair or replace the damaged property before seeking benefits for increased costs of construction," and no repairs or replacement had taken place); Los Palacios II Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co., 2011 WL 13100234, *6-7 (S.D. Fla. Sept. 6, 2011) (agreeing that insured was not eligible for coverage related to "increased cost of construction to comply with enforcement of applicable building codes" "because it failed to actually repair or replace the damaged property, as the Policy requires"). While these cases support defendant's argument that plaintiff is not entitled to ordinance or law damages, the Court nonetheless finds summary judgment inappropriate because there is a genuine issue of material fact as to whether the costs have been "incurred."

***9** The record indicates Farrington has entered into a contract with plaintiff to make repairs to his roof. (Doc. #3-1, p. 6.) It also indicates that one of the reasons repairs are allegedly required is to comply with Florida's Building Code. (Doc. #47-1, pp. 71-72; Doc. #49-1, pp. 77-78). While the Florida Supreme Court has held that an insured must have "incurred an additional loss in order to recover under the supplemental coverage," it has also agreed that " 'to incur' means to become liable for the expense, but not necessarily to have actually expended it." Ceballo, 967 So. 2d at 815. The Court finds whether any ordinance or law damages have been "incurred" in this case is a question for the jury. See Jossfolk, 110 So. 3d at 113 (finding insurer "incurred additional loss" when the city "required compliance with current ordinances in order to complete repairs"); Everhart v. Citizens Prop. Ins. Corp., 90 So. 3d 374, 375 (Fla 1st DCA 2012) (Makar, J., specially concurring) (suggesting "entering a written contract" to rebuild storm-damaged home would constitute incurring liability for purposes of "law and ordinance" coverage). Accordingly, defendant's request for summary judgment on this issue is denied.

E. Screen-Related Repair Damages

Finally, defendant moves for partial summary judgment on the issue of whether the Policy covers the cost of rescreening Farrington's pool enclosure and the attached door. (Doc. #50, pp. 19-20.) The Policy contains a "Limited

Screened Enclosure and Carport Coverage" endorsement that specifically states it "does not provide coverage for screen material or costs associated with removing or replacing screens." (Doc. #46-1, p. 71.) In response, plaintiff acknowledges that the endorsement excludes coverage for these items and to the extent the costs are contained in its estimate, plaintiff withdraws its claim for such items. (Doc. #61, p. 15.) Given plaintiff's withdrawal, this portion of defendant's motion has been rendered moot.

Accordingly, it is now

ORDERED:

Defendant's Motion for Summary Judgment (Doc. #50) is **GRANTED in part and DENIED in part** as follows:

1. Defendant's request for summary judgment on the issues of prompt notice and ordinance and law damages is **denied**;

2. Defendant's request for summary judgment on the issues of replacement cost value damages and matching damages is **granted**; and

3. Defendant's request for summary judgment on the issue of screen-related repair damages is **denied as moot**.

DONE AND ORDERED at Fort Myers, Florida, this 9th day of March, 2021.

All Citations

Slip Copy, 2021 WL 877560

Footnotes

1 The background facts are either undisputed or read in the light most favorable to plaintiff as the nonmoving party. However, these facts, accepted at the summary judgment stage of the proceedings, may not be the "actual" facts of the case. Priester v. City of Riviera Beach, Fla., 208 F.3d 919, 925 n.3 (11th Cir. 2000).

2 Defendant's motion states the loss was first reported to it on September 18, 2018, a fact which plaintiff admits in its opposition. (Doc. #50, p. 2; Doc. #61, p. 1.) However, the record demonstrates the loss was reported on September 12, 2018. (Doc. #46-1, pp. 4, 77.) The difference is not material to any issue in this motion.

3 In this diversity case, Florida substantive law applies because the insurance contract was negotiated in Florida. PDQ Coolidge Fromad, LLC v. Landmark Am. Ins. Co., 566 F. App'x 845, 847 (11th Cir. 2014).

4 Plaintiff argues that this assertion should be stricken because it contradicts the engineer's determination as to the cause of the roof damage. (Doc. #61, p. 7.) The Court disagrees. As previously noted, the ability to determine causation does not mean prejudice does not exist. Yacht Club, 599 F. App'x at 881.

5 The Court's ruling is limited to the issue of whether matching damages constitute "direct loss" under the Policy, and does not preclude plaintiff's suggestion that replacement of all the roof tiles is required by the Florida Building Code, or determine whether such a replacement is covered under any other Policy provision.

End of Document

Exhibit F

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2038

SPONSOR: Banking and Insurance Committee and Senator Fasano

SUBJECT: Consumers' Insurance Rights

DATE: April 1, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich/Knudson	Deffenbaugh	BI	Fav/CS
2.			CM	
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 2038 establishes broad consumer protection provisions pertaining to property and casualty insurance and motor vehicle insurance. The legislation also changes other provisions relating to insurance.

Changes regarding property and casualty insurance:

- Requires the Division of Consumer Services to designate an employee as a primary contact for consumers on sinkhole issues;
- Requires the F.S.U. Department of Risk Management and Insurance to conduct a feasibility and cost-benefit study for a potential Florida Sinkhole Insurance Facility and other matters related to the affordability and availability of sinkhole insurance;
- Provides that an insurance policy mandating arbitration does not override the policyholder's right to mediation under s.;
- Forbids an insurer from canceling or non-renewing a policy because of a single claim on a property insurance policy resulting from water damage, unless the insurer can demonstrate that the insured policyholder failed to take reasonable action to prevent a recurrence of damages as requested by the insurance company;
- Reporting requirements related to loss underwriting mandates that when an insurer refuses to provide coverage due to adverse underwriting information, the insurer must provide the applicant specific information on the reasons for the refusal to insure and inform the applicant how to obtain the loss underwriting if it is a basis for a refusal to insure;
- Requires a lender to reimburse the property owner for any penalty or fees imposed by the insurer and paid by the property owner to reinstate the policy, if a lender fails to timely pay a premium. If the payment is not over 90 days overdue, the insurer must reinstate the

insurance policy retroactive to the day of cancellation. If the premium payment is more than 90 days overdue or if the insurer refuses to reinstate the policy, the lender must pay the difference between the cost of the previous insurance policy and a comparable, new policy for 2 years.
- Requires the insurer to pay for any consequential physical damage that is the result of repairs undertaken to repair or replace damage that was covered under the policy, unless the insurance policy says otherwise;
- When a portion of a home must be repaired or replaced, the repair or replacement must include adjoining areas as necessary.

Changes related to Auto Insurance:

- Allows businesses that sell personal accident and motor vehicle excess liability insurance to submit one application to the Department in order to obtain licenses for each location of the business.
- Establishes guidelines to apply to the adjustment and settlement of personal and commercial motor vehicle insurance claims;
- Provides specified consumer protections pertaining to: third-party claimants; motor vehicle repairs; replacement parts; adjustment and settlement of first-party motor vehicle total losses; settlements; partial losses; storage charges; and, sales taxes.

Changes related to credit life and disability insurance:

- Allows credit life and disability insurers to use newly adopted disability and mortality tables to set reserves, and repeals the previous requirement that the minimum reserve for credit life and disability policies be the unearned gross premium.

Changes involving premium finance companies:

- Eliminates the filing fee specified in s. 627.849, F.S. for submission of premium finance forms.
- Requires that when a financed insurance contract is canceled an insurer must return the unpaid balance due under the finance contract to the premium finance company and any remaining unearned premium to the agent or insured, within 30 days of the requested cancellation date. In turn, the bill places a time requirement on the premium finance company to refund to the insured any refund due on the account within 30 days of the account being overpaid or, if the refund is sent to the agent within 15 days of the overpayment, shall notify the insured of the refunded amount.

Changes the means by which mortality tables are adopted:

- Allows the Financial Services Commission to adopt by rule the latest revisions to the minimum standards for valuation of life insurance policies, produced by the National Association of Insurance Commissioners, by rule rather than having to do so by legislation.

The bill states that any provisions of the act that are found invalid are severable from the rest of the act.

This bill amends the following sections of the Florida Statutes: 20.121, 501.137, 624.4622, 625.081, 625.121, 626.321, 627.476, 627.4091, 627.4133, 627.7015, 627.838, 627.848, and 627.849.

This bill creates the following sections of the Florida Statutes: 625.9743, 626.9744, and 627.7077, and repeals the following section of the Florida Statutes: s. 625.131.

II. Present Situation:

Unfair Trade Practices

Part IX of ch. 626, F.S., contains the Unfair Insurance Trade Practices Act. The act defines and provides for the determination of all unfair methods of competition as well as what acts constitute unfair or deceptive trade practices. Violators of the act are subject to a maximum fine of $2,500 for an unwillful violation up to $10,000 for all unwillful violations arising out of the same action, and a maximum $20,000 fine for each willful violation not to exceed $100,000 for all willful violations arising out of the same action. A multitude of unfair trade practices or unfair modes of competition are identified in the act including making misrepresentations regarding an insurance policy, engaging in unfair claim settlement practices such as denying claims without conducting a reasonable investigation, engaging in unfair discrimination, and more.[1] The act also contains a "policyholders bill of rights" that mandates that policyholders have the right to competitive pricing practices by insurers, the right to obtain comprehensive coverage, to an insurance company that is financially stable, and other rights.[2]

Insurance Contracts

Part II of ch. 627, F.S., contains the statutory regulations in Florida for what may be included in an insurance contract, defines certain types of coverages, provides the requirements for filing of insurance policies with the office for approval, requires an insurer to provide a notice of cancellation, nonrenewal, or of the renewal premium, along with a variety of other provisions.

Alternative Dispute Resolution and Arbitration

Mediation is a "private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement."[3] In mediation, the mediator has no authority to impose a resolution on the parties. Mediation is designed as an informal, inexpensive, and non-threatening forum where parties can attempt to resolve disputes. The Florida statutes give insureds that have disputes regarding property insurance and auto insurance the right to engage in a non-binding meditation conference with insurers. Property insurance mediation is set forth in s. 627.7015, F.S., whereby first party claimants have the right to a mediated claim resolution conference for claims under personal lines policies prior to the commencement of the appraisal process or the start of litigation. Additionally, a court may refer litigants to mediation. Auto insurance mediation is governed by s. 627.745, F.S. Mediation is available to the insurer or the insured for any claim filed with an insurer for personal injury

[1] Section 626.9521, F.S.
[2] Section 626.9641, F.S.
[3] BLACK'S LAW DICTIONARY 981 (6th ed. 1990).

damages of $10,000 or less. For both types of mediation, the department selects a qualified mediator at random and the parties must negotiate in good faith and have full authority to settle the claim.

Arbitration is "a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard."[4] Arbitration is designed as an inexpensive and quicker alternative to a traditional legal trial. The Office of Insurance Regulation prohibits insurers from requiring mandatory, binding arbitration in insurance policies, on the grounds that arbitration can place financial and time burdens on consumers and interferes with the policyholder's right to engage in non-binding mediation.

Mold Related Claims and Litigation

Beginning in the 1990's, claims and litigation involving toxic mold infestation in homes and other dwellings has presented greater challenges for both consumers and insurers. Generally, situations involving mold arise when a flood, leak, or water overflow within a home results in the growth of mold within the home. Most claims involving mold center on contentions that the mold causes illnesses such as skin rashes, lung problems and even brain damage.[5] The amount of mold claims and losses has increased greatly in recent years. For instance, a 2002 study by the Texas Department of Insurance shows that the number of mold claims in that state increased from 1,050 in the first quarter of the year 2000, to 14,704 in the fourth quarter of 2001. During that time, the estimated incurred loss increased from over $14 million in the first quarter of 2000, to over $187 million in the fourth quarter of 2001. As a result of increased costs and litigation, customers have found it increasingly difficult to obtain insurance coverage if their home has sustained water damage in the past.

Mortality and Disability Tables for Life Insurance and Annuities

Under current law, new mortality and disability tables for life insurance and annuities are required to be adopted by statute under s. 625.121, F.S. Every state except Florida permits their insurance department to adopt these mortality and disability tables by rule rather than enacting a law every time the tables are updated. The National Association of Insurance Commissioners (NAIC) adopts and updates periodically the mortality and disability tables pertaining to life insurance and annuities. According to representatives with the Office of Insurance Regulation (Office), allowing the Office to adopt the NAIC tables by rule would facilitate the adoption of such tables and aid insurers in complying with Florida's regulations.

Motor Vehicle Consumer Protections

The Division of Consumer Services (division) within the Department of Financial Services (department) has several functions such as receiving inquiries and complaints from consumers, disseminating information, and providing assistance. According to representatives with the division, in 1992, the then-Department of Insurance promulgated Rule 4-166.027, F.A.C., which provided protections for motor vehicle consumers by establishing broad standards for the prompt, fair, and equitable settlement of first-party and third-

[4] BLACK'S LAW DICTIONARY 105 (6th ed. 1990).

[5] *See* Ballard v. Fire Insurance Exchange, Cause No. 99-05252, 345th Judicial District Court, Travis County Texas. In *Ballard*, a jury returned with a $32 million verdict against an insurer for failure to remedy a mold growth problem in an insured's home. The verdict was later reduced to $4 million on appeal.

party personal and commercial motor vehicle insurance claims. This rule established the following:

- guidelines for insurers to follow in adjusting and settling claims;
- prohibitions for insurers as to actions regarding third-party claimants, e.g., urging such claimants to use their own policy (even though the claimant's vehicle was damaged by the negligent actions of the company's insured), thus avoiding paying the claim under the policy issued by that insurer;
- standards for vehicle repairs;
- provisions as to partial and total loss value; and
- provisions for replacement parts.

In 2002, this rule was removed because its terms were found to extend beyond the jurisdiction of the department. According to department officials, the rule provisions provided a standard for fair and equitable auto claims handling that both consumers and insurance companies could use. Last year, the division received approximately 500,000 phone calls from consumers and 40,000 written complaints. Division representatives state that 30 to 40 percent of these complaints involve motor vehicle insurance. Many times consumers are in need of special attention as to motor vehicle claims procedures, according to these representatives.

Consumers are currently afforded protection under the unfair and deceptive claims practices provisions in the Insurance Code. These practice provisions prohibit insurers from engaging in specified unfair claim settlement practices as to their insureds and in specified cases, third-parties.[6] These provisions prohibit the making of material misrepresentations in order to effect a settlement; making misrepresentations as to pertinent facts or insurance policy provisions relating to coverages; failing to act promptly with respect to claims; and, failing to affirm or deny full or partial coverage of claims, among other provisions.

Motor Vehicle Crash Parts

Motor vehicle crash parts, sometimes referred to as cosmetic parts, are the sheet metal components of vehicles. These are the most frequently damaged parts in auto accidents, such as the fenders, hoods and doors panels. There are two sources for these parts: auto manufacturers, who sell these parts under their own names, also known as original-equipment manufacturers (OEMs), and generic or aftermarket crash parts suppliers. Before generic parts existed, creating competition in the marketplace, OEMs were able to sell their parts at much higher prices than they can today. According to the Insurance Institute for Highway Safety (IIHS), the introduction of aftermarket parts forced the price of OEM parts down by an average of 30 percent.

In the continuing debate about whether generic parts are as good as parts from OEMs, the issue of safety is in the forefront. Critics claim that using parts from sources other than OEMs could compromise safety. However, the IIHS says that with the possible exception of hoods, there are no safety implications of using cosmetic crash parts from any source. This has been demonstrated by crash tests conducted at the IIHS. In addition, an independent, third-party

[6] Section 626.9541, F.S.

nonprofit organization, Certified Automotive Parts Association (CAPA), inspects generic automotive parts and guarantees the quality of those that meet its high standards. Generic crash parts do not interfere with a vehicle's existing warranty and are often manufactured by the same supplier and in the same manner as OEM parts.

Many states have enacted laws that dictate to insurers and auto body shops when and how they must disclose the use of aftermarket parts to their customers. The majority of these states, including Florida, require repair estimates to identify non-OEM parts and specify that warranties on such parts are the responsibility of the part manufacturer, not the manufacturer of the vehicle itself. Under part III of ch. 501, F.S., an insurer or repair facility must clearly identify in the written estimate for repairs, in 10-point type, each such part in all instances where nonoriginal equipment manufacturer aftermarket crash parts are used. A violation of part III constitutes a violation of the unfair insurance trade practices act under part IX of ch. 626, F.S.

Some insurers restricted their use of generic crash parts or stopped using them altogether after litigation involving State Farm Mutual Auto Insurance company.[7] According to IIHS representatives, this has contributed to the increase in the cost of repairing cars after collisions.

Diminished Value

During the past several years, litigation has occurred involving diminished market value which is the value of a vehicle above the repair value. According to representatives with IIHS, trends in recent court decisions nationwide have deemed that diminished value is not recoverable under policies, limiting insurer liability to the cost of repairs. State supreme and appellate courts in Maine, Delaware, Florida, Alabama, Louisiana, Missouri and Wisconsin have recently addressed the issue and ruled that diminished value is not recoverable.

In March 2003, the South Carolina Supreme Court ruled that insurance companies are not obligated to pay for the diminished value of a vehicle that was damaged in a crash, and are only required to pay for the cost of repairs. It ruled unanimously that State Farm does not have to make up the difference in diminished value of a wrecked car as well as pay for repairs.

Motor Vehicle Claim Settlement Issues

Officials with the Department of Financial Services state that it is important to codify the provisions of Rule 4-166.027, F.A.C., into law in order to establish uniform standards in the adjustment of auto losses. While most insurers adhere to this rule, its incorporation into state law will help maintain consumer protections as well as avoid potential disputes and litigation in the future.

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[7] In 1999, generic replacement part suppliers and users experienced a major setback. In October of that year, in the case of *Avery vs. State Farm*, a southern Illinois jury found State Farm Mutual Auto Insurance Co. liable for $456 million in damages and an additional $730 million in punitive damages in a class action lawsuit involving the use of generic auto parts. The total award was reduced to $1.05 billion. The plaintiffs argued that the company had failed to tell its policyholders about the use of aftermarket parts in auto repairs, violating the state's consumer fraud laws, and that their use did not restore the automobile to its original condition, which was a breach of contract. In its April 5, 2001, decision, the appellate court left standing nearly all of the trial court's findings, and affirmed the judgment. State Farm has appealed the judgment, which has the potential to affect policyholders everywhere, to the state's high court. If it is allowed to stand, the verdict could allow automakers to arguably charge more for replacement parts.

III. Effect of Proposed Changes:

Section 1. Amends s. 20.121, F.S., to require that the Division of Consumer Services of the Department of Financial Services shall designate an employee of the Division as a primary contact for consumers on issues relating to sinkholes. The designated employee is to serve as a source for consumers for information regarding sinkhole-related insurance issues.

Section 2. Amends s. 501.137, F.S., which contains consumer protection provisions that require mortgage lenders to pay taxes or insurance premiums when receiving funds for the payment of property taxes or hazard insurance premiums. If the lender neglects to timely pay a tax or premium when escrow funds are available and the property owner suffers a loss, the lender is liable for a loss that would have been insured up to policy limits. The bill adds to these requirements that if a lender fails to timely pay a premium, and the payment is not over 90 days overdue, the insurer must reinstate the insurance policy retroactive to the day of cancellation, and the lender must reimburse the property owner for any penalty or fees imposed by the insurer and paid by the property owner to reinstate the policy. If the premium payment is more than 90 days overdue or if the insurer refuses to reinstate the policy, the lender must pay the difference between the cost of the previous insurance policy and a comparable, new policy for 2 years.

Section 3. Creates subsections (3) and (4) of s. 624.4622, F.S. The section contains requirements for the creation of self insurance funds by two or more local governmental entities for paying workers compensation benefits.

Subsection (3) requires local government self-insurance funds created after October 1, 2004, to be initially organized as a commercial self-insurance fund under s. 624.462, F.S., or as a group self-insurance fund under s. 624.4621, F.S. Subsection (4) mandates that for the first 5 years of its existence, the fund shall be subject to all requirements applied to commercial self-insurance funds or group self-insurance funds. Local government self-insurance funds formed after January 1, 2005, must file full financial statements, including a statement of opinion on loss and loss adjustment expense reserves by a qualified actuary, with the Office of Insurance Regulation for their first 5 years of existence. The fiscal statement must be filed within 60 days after the end of the fund's fiscal year, and quarterly statements must be filed within 45 days after the end of the quarter. The office may grant filing extensions for good cause.

The changes created by this section requires a local government self insurance fund to maintain a surplus. Currently, such funds are permitted to be insolvent, likely because governmental entities can exercise their taxing power to raise funds.

Section 4. Amends s. 625.081, F.S., and exempts credit disability insurance from the requirement that the insurer maintain an active life reserve that is less in the aggregate than the pro rata gross unearned premiums for such policies. The exemption will allow reserves to be set using new mortality and disability tables adopted by section 5 of this bill. Use of these tables should enable insurers to set more accurate reserves.

Section 5. Amends 625.121, F.S., relating to the standard valuation law pertaining to life insurance policies, to permit the Financial Services Commission (commission) to adopt the National Association of Insurance Commissioner's (NAIC) mortality and disability tables by

rule. Under current law, mortality and disability tables are periodically updated and adopted for use by all states. This provision permits the commission to adopt updated tables by rule of the Financial Services Commission for policies issued on or after July 1, 2004. The provision applies to ordinary life, disability in or supplemental to ordinary life, accidental death benefits in or supplemental to policies, annuities and pure endowments.

The bill also allows insurers to use the minimum reserve requirements for single-premium credit disability insurance, monthly premium credit life insurance and monthly premium credit disability insurance established by the National Association of Insurance Commissioners. This provision applies to policies issued prior to January 1, 2004.

Section 6. Amends s. 626.321, F.S., pertaining to limited licenses for baggage and motor vehicle excess liability insurance. The bill provides that an entity applying for a license under this section is required to submit only one application for a license; is required to obtain a license for each office; and is required to pay applicable license fees. The bill further provides that for limited licenses for baggage and motor vehicle excess liability insurance, a business entity offering this type of insurance may use part-time, as opposed to full-time employees, to offer such insurance. The measure also corrects a statutory cross-reference.

Section 7. Amends s. 627.476, F.S., to permit an insurance company to substitute the ordinary mortality tables adopted after 1980 by the National Association of Insurance Commissioners for use in determining the minimum nonforfeiture standard.

Section 8. Creates s. 626.9743, F.S., which applies to adjustment and settlement of personal and commercial motor vehicle insurance claims. The bill codifies many of the provisions under Rule 4-116.027, F.A.C. pertaining to motor vehicle consumer protections (*See*, discussion under Present Situation section, above.) The bill provides for the following:

- an insurance company may not, when liability and damages owed under the policy are reasonably clear, recommend that a third-party claimant make a claim under his or her own policy solely to avoid having to pay the claim under the policy issued by that insurer.
- an insurer that elects to repair a vehicle, and requires a specific repair shop for vehicle repairs, shall cause the damaged vehicle to be restored to its physical condition as to performance and appearance prior to the loss at no additional cost to the insured or third-party claimant other than as stated in the policy.
- an insurer may not require the use of replacement parts in the repair of a motor vehicle which are not at least equal in kind and quality to the damaged parts prior to the loss in terms of fit, appearance, and performance.
- describes the methods that insurers must use when an insurance policy provides for the adjustment and settlement of first-party motor vehicle total losses on the basis of actual cash value or replacement provisions.
- when the amount offered in settlement reflects a reduction by the insurer because of betterment or depreciation, the information relating to the reduction must be maintained with the insurer's claim file.
- an insurer shall, if partial losses are settled on the basis of a written estimate, supply the insured with a copy of the estimate upon which the settlement is based.

- an insurer shall provide notice to an insured before termination of payment for previously authorized storage charges and such notice shall provide 72 hours for the insured to remove the vehicle from storage.
- an insurer may defer payment of the sales tax (unless and until the obligation has been incurred), if such tax will be incurred by a claimant upon replacement of a total loss or upon repair of a partial loss.

Nothing in this section shall be construed to preclude enforcement of policy provisions relating to settlement disputes.

Section 9. Creates s. 626.9744, F.S., mandating that insurers follow two new requirements, unless the insurance policy provides otherwise, when a homeowner's insurance policy provides for the adjustment and settlement of first-party losses based on repair or settlement cost. First, when a loss requires repair or replacement of an item or part, any physical damage that occurs as a result of the repair or replacement work and is covered by the policy shall be included in the loss to the extent of any applicable limits. The insured cannot be required to pay for betterment required by ordinance or code or any other cost except the applicable deductible, unless the policy specifically excludes such coverage.

The second requirement is that when a loss requires the repair or replacement of portions of a home, and the replaced items do not match in quality, color, or size, the insurer must make reasonable repairs or replacement of items in adjoining areas of the home. In determining the extent of repairs or making replacements to adjoining areas, the insurer may consider cost, the remaining useful life of the undamaged portion, and other relevant factors. This requirement does not make the insurer a warrantor of repairs, and does not preclude enforcement of policy provisions relating to settlement disputes.

Section 10. Adds s. 627.4091(5), F.S., which states that when an insurer refuses to provide coverage to an applicant due to adverse underwriting information, the insurer must provide to the applicant specific information regarding the reasons for the refusal to insure. If the refusal to insure is based on a loss underwriting history or report from a consumer reporting agency, the insurer must identify the loss underwriting history and notify the applicant of his or her right to obtain a copy of the report from the consumer reporting agency.

Section 11. Adds subsections (4) and (5) to s. 627.4133, F.S., which requires that an insurer provide notice for cancellation, non-renewal, or regarding a renewal premium. An insurer that cancels a property insurance policy on property secured by a mortgage due to the failure of the lender to timely pay the premium when due, shall reinstate the policy once payments are made as required by s. 501.137, F.S. (see section 2 of this bill).

The bill provides that an insurer cannot use a single claim on a property insurance policy which is the result of water damage to cancel or non-renew coverage, unless the insured failed to take action (as requested by the insurer) to prevent a future similar occurrence of damage to the insured property.

Section 12. Adds subsection (10) to 627.7015, F.S., to state that an arbitration clause in an insurance policy cannot preclude the insured from using the mediation provisions of s. 627.7015, F.S.

Section 13. Creates s. 627.7077, F.S., which requires the FSU Department of Risk Management and Insurance to conduct a feasibility and cost-benefit study of a potential Florida Sinkhole Insurance Facility and other matters related to the affordability and availability of sinkhole insurance.

Section 14. Deletes subsection (3) of s. 627.838, F.S., which mandates that a filing with the office of a premium finance form must be accompanied with the filing fee specified in s. 627.849, F.S.

Section 15. Amends s. 627.848(1)(e), F.S., which provides the requirements for canceling an insurance contract when a premium finance agreement contains a power of attorney or other authority enabling the premium finance company to cancel any insurance contract listed in the agreement. The bill adds a time requirement that when a financed insurance contract is canceled, the insurer must return the unpaid balance due under the finance contract to the premium finance company and any remaining unearned premium to the agent or insured, within 30 days of the requested cancellation date. In turn, the bill places a time requirement on the premium finance company to refund to the insured any refund due on the account within 30 days of the account being overpaid or, if the refund is sent to the agent within 15 days of the overpayment, shall notify the insured of the refunded amount.

Section 16. Amends s. 627.849, F.S., to delete the $10 form filing fee for filing with the Department regarding premium financing.

Section 17. Repeals s. 625.131, F.S., which requires the minimum reserve for credit life and disability policies to be the unearned gross premium, and contains reserve requirements. The section is repealed due to the adoption of new standard ordinary mortality tables in s. 625.121(13), F.S. (section 5 of this bill), which will be used to set reserves. The new mortality tables should enable insurers to set more accurate reserves.

Section 18. States that if any provision or application of SB 2038 is held invalid, the rest of the act is severable, and the invalidity does not affect other provisions or applications of the bill that can be given effect without the invalid provision or application.

Section 19. Except as otherwise provided in the act, it will take effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Prohibition on an Insurer Refusing to Insure a Residence Due to One Occurrence of Water Damage that was Incurred and Repaired—The provision will help homeowners to maintain coverage despite an occurrence of water damage in a home if steps are taken to prevent an additional event as requested by an insurer.

Requirement for Property Insurance that Consequential Damages Resulting from a Repair or Replacement be Included in the Loss—This provision would ensure that policyholders do not have to pay to repair damage that is incurred as a result of a repair or replacement that was covered by the insurance policy, and will benefit consumers. However, the bill provides that the provision does not apply if an insurance policy provides otherwise.

Requirement that Repairs to a Home Create a Reasonably Uniform Appearance—Consumers will benefit from the repairs done to a home that will restore it aesthetically to the appearance it enjoyed before damage was incurred without further cost to the policyholder. However, the bill provides that this provision is not applicable if an insurance policy provides otherwise.

Requirement that Insurers Reinstate Coverage when a Policy is Cancelled Due to Non-Payment by a Mortgage Company—Property owners would be afforded greater protections to either reinstate a property insurance policy that has been canceled due to nonpayment of premium by the mortgage lender or to be reimbursed for the additional cost of obtaining replacement coverage. State regulated financial institutions and mortgage lenders would be subject to any policy reinstatement fees or additional costs for replacement coverage for two years. The bill may expose insurers to loss for risks covered under a policy for up to 90 days for which the premium has not yet been paid, but the past due premium would be required to be paid before the coverage is reinstated, retroactive to the date of cancellation.

Standards and Practices for Auto Claims— Consumers should benefit from the protections afforded in this bill. Some insurers will have to implement vehicle claims practices required under the bill, however, many insurers have already complied with these provisions because they were contained in Rule 4-166.027, F.A.C., (since repealed), most of which is now codified in this legislation.

Sinkhole Insurance Facility Study—The F.S.U. study will be financed with assessments on property insurers, costing them up to $300,000.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section (2) of this bill and Senate Bill 2196 both amend the provisions of s. 501.137, F.S., which enumerates the responsibilities mortgage lenders have to timely pay taxes and insurance premium payments from escrow accounts. The two bills differ in their changes to s. 501.137, F.S., but the differences do not appear to be substantive.

VIII. Amendments:

None.

Exhibit G

OFFICE OF INSURANCE REGULATION

DAVID ALTMAIER
COMMISSIONER

July 22, 2021

Sent via e-mail to
Karen Asher-Cohen
Radey Law Firm
karen@radeylaw.com

RE: Matching Sublimit provision in file number OL HO 1000 12 20

Dear Karen Asher-Cohen:

I am writing in response to your letter to Tamara St. Hilaire during her time with the Florida Office of Insurance Regulation ("Office") that was presented to me during out meeting on Monday, July 12, 2021, regarding the above.

Please note that the Office does not have statutory authority to render interpretations of statutes, except in rules for interpretations of general applicability or in declaratory statements for interpretation of a more limited applicability, assuming the requirements for such a statement are met. I refer you to section 120.54, Florida Statutes, for the applicable statute on rules. Further, declaratory statements are covered by section 120.565, Florida Statutes, and Florida Administrative Code Chapter 28-105.

You requested information relating to the statutory "matching" requirements and application of section 626.9744, Florida Statutes. You indicated during our meeting that the clause stating, "unless otherwise provided by the policy," allows insurers and policyholders to contract around the minimum requirements of section 626.9744, Florida Statutes.

You are correct that the statute does allow for the policy to "provide otherwise," however, the statute provides the minimum acceptable level of coverage that is to be provided and then the insurer is free to "provide otherwise" over and above that. Interpreting the clause at the beginning of the statute to mean that an insurer may establish a sublimit or otherwise reduce the coverage set forth in the statute would in essence nullify and defeat the regulatory purpose of the statute.

Additionally, the Vazquez v. Citizens case (Vazquez v. Citizens Prop. Ins. Corp., 304 So. 3d 1280, 1282 (Fla. Dist. Ct. App. 2020)) that was provided as justification that the provisions of the policy supersede the plain language of the statute and allow for the disregard of the minimum statutory requirements is unpersuasive. The Vazquez case examines the determination of the actual cash value of loss and whether funds for matching should be included in the claim payment prior to the start of repairs. The court found that section 627.7011, Florida Statutes applies to the initial payment for repairs and that the insurer was

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not required to pay for matching as a part of the actual cash value for loss in the initial payment prior to the start of repairs.

I hope this adequately responds to your letter.

Sincerely,

Jamilynn Pettiway
Assistant General Counsel

Exhibit H

Olympus form filing 20-031040 - SB 76 updates

WC

Walden, Cindy <cindy.walden@floir.com>

Reply all

Thu 6/17, 2:10 PM

jyoung@oigfl.com

Good afternoon Jeff,

I have received some initial feedback on some of the SB 76 language and what we would look for to be included in the forms at present. This might possibly vary according to the underlying policy language, but we should not see much deviation. Please see the following :

1.) "Supplemental Claims" and "Reopened Claims"- Lines 1019-1040 of SB 76. This language can be found in your Notice of Claims provision. We have had several companies inquire as to whether they are required to update their forms with this new language or can they merely continue to use the currently approved language, without making a new filing. Management/Legal has advised that a company is not required to file this language, a company may continue to rely on their current provision and settle claims according to that particular language. However, if a company wants to apply the new language to their claims, then the forms would need to be revised to provide this new requirement/information for the policyholder.

2.) Suit Against Us – Lines 1105-1112 of SB 76 – it was determined that this language will need to be included in forms. Management/Legal has advised that the following piece could be added, or a company could decide to add all of the language, which is quite lengthy. Following is an example of the shorter version which would be acceptable. Please note if the lengthier version of the bill language is to be added, it would need to be reviewed by our Management/Legal Team for compliance with the new law. Also any deviations from the following language will need to be reviewed by them as well :

Suit Against Us
a. If you and we fail to agree on a settlement regarding the loss, prior to filing suit, you must provide the Department of Financial Services with written notice of intent to initiate litigation at least 10 business days before filing suit under the policy in accordance with 627.70152, Florida Statutes.

I trust this information will be helpful to you. Please let me know if you have any questions.

Sincerely,

Cindy Walden
Government Analyst II
Office of Insurance Regulation
Property & Casualty Product Review
(850) 413-2616 (Phone)

(850) 922-3865 (Fax)
cindy.walden@floir.com

Olympus form filing 20-031040

WC

Walden, Cindy <cindy.walden@floir.com>

Reply all

Wed 6/16, 9:46 AM

jyoung@oigfl.com

Thank you for the update Jeff !

From: Jeffrey Young [mailto:Office365@messaging.microsoft.com]
Sent: Wednesday, June 16, 2021 8:55 AM
To: Walden, Cindy <cindy.walden@floir.com>
Cc: Jeffrey Young <jyoung@oigfl.com>
Subject: Re: [ENCRYPT] TRADE SECRET - Olympus form filing 20-031040

External Email

Cindy,

I filed the deemer waiver this morning. A copy is attached for your review. My team is meeting this afternoon to work through the list of issues you provided. We will be in touch with any concerns.

Thank you,

Jeff

From: Walden, Cindy <cindy.walden@floir.com>
Sent: Monday, June 14, 2021 3:32:27 PM
To: jyoung@oigfl.com <jyoung@oigfl.com>
Subject: RE: [ENCRYPT] TRADE SECRET - Olympus form filing 20-031040

Hi Jeff, I understand completely, some points are easy fixes and some may need further discussion. We are still working through SB 76 and what will need to be revised in the forms, etc. so I am waiting on something definitive there from Management/Legal. I will stay in touch as any feedback comes in.

Thanks for the update !

From: Jeffrey Young [mailto:Office365@messaging.microsoft.com]
Sent: Monday, June 14, 2021 3:25 PM
To: Walden, Cindy <cindy.walden@floir.com>
Cc: Jeffrey Young <jyoung@oigfl.com>
Subject: Re: [ENCRYPT] TRADE SECRET - Olympus form filing 20-031040

External Email

Cindy,

Thank you for this feedback. As I am sure you can appreciate, it will take us some time to work through this list. As such, I anticipate filing another deemer extension request before the end of the business day tomorrow.

Thank you,

Jeff

From: Walden, Cindy <cindy.walden@floir.com>
Sent: Monday, June 14, 2021 3:03:59 PM
To: jyoung@oigfl.com <jyoung@oigfl.com>
Subject: [ENCRYPT] TRADE SECRET - Olympus form filing 20-031040

Good morning Jeff,

Following is some additional feedback from my Forms Management/Legal Team on several topics they have reviewed. Please note we are continuing our review of your filing so this may not necessarily be an exhaustive list and additional concerns may need to be addressed once your response is received. Also, with the signing of SB 76 into law with an effective date of 7/1/21, you may wish to review with your team as there will be some areas of the current form impacted. I will include what we have determined to date. Please see the following :

Assignment of Benefits endorsement

For consistency and clarity to the policyholder, Legal has advised that the assignment of benefits language should be included all in one form, rather than in 3 separate forms as currently filed. At present, the policyholder could have separate forms that include this language and this would be confusing and possibly misleading to the policyholder. Legal suggests that you include the language in its entirety in either the Special Provisions or an Assignment of Benefits endorsement. Please note that the form language must comply with current statutory requirements/language as was previously discussed and should not bring in more restrictive language or requirements than found in current statute. Once the revised form is resubmitted, they will review again for compliance and advise of any concerns.

Unit Owners Coverage A and Unit Owners Coverage C

Please refer to the approved Citizens language for these particular forms rather than using a compilation of other carrier's form language as this language was carefully

worked out with Citizens for approval as noted in our 5/24/21 email correspondence to you.

Special Provisions

1. Page 1 – Definitions – please include a definition for "assignor" pursuant to Section 627.7152, Florida Statute.

2. Page 4 – Reasonable Emergency Measures- 2.a. – in the third sentence, please correct the spacing typo in the word "costs".

3. Page 4 – Reasonable Emergency Measures- 2.b.- this language will need to be revised to allow for repairs to begin in the event of an emergency even if the excess will exceed the specified limit or all for work to begin within a specified time frame in case the company fails to respond or act in a meaningful way. Please refer to the approved Citizens language.

4. Page 4 – Reasonable Emergency Measures – 2. last paragraph – What is the policyholder's remedy or line of action if the company fails to respond within 48-hours ? There needs to be an option for the policyholder to start work in the event the company does not respond within this timeframe. Please refer to approved Citizen's language.

5. Page 4 -Reasonable Emergency Measures – 2.c. – second paragraph after (9) should be revised to state " We will not pay any amount above or beyond the approved additional costs" for clarity to the policyholder.

6. Page 5 – 11. Ordinance or Law – Legal previously advised this appears to conflict with Section 627.7011, Florida Statutes, as it does not include this requirement. It was our understanding the language would be removed.

7. Page 6 – Please remove one of the periods "." at the end of the first sentence.

8. Page 6 – 2. Matching Sub-Limit – the supporting documentation has been reviewed and carefully considered but Legal advises their position remains unchanged and this provision will need to be revised to meet statutory obligations to make reasonable repairs. The statute provides a floor of coverage that is to be provided and then the company is free to provide otherwise over and above this. There is no statutory support for limiting the claim to 1% of Coverage A and B or Coverage A for an HO6. In addition, the lead-in paragraph will need to be revised and a suggestion of acceptable language would be "If undamaged property does not match new materials in adjoining areas, we will make reasonable repairs on replacement of items in adjoining areas."

9. Provision 12. Accidental Discharge or Overflow of Water or Steam and "tear out" language – we previously discussed that you will need to refer to approved Citizens language for these areas, noting the differences in the HO3 vs. HO6 language.

10. Provision 12. Accidental Discharge or Overflow Of Water Or Steam - use of "objects blocking visibility" in the exclusion language- we have reviewed your 6/7/21 email response and additional information provided but at this time our position remains unchanged as we feel "objects blocking visibility" is overly broad and a standard and comprehensive coverage concern. This same language was previously revised as was required in the Tower Hill example you provided and also differs from your previously approved language in your filing 18-03538 which stated "objects on these surfaces blocking visibility". Please revise accordingly, noting you could use either of those approved examples.

11. Provision 12. Accidental Discharge or Overflow Of Water Or Steam – regarding the new exclusion for grout failure, please include language that will provide a link to a specific time frame for the exclusion as to provide clarity to the policyholder.

12. Page 8 – Exception to c.(6) language – please refer to approved Citizens language for appropriate revisions as needed.

13. Page 11 – Exclusions 13. And 15. – as we previously discussed, noting these repeat language already in place prior in the form, it was our understanding they would be removed as a separate exclusion from this provision to avoid any confusion for the policyholder.

14. Page 11 -B. Duties After Loss, please take note of everywhere that Citizens has included "to the degree reasonable possible" and please add to your form.

15. Page 11 – B. Duties After Loss -Legal previously advised that this area would need to be bifurcated to differentiate between the insured's and assignee's duties.

16. Duties After Loss and Mortgage Clause – Legal previously advised that the use of "immediately" is not an acceptable requirement and it was our understanding this was to be revised.

17. Page 11 – B. Duties After Loss – e. –per Management, please revise "60 days after the loss" to "60 days after our request" as a standard and comprehensive coverage concern. It is being revised in filings as received going forward.

18. Page 15 - Suit Against Us – as previously discussed, this provision will need to be bifurcated to differentiate between the insured and the assignee. However, with the signing of SB 76 last week, the language required in this provision is still being discussed internally by our Management/Legal team. Please review with your team as well as it appears revisions are in order to comply with SB 76.

19. Page16 – first paragraph – for the last sentence that begins with "Any contract entered into…" please reformat so that it is a separate paragraph rather than a continuation of the language.

20. Page 16 – I. Loss Payment – 3.- for the last sentence that begins " failure to comply…", please include " by you" at the end of the sentence.

21. Page 17 – Notice of Claim - please update accordingly to comply with the changes made in SB 76 to be effective 7/1/21.

22. Page 18 – e. Coverage E-Personal liability and Coverage F-Medical Payments To Others-please revise accordingly to the defined term of "insured" in the provision.

Noting the upcoming deemer date of 6/21/21, Management has advised that a request to waive the deemer would be in order if you wish to make the requested revisions to allow sufficient time for your response and our review of the revisions submitted. You should also review SB 76 for any impacts or requirements the approved bill may have on your current filing and make revisions accordingly. Alternatively, you also may choose to withdraw the filing without prejudice and resubmit it at a later date when the filing is complete.

Please let me know how you wish to proceed by the close of business 6/16/21 and if a waiver of the deemer will be requested. We can then determine an appropriate time for your response by date. Thank you for your assistance with the filing.

Sincerely,

Cindy Walden

Government Analyst II

Office of Insurance Regulation

Property & Casualty Product Review

(850) 413-2616 (Phone)

(850) 922-3865 (Fax)

cindy.walden@floir.com

Exhibit I

Paragraph **12. Grave Markers** in forms **HO 00 03** and **HO 00 04** (**11.** in form **HO 00 06**) is deleted.

The following **Additional Coverage** is added:

12. "Fungi", Wet Or Dry Rot, Or Bacteria in forms **HO 00 03** and **HO 00 04** (**11.** in form **HO 00 06**) is added:

12. "Fungi", Wet Or Dry Rot, Or Bacteria.

a. We will pay up to $10,000, in aggregate per policy term, for:

(1) The total of all loss or costs payable under **SECTION I – PROPERTY COVERAGES: Coverage A – Dwelling, Coverage B – Other Structures, Coverage C – Personal Property, & Coverage D – Loss of Use,** caused by "fungi", wet or dry rot, or bacteria;

(2) The cost to remove "fungi", wet or dry rot, or bacteria from property covered under **SECTION I – PROPERTY COVERAGES**;

(3) The cost to tear out and replace any part of the building or other covered property as needed to gain access to the "fungi", wet or dry rot, or bacteria; and

(4) The cost of testing of air or property to confirm the:

(a) Absence;

(b) Presence; or

(c) Level of:

(i) "Fungi;"

(ii) Wet or dry rot; or

(iii) Bacteria.

(d) Whether performed:

(i) Prior to;

(ii) During; or

(iii) After:

- Removal;
- Repair;
- Restoration; or
- Replacement.

The cost of such testing will be provided only to the extent that there is a reason to believe that there is the presence of "fungi," wet or dry rot, or bacteria.

b. The coverage described in **a.** only applies when:

(1) Such loss or costs are a result of a **Peril Insured Against** that occurs during the policy period; and

(2) Only if all reasonable means were used to save and preserve the property from further damage at and after the time the **Peril Insured Against** occurred.

c. $10,000, in aggregate per policy term, is the most we will pay for the total of all loss or costs payable under this **Additional Coverage** for all **SECTION I – PROPERTY COVERAGES** outlined in **a.(1)**, above regardless of the:

(1) Number of locations insured;

(2) Number of claims made; or

(3) Number of "insureds"

d. If there is covered loss or damage to covered property, not caused, in whole or in part, by "fungi", wet or dry rot, or bacteria:

Loss payment will not be limited by the terms of this **Additional Coverage**, except to the extent that "fungi", wet or dry rot, or bacteria causes an increase in the loss.

Any such increase in the loss will be subject to the terms of this **Additional Coverage**.

This coverage does not increase the limit of liability shown in the Declarations for any applicable **SECTION I – PROPERTY COVERAGE**.

The following is added:

F. Special Limits of Liability for Coverages A and B (**Coverage A** in form **HO 00 06**)

1. Cosmetic and Aesthetic Damage to Floors

The total limit of liability for Coverages **A** and **B** (**Coverage A** in form **HO 00 06**) combined is $10,000 per policy period for cosmetic and aesthetic damages to floors.

a. Cosmetic or aesthetic damage includes but is not limited to:

(1) Chips;

(2) Scratches;

(3) Dents;

(4) Discoloration;

Or any other damage to less than 5% of the total floor surface area and does not prevent typical use of the floor.

b. This limit includes the cost of tearing out and replacing any part of the building necessary to repair the damaged flooring.

c. This limit does not increase the Coverage **A** or Coverage **B** limits of liability shown on the Declarations Page, nor does it apply to a loss otherwise excluded or limited in this policy.

d. This limit does not apply to cosmetic or aesthetic damage to floors caused by a Peril Insured Against as named and described under Coverage **C** Personal Property in form **HO 00 03** and **SECTION I – PERILS INSURED AGAINST** in form **HO 00 06**.

2. Matching of Undamaged Property

We will repair or replace undamaged property due to mismatch between undamaged material

and new material in adjoining areas if repairs or replacement are reasonable. In determining the extent of the repairs or replacement of items in adjoining areas, we will consider:

a. The cost of repairing or replacing the undamaged portions of the property; and

b. The degree of uniformity that can be achieved without such cost; and

c. The remaining useful life of the undamaged portion; and

d. Other relevant factors

SECTION I – PERILS INSURED AGAINST

Paragraph **A.1.** in form **HO 00 03** is deleted and replaced by the following:

1. We insure for sudden and accidental direct physical loss to covered property described in Coverage **A** and Coverage **B** unless the loss is otherwise excluded or limited in this policy. However, loss does not include and we will not pay for any "diminution in value".

The first paragraph in **SECTION I – PERILS INSURED AGAINST** in form **HO 00 04** is deleted and replaced by the following:

We insure for sudden and accidental direct physical loss to covered property described in Coverage **C** caused by any of the following perils unless the loss is otherwise excluded or limited elsewhere in this policy. However, loss does not include, and we will not pay for, any "diminution in value".

The first paragraph in **SECTION I – PERILS INSURED AGAINST** in form **HO 00 06** is deleted and replaced with the following:

We insure for sudden and accidental direct physical loss to covered property described in Coverages **A** and **C** caused by any of the following perils unless the loss is otherwise excluded or limited in this policy. However, loss does not include, and we will not pay for, any "diminution in value".

Paragraph **8. Vandalism or Malicious Mischief** in Forms **HO 00 04** and **HO 00 06** is deleted and replaced by the following:

8. Vandalism Or Malicious Mischief

This peril does not include loss to property on the residence premises", and any ensuing loss caused by any intentional and wrongful act committed in the course of the vandalism or malicious mischief, if the dwelling has been vacant for more than 30 consecutive days immediately before the loss.

A dwelling being constructed is not considered vacant.

Paragraph **12. Accidental Discharge or Overflow of Water or Steam**, **a.** in Form **HO 00 06** is deleted and replaced by the following:

a. This peril means accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning, or automatic fire protective sprinkler system, or from within a household appliance. This includes the cost to tear out and replace only that part or portion of a building or other structure owned solely by you which is covered under Coverage A and at the location of the "residence premises", but only when necessary to access the system or appliance from which the water or steam escaped.

(1) The cost we will pay for the tear out and repair of the part or portion of the building or other structure covered under Coverage A as specified above is limited to only that part or portion of the covered building or other structure owned solely by you which is necessary to provide access to the part or portion of the system or appliance that caused the covered loss; this applies whether the system or appliance, or any part or portion of the system or appliance, is repairable or not.

(2) Such tear out and repair coverage only applies to other structures:

(a) Owned solely by you; and

(b) If the water or steam causes actual damages to a covered building owned solely by you at the location of the "residence premises".

(3) In no event will we pay for the repair or replacement of the system or appliance that caused the covered loss.

Paragraph **12. Accidental Discharge Or Overflow Of Water Or Steam. b.(4)** in Form **HO 00 04** (**b.(5) in Form HO 00 06**) is deleted and replaced by the following:

(4) To a building caused by constant or repeated seepage or leakage of water or the presence or condensation of humidity, moisture or vapor, over a period ofweeks, months or years, unless such seepage or leakage of water or the presence or condensation of humidity, moisture or vapor and the resulting damage;
(a) Is unknown to all "insureds"; and
(b) Is hidden within the walls or ceilings or beneath the floors or above the ceilings of a structure.

However, there is no coverage for loss resulting from water or steam, or the presence or condensation of humidity,