

Public Adjuster Violates Statutory Fee Cap

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Public Adjuster Contract Puts Insurer on Horns of a Dilemma

Public insurance adjusters serve a purpose – they represent insureds who are unable or unwilling to represent themselves in a first party property claim. They are entitled to a contingency fee based upon the amount they recover on behalf of the insured from the insurer. Florida, to protect its citizens, limit the fee that a public adjuster can charge to no more than 20% of the gross recovery from the insurer.

In *Gables Insurance Recovery, Inc., etc. v. Citizens Property Insurance Corporation*, No. 3D15-2320, No. 3D16-87, Third District Court of Appeal State of Florida (September 20, 2018) two homeowners suffered water damage to their homes, and after being unable to collect under their insurance policies, they assigned their claims against their insurance company to a public adjuster. The Florida Court of Appeal was asked to decide whether the insureds validly assigned their claims such that the public adjuster had standing to bring breach of insurance contract claims on their behalves. The trial court in each homeowner's case granted summary judgment in favor of the insurance company, finding that the assignments could not confer standing because they violated state law (Florida Statutes section 626.854(11)(b) (2014)) prohibiting public adjusters from entering into a contract that charged the homeowners more than twenty percent of the payments made on the insurance claims.

FACTUAL BACKGROUND — Case Number 15-2320: **Ethel Matusow**

Ethel Matusow's home suffered water damage. Matusow hired Gables Insurance Recovery, Inc. as a public adjuster "to appraise, advise and assist" with her claim against Citizens. The public adjusting contract allowed Gables Recovery to "retain on [Matusow's] behalf the professional services of appraisers, estimators, engineers and other experts reasonably needed to assist in this matter and to further [] pursue the claim and corresponding payments." For its efforts, the contract called for Gables Recovery to be paid "20% of the gross amount of the collectible loss or damage recovered."

Ultimately, Gables Recovery was unable to reach a settlement with Citizens. Matusow, then, entered into a second contract with Gables Recovery, assigning the company her entire claim.

As to compensation, the agreement provided that Gables Recovery would "retain 20% of all amounts collected for the proceeds pertaining to the coverage set forth in the insurance policy."

Gables Recovery was also entitled to recover, collect, retain and otherwise [was] entitled to receive any attorney fees and costs.

Gables Recovery, as Matusow's assignee, demanded that Citizens pay \$21,130.63 under the policy to fix the water damage in Matusow's home. When Citizens refused to pay, Gables Recovery sued for breach of the insurance policy. Citizens answered and asserted as an affirmative defense that Gables Recovery had no standing because the Matusow assignment violated section 626.854(11)(b) – the twenty percent statutory compensation cap for public adjusters.

The trial court granted Citizens' summary judgment motion, denied rehearing, and entered judgment in its favor.

Case Number 16-87: Christopher Difilippi

Like Matusow, Christopher Difilippi filed an insurance claim with Citizens when his house suffered water damage. Other than the compensation amount, the contract was identical to the Matusow public adjuster contract.

The public adjuster sued based upon the Difilippi assignment. The two documents were identical to those signed by Matusow except for Difilippi's personal information, and the amount of compensation owed to Gables Recovery. Under the Difilippi agreement, Gables Recovery retained ten percent of any insurance proceeds recovered from Citizens, plus fees and costs.

Gables Recovery, as Difilippi's assignee, notified Citizens that the initial payment did not cover all the damage to Difilippi's home. When Citizens refused to pay the additional claim, Gables Recovery sued for breach of the insurance policy.

The trial court granted Citizens' summary judgment motion, and entered final judgment in favor of Citizens.

DISCUSSION

Because Gables Recovery was not a party to – or a third party beneficiary of – the insurance contracts between the insureds and Citizens, there is no dispute that the only way the company could have standing to sue on behalf of the homeowners was if the assignments were valid. If the assignments were not valid, then as a non-party to the insurance contracts Gables Recovery would have no right to sue.

In general, contracts are assignable unless forbidden by the terms of the contract, or an assignment would violate some rule of public policy or some statute, or unless they involve a question of personal trust and confidence.

Was Gables Recovery acting as a public adjuster?

Gables Recovery first argues that the Matusow and Difilippi agreements did not violate the twenty percent cap because the company was no longer acting as the homeowners' public adjuster when the lawsuits were filed.

Here, the undisputed evidence was that the Matusow and Difilippi agreements met the statutory definition of public adjuster.

Gables Recovery agreed to do much more than simply file and prosecute a lawsuit in exchange for a commission. The agreements gave Gables Recovery "full discretion and authority to proceed with all efforts to recover any and all amounts due, owing, and or payable, it deem[ed] necessary including the filing of the claim in court." Gables Recovery agreed to use "all efforts" to recover money for Matusow and Difilippi. "[A]ll efforts" included litigation, but it also included continued negotiation and settlement with Citizens.

Based on the agreements and the affidavit of the company representative, there was no genuine dispute that Gables Recovery was acting as Matusow and Difilippi's "public adjuster.

Was Gables Recovery a duly licensed attorney?

Gables Recovery was licensed as a section 626.854 public adjuster, and not a duly licensed attorney.

Did the Matusow and Difilippi agreements violate section 626.854(11)(b)?

Gables Recovery next argues that the trial court erred because there was a genuine issue of material fact regarding whether its agreements with Matusow and Difilippi violated the twenty percent cap. There is no dispute as to the Matusow agreement but there is as to Difilippi's.

Under the Matusow agreement, the homeowner agreed to pay Gables Recovery twenty percent of any recovered insurance money plus any attorney fees and costs or any other applicable provision of state or federal law entitling the prevailing party to attorney fees and costs. This violated section 626.854 because the agreement would have her pay twenty percent of what was recovered in addition to prevailing party attorney's fees and costs. Having Matusow "agree to" pay the attorney's fees and costs in addition to the twenty percent was a "thing of value" in excess of the twenty percent cap, which is prohibited by the statute.

The Difilippi agreement, however, compensated Gables Recovery ten percent of any insurance proceeds and any applicable attorney fees and costs.

The attorney fees under the agreements are not being paid to attorneys. Only Gables Recovery is "entitled to . . . receive" this money under the contract. Together with the twenty percent contingency, Gables Recovery agreed to be paid in excess of what was allowed under section 626.854(11)(b).

The trial courts found that Gables Recovery did not have standing because the insureds assigned their insurance claims in violation of state law. The Court of Appeal affirmed that finding as to

the Matusow claim – no more – and no less. Matusow violated state law when she assigned her insurance claim. Nothing in this opinion invalidates the insurance contracts between Citizens and their insureds, or the professional services agreements between the insureds and their public adjuster, Gables Recovery. Now, as before, Citizens is still Matusow’s insurer and Gables Recovery can represent her as her public adjustor.

CONCLUSION

Florida, as of now, allows for the assignment of claims on an insurance policy.

There is a genuine issue of material fact on whether the Difilippi assignment violated section 626.854(11)(b) and it is up to the trial court to determine whether the fees and costs would raise an amount in excess of 20%. If it does the Difilippi case can be dismissed. If not it can go through trial.

ZALMA OPINION

The public adjusters in these two cases are not attorneys. Although there is no law that a public adjuster cannot also be a lawyer, in this case they were not but they still insisted on receiving attorneys fees. They needed to hire lawyers to sue the insurer. Yet, their contract allows them to collect from the proceeds of the suit the fees they must pay the lawyers they hired. By so doing they clearly violated the limit set by the statute in one case and may – depending on how much the attorneys fees and costs add up to be – end up violating the statute. If the insurer litigates aggressively it may force the costs to the point where the case will be dismissed. Of course, doing so may exceed the cost of negotiating a settlement. The assignment causes the insurer to face the dilemma of paying its lawyers or the public adjuster.