PUBLICATION

The Third District Court of Appeal Affirms Carrier's Prejudice/Late-Notice Defense

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One of a policyholder's primary contractual duties after suffering a potential loss is to provide prompt notice to the insurer. Prompt notice is often described as a condition precedent to insurance coverage. In fact, Florida law provides that when late notice of a loss is given, a rebuttal presumption of prejudice is imposed against the policyholder, which requires an insured to come forward with evidence to establish that an insurer has not, in fact, been prejudiced by the late reporting. *Bankers Ins. Co. v. Macias* (Florida 1985). Prejudice can simply mean that an investigation was made more difficult or that better conclusions could have been drawn from a timely reported claim; it does not mean that a claim investigation was made impossible. Notwithstanding, courts can be reluctant to grant summary judgment on untimely notice claims, often declaring that whether prejudice exists, or has been vitiated, presents an issue of disputed fact for a jury to resolve.

Not surprisingly then, the Third District's holding in *Perez v. Citizens Property Insurance Company* (Florida Third DCA), decided on July 6, 2022, should be warmly welcomed by the insurance industry. In *Perez*, the Third District affirmed summary judgment in favor of the insurer on the issue of whether the insured could overcome the presumption of prejudice after an untimely reported Hurricane Irma claim. The insured did not report a Hurricane Irma claim for over two years from the alleged date of loss, but completed several cycles of repairs, yet failed to maintain any of these records. Because of the delay, the insurer could not conduct an initial investigation of the home until several years after the storm and after repairs had already been conducted. After requested repair receipts were not provided, the insurer denied the claim, stating that the insured failed to timely report her claim, which prejudiced the insurer's investigation and made it impossible to make a coverage determination.

The insured then sued for breach of contract, and the insurer subsequently moved for summary judgment. In response to summary judgment, the insured produced an affidavit from her own investigator, which reported damage to several areas of the roof and the interior of the home allegedly caused by Hurricane Irma. The affidavit was based on "statements made by the insured and a review of historic NOAA weather data." The trial court granted summary judgment to the insured, stating that the delay in reporting the claim prejudiced the insurer's investigation. In affirming the trial court, the Third District held that the affidavit relied on by the insured did not overcome the presumption of prejudice caused by the untimely notice. The court explained that the affidavit was based on an investigation conducted nearly three years after the claimed date of loss, making it impossible for the insurer to determine which, if any, of the current damage to the roof was caused by Hurricane Irma and which, if any, of the current damage was caused by some other event.

The court contrasted the facts in *Perez* with *Vega v. Safepoint Insurance Company* (Florida Third DCA 2021), where the court held that the expert's report conducted two years after the claimed date of loss was sufficient to create an issue of fact as to whether the damage to the roof was caused by the windstorm. In *Vega*, the insured's expert relied on a report and photographs taken during Safepoint's initial investigation of the claim, which was done immediately after the claimed loss and before any repairs had been conducted. Accordingly, the court held that the expert's report relied on information sufficient to support the conclusion that the windstorm was the probable cause of damages to Vega's roof.

In *Perez*, the expert did not have access to any information about the state of the roof immediately following Hurricane Irma because the insured waited over two years to report her claim to the insurer. Thus, the court held that the expert formed his opinion based solely on an investigation conducted nearly three years after the incident and after repairs had already been completed. The court explained that this lapse of time, as well as the intervening repairs, rendered the expert's opinion wholly inconclusory as to whether the current damage was caused by Hurricane Irma or some other event from the intervening three years. Accordingly, the court held that the expert's affidavit was insufficient to rebut the presumption of prejudice to the insurer resulting from the insured's delay in reporting the claim, and did not create any genuine issue of material fact sufficient to preclude summary judgment.

Considering the decision in *Perez*, insurance companies should continue to be strategic in identifying and denying untimely claims. As in *Perez*, property damage claims are often submitted months, if not years, after an alleged loss occurs, and only after repairs have been made. Seldom are repair receipts preserved, let alone photographs of the allegedly damaged property before it was removed, repaired, or replaced. Carriers should be diligent and vigilant in their requests for information, specifically including proof of prior temporary or permanent repairs. A reservation of rights letter should accompany almost any acknowledgment of a claim that is reported more than a few weeks after the alleged loss, and if an investigation has been compromised or made more difficult, a carrier should not shy away from denying a claim on this basis. Even if some conclusions can be drawn, and even if it appears that no coverage would exist, failing to raise a prejudice/late notice defense could be problematic in future litigation.

The *Perez* ruling continues a consistent line of authority that insurers should rely on in adjusting claims and defending resulting lawsuits. A duty to report a claim promptly is not a mere technicality; it is a critical and material obligation that is meant to ferret out potentially fraudulent claims. The carrier should not bear the legal burden of having to prove that its investigation was actually compromised because the law makes it the *insured's* burden to rebut the presumption of prejudice imposed against the carrier. Giving an insured the benefit of the doubt is still an important facet of claims handling; however, this goodwill should not be confused with demanding strict compliance with all terms of the policy, especially the duty to promptly report notice of a claim.

If you have any questions about this opinion or an insured's post-loss obligations, please do not hesitate to contact David B. Levin.