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Insurance Coverage ALERT

Florida Supreme Court Finds That Insurer's Engineer and Professional Geologists Are Not Presumed Correct

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Plaintiff insured filed a sinkhole claim with defendant insurer in August 2005. The insurer hired a forensic engineering and earth sciences firm (the investigator) to investigate the claim. The investigator determined that damage to the property was caused by shrinkage, thermal stress and differential settlement, all of which were excluded from coverage under the policy. Relying on the investigator's determination, the insurer denied the claim. The insured consequently sued for breach of contract.

The insurer moved to apply Fla. Stat. § 90.304, which states that in civil actions, all rebuttable presumptions not defined in Fla. Stat. § 90.303 are presumptions affecting the burden of proof. Further, the insurer requested that the jury be instructed that the presumption of correctness as articulated in the 2005 version of Fla. Stat. § 627.7073(1)(c) was a rebuttable presumption affecting the burden of proof. The 2005 version of Section 627.7073(1)(c) stated the presumption as follows:

The respective findings, opinions, and recommendations of the engineer and professional geologist as to the verification or elimination of a sinkhole loss and the findings, opinions, and recommendations of the engineer as to land and building stabilization and foundation repair shall be presumed correct.

The trial court granted the insurer's motion and request.

During the trial, both parties presented expert testimony with regard to the cause of damage to the property. The insured's expert concluded that sinkhole activity caused damage to the house, and the insurer's expert concluded the opposite.

At the conclusion of the presentation of the evidence, the trial court instructed the jury that it was not to presume that the investigator's opinions, findings and conclusion as to the cause of damage and whether or not sinkhole loss had occurred were correct. The trial court also instructed the jury that this presumption was rebuttable and that the insured had the burden of proving by a preponderance of the evidence that the findings, opinions, and conclusions in the report were not correct. The jury returned a verdict in favor of the insurer, and after denying the insured's motion for a new trial, the trial court entered a final judgment in favor of the insurer.

The Second District Court of Appeal reversed, holding that because the trial court misapplied the presumption and gave the jury an instruction improperly shifting the burden of a proof, a new trial was required. The appellate court indicated that there was no legislative expression that public policy

compels a homeowner to shoulder the burden to disprove the report and opinions of the insurer's engineers and geologists.

The Florida Supreme Court approved the appellate court's decision. The Court determined that the treatment of Section 627.7073(1)(c) as evidentiary in nature was incorrect because the sinkhole statutes do not apply to the litigation context. Rather, the Court noted, the presumption applies to the initial claim process and investigation that insurance companies are required to follow in accepting or denying claims. The Court further indicated that Fla. Stat. § 627.7073 does not advance any social policies and that even if it did, they did not warrant the application of Fla. Stat. § 90.304.

Practice Note

The Florida Supreme Court determined that the presumption of correctness set forth in Fla. Stat. § 627.7073 applies during the initial claims process. However, because the Court determined that the presumption of correctness set forth in Section 627.7073 does not apply to the litigation context, any determinations made by an insurance company's engineers and geologists regarding sinkhole loss and recommendations for repairs will not be presumed correct during litigation. Therefore, lawsuits will be determined by a battle of the experts between the insurance company's expert and the insured's expert.

Please be advised that this decision currently applies to the presumption of correctness language of the 2005 version of Section 627.7073. However, because the Supreme Court indicated that sinkhole statutes do not apply to the litigation context, it is likely that courts will also apply this decision to the 2011 amended version of Section 627.7073. As a result, although the amended statute clarified that the findings of the insurer's professional engineer or professional geologist shall be presumed correct, courts may follow the Supreme Court's decision and not allow the findings of the insurer's engineer or geologist to be a rebuttable presumption in the litigation context.

Universal Insurance Company of North America v. Michael Warfel, No. SC10-948 (Fla. Jan. 26, 2012)
