

# P&C Quarterly

*A quarterly DLD Lawyers property & casualty newsletter.*



## Dear Reader

WELCOME! This is the first edition of what will be DLD Lawyers' quarterly newsletter outlining hot topics in the area of property and casualty law in Florida. We hope you find this newsletter informative and educational, and that it assists you with the ever-changing laws in Florida related to the specialty field of property and casualty law.

For those of you who are familiar with us, we hope this newsletter continues to advance the communications between our firm and its clients and friends.

For those of you who are new to our law firm, it is our hope that our newsletters will help

you make strong business decisions related to the claims handling and litigation processes.

We invite all of you to visit our firm's website at [www.dldlawyers.com](http://www.dldlawyers.com), and contact us with any questions or comments that you may have.

We thank you for your continued business and friendship and look forward to a continuing relationship.

Warm regards,  
DLD Lawyers

# Property Insurance Reform Bill

The Florida Senate’s Budget Committee cleared this year’s Florida property insurance reform bill, allowing for it to continue through the legislative process. The bill has provisions that deal with Citizens Property Insurance Corp. as well as sinkhole claims, storm claims filing deadlines, public adjusters, surplus requirements and mitigation discounts. However, particular provisions that were central to the insurance industry’s support of the bill were changed on a narrow 7-5 vote.

Originally the bill, known as SB 408, contained provisions that would change the way claims for damages to homes would be paid; allowing payment for initial costs with the remainder to be paid when the homeowner provides a contract for repairs or replacement.

However, State Sen. Mike Fasano, R-New Port Richey, successfully attached an amendment that keeps the present method whereby all costs are to be paid up front. This change to the bill was made much to the dismay of the insurance industry that is strongly behind the bill’s original provisions dealing with replacement-cost methodology. The industry takes the position that homeowners are pocketing the money instead of making repairs to their property.

Sen. Fasano was also successful in defeating another industry-backed provision by repealing file-and use. The bill’s sponsor, Sen. Garrett Richter, R-Naples had pushed through the amendment that would require all rate filings that would increase premiums to go through the file and use process and get permission from the Office of Insurance Regulation. Sen. Richter believes the amendment necessary to correct problems expeditiously if a company has deficient rates.

The rest of the bill, however, passed the committee on a 12-8 vote keeping intact another major goal of the industry: doing away with the current requirement that insurers provide sinkhole coverage.

Sen. Richter believes the Fasano amendments will not survive the bill’s eventual final version. Fasano himself expressed doubts his changes would remain when the bill is taken up for a final vote.

Richter said SB 408 is necessary so Florida’s insurance market can stabilize which in turn would attract more companies to Florida. Presently, companies are leaving the state even though it has not been impacted by any catastrophic storms in the last five years.

Florida Senate - 2011 SB 408

By Senator Richter

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1           A bill to be entitled
2   An act relating to property and casualty insurance;
3   amending s. 624.407, F.S.; revising the amount of
4   surplus funds required for domestic insurers applying
5   for a certificate of authority after a certain date;
6   amending s. 624.408, F.S.; revising the minimum
7   surplus that must be maintained by certain insurers;
8   authorizing the Office of Insurance Regulation to
9   reduce the surplus requirement under specified
10  circumstances; amending s. 624.4095, F.S.; excluding
11  certain premiums for federal multiple-peril crop
12  insurance from calculations for an insurer's gross
13  writing ratio; requiring insurers to disclose the
14  gross written premiums for federal multiple-peril crop
15  insurance in a financial statement; amending s.
16  624.424; revising the frequency that an insurer may
17  use the same accountant or partner to prepare an
18  annual audited financial report; amending s. 626.854,
19  F.S.; providing limitations on the amount of
20  compensation that may be received by a public adjuster
21  for a reopened or supplemental claim; providing
22  statements that may be considered deceptive or
23  misleading if made in any public adjuster's
24  advertisement or solicitation; providing a definition
25  for the term "written advertisement"; requiring that a
26  disclaimer be included in any public adjuster's
27  written advertisement; providing requirements for such
28  disclaimer; requiring certain persons who act on
29  behalf of an insurer to provide notice to the insurer,
    
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CODING: Words ~~deleted~~ are deletions; words underlined are additions.

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## Shielding Senior Officers From Depositions

This article will examine the case of *General Star Indemnity Company vs. Atlantic Hospitality of Florida, LLC*, 57 So.3d 238 (3<sup>rd</sup> DCA 2011) and how its ultimate outcome could shape the discovery process in regard to the depositions of senior officers. Although the case is currently pending review by the Supreme Court of Florida, the decision of the Third District Court of Appeal will be analyzed for the purposes of this article, since it is binding on all future decisions in the Eleventh Circuit of Miami – Dade County.

In *General Star vs. Atlantic Hospitality*, the petitioner, General Star, sought a writ of certiorari to quash two discovery orders compelling two senior officers of General Star to appear for depositions in a windstorm insurance coverage dispute. In opposition, General Star filed an affidavit stating that the senior officers had no role in the investigation or adjustment of Atlantic Hospitality's claims. The Court found for General Star, since General Star had shown that its President is a manager, not an employee or adjuster, with personal knowledge of the dispute in the original lawsuit. The Court further concluded that Atlantic Hospitality had not shown that the President's deposition was reasonably "calculated to lead to the discovery of admissible evidence." The court held that trial and appellate counsel for the insured "are too sophisticated and experienced to believe that a pre-printed signature on a standard form policy would subject the Connecticut-based president of the insurer to a deposition."

Thus, it should be the goal of a competent insurance defense counsel to keep discovery as "just, speedy and inexpensive" as possible. That goal cannot be obtained if senior officers of insurance carriers are expected to participate in depositions simply because their signature appears on boiler - plate, pre - printed, insurance policies when those depositions ought to be handled by other employees or adjusters with personal

knowledge of the factual dispute.

The Court took note of, but did not adopt, the "apex doctrine." This doctrine has been applied in many cases regarding the depositions of senior state governmental officers. General Star urged the adoption of this doctrine, which would require Atlantic Hospitality to depose lower level employees involved in the insurance dispute before noticing any depositions of senior managers at the "apex" of the company. Although adoption of this doctrine seems to alleviate General Star's complaint against Atlantic Hospitality, the 4th District Court of Appeals held that a district court of appeal cannot adopt a doctrine which "arguably conflicts with discovery rules." Only the Florida Supreme Court has this authority, and Florida's discovery rules do not contain a requirement that a party must show that a high level officer has special knowledge before that officer can be deposed.

At first glance it seems odd that a discovery issue that appears to be so simple went so far in the trial system, yet under further investigation it is not just the complaint that is at issue, but also factors such as precedent and the limitations of lower courts. The District Court would set a dangerous precedent if it allowed Atlantic Hospitality to depose General Star's senior officers when they had no real knowledge of the dispute in question. Much of the Court's time and both of the parties' time would be wasted, and problems most definitely would arise in which senior officers would not be able to manage their companies for having to attend depositions that are frankly unnecessary and harassing.



## Appellate Decisions Addressing Appraisal

Issues surrounding appraisal continue to be a hot topic in Florida's Appellate Courts. Florida courts have recently upheld traditional case law recognizing that compliance with a property insurance policy's post-loss conditions is a condition precedent to the right of an insured to compel appraisal. Accordingly, decisions have held that, where there are factual issues regarding whether an insured has complied with post-loss policy conditions, the trial court must conduct an evidentiary hearing to determine if post loss conditions have been met by the insured. See, *Citizens Property Insurance v. Maytin*, 51 So.3d 591 (Fla. 3d DCA 2010) (property insurer is entitled to evidentiary hearing to determine whether insured complied with post-loss conditions of the policy being compelled to participate in appraisal of

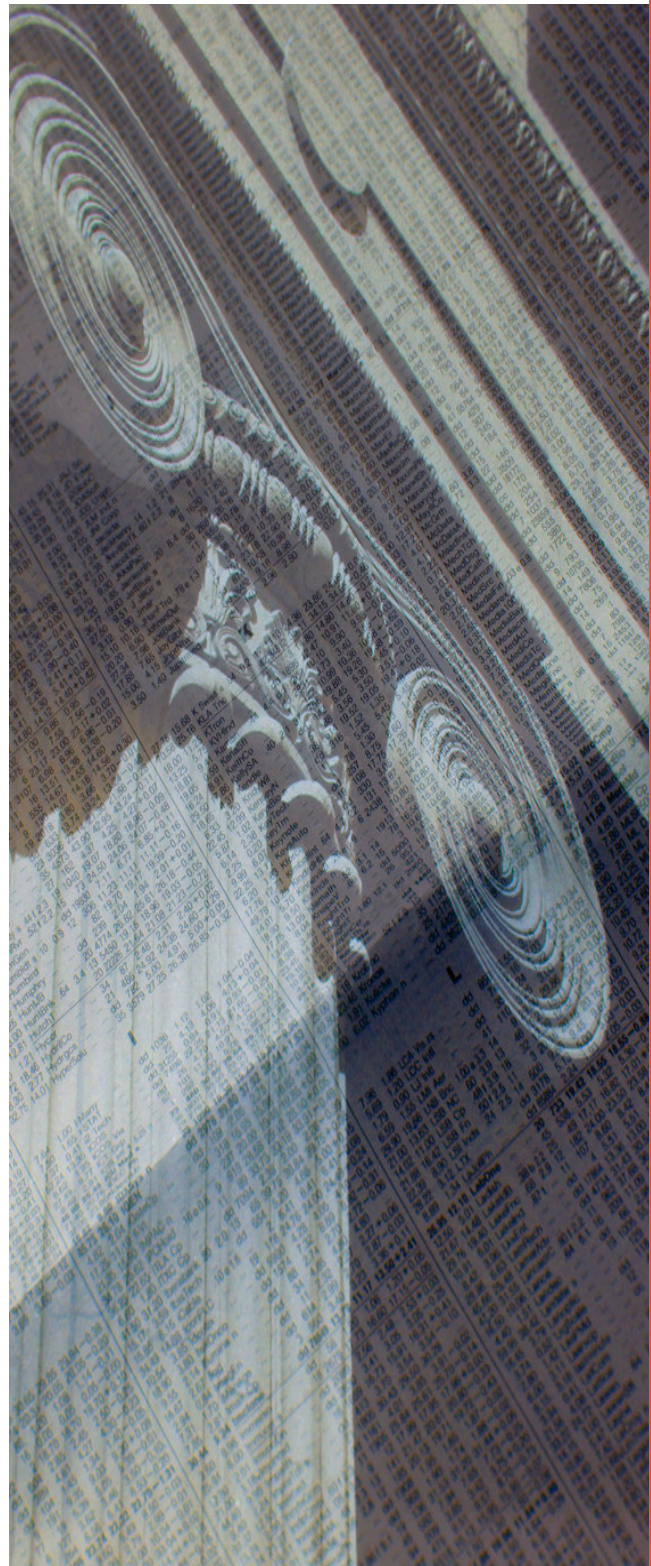
Insured's losses) and *Citizens Property Insurance Corp. v. Gutierrez*, 2011 WL 710148 (Fla. 3d DCA 2011) (trial court erred in granting motion to compel appraisal and in failing to conduct evidentiary hearing concerning insureds' compliance with policy's post-loss conditions).

In addressing an insured's duty to comply with post-loss conditions, the Third District Court of Appeal also recently upheld its position that the procedure utilized to resolve issues pertaining to coverage, as well as a determination of the scope of property damage via appraisal, should be left to the discretion of the trial court. In its recent decision the Third District noted that "putting the issue of coverage first before [appraisal] in every case might have

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adverse effects on the expeditious, out of court disposition of litigation which is the reason [appraisal] is a favored remedy.” Thus, the Third District Court of Appeal has left it to the trial court’s discretion to determine the order in which the issues of damages and coverage are to be determined. In undertaking its analysis, the trial court should determine whether or not to allow the appraisal and coverage processes to move forward on dual track basis. See, *Citizens Property Insurance Corp. v. Mango Hill Condominium Association*, 2011 WL 613518 (Fla. 3d DCA 2011).

The *Mango Hill* decision stands in contrast to the coverage versus appraisal procedure enunciated by the Fourth District Court of Appeal. In October of 2010 the Fourth District issued its decision in *Citizens Property Insurance Corp. v. Michigan Condominium Association*, 46 So.3d 177 (Fla. 4<sup>th</sup> DCA 2010). In *Michigan Condominium*, an insured brought an action against his property insurer seeking, among other things, an appraisal of damages. The trial court entered an order granting the insured’s motion to compel appraisal before the trial court resolved the parties’ underlying coverage dispute. The insurer appealed and argued at the appellate level that the Court’s order conflicted with the Fourth District’s decision in *Sunshine State Insurance Co. v. Corridori*, 28 So.3d 129, 131 (Fla. 4<sup>th</sup> DCA 2010) holding that a trial court must resolve *all* underlying coverage disputes prior to ordering an appraisal. The Fourth District agreed and reiterated its position that a finding of liability necessarily precedes a determination of damages. The Appellate Court acknowledged, but respectfully disagreed with, the recognition of a dual track approach by the Third District Court of Appeal and certified conflict with the Third District’s position. *Id.* at 178. Insurers and practitioners who are addressing coverage and appraisal issues in the Third and Fourth districts should be aware of these decisions.



## Pre-Judgment Interest & Appraisal

Insureds often argue that pre-judgment interest is an element of their recoverable damages once an appraisal award has been entered in their favor. Their argument is premised upon longstanding Florida law that “when a verdict liquidates damages on a plaintiff’s out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss.” *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 215 (Fla.1985).

*Argonaut*, however, involved a subrogation claim made by an insurance carrier against a plumbing company. The carrier argued the plumbing company negligently caused a fire, which resulted in damages to the carrier’s insured. After judgment was entered against the plumbing company and in the carrier’s favor, the court awarded the carrier pre-judgment interest from the date of the loss. The court held, “when a verdict liquidates damages on a plaintiff’s out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss.” *Argonaut* at 215.

Insureds have relied upon *Argonaut* in arguing that an appraisal award is akin to a verdict that fixes damages as of a date certain (the date of the loss); and therefore, the insured should be entitled to recover pre-judgment interest from the date of the loss. Recent decisions have made clear that this argument is misplaced.

Specifically, in *Ellie’s 50’s Diner*, the Fourth District Court of Appeals held that in an appraisal context, it is the terms of the policy that decides when payment is due or, in other words, when damages have become liquidated. *Ellie’s 50’s Diner, Inc. v. Citizens Property Insurance Corporation*, 2011 WL 710149 (Fla. 4<sup>th</sup> DCA 2011). The Third District Court of Appeals has similarly held that in an appraisal context, pre-judgment interest is due from the date payment is due pursuant to the

terms of the policy. *North Pointe Ins. Co. v. Tomas*, 16 So.3d 977 (Fla. 3d DCA 2009); and *Sunshine State Ins. Co. v. Davide*, 15 So.3d 749 (Fla. 3d DCA 2009).

Most insurance policies provide that a carrier has 30 or 60 days after the entry of an appraisal award to make payment, and carriers rely on these contractual terms in support of the position that pre-judgment interest does not accrue until after the expiration of the deadline to make payment according to the terms of the policy.

The decisions in *North Pointe* and *Sunshine State* also make clear that if a carrier initially denies coverage and then agrees to go to appraisal, the carrier has waived any payment provision contained in the policy and thus, the proper calculation of pre-judgment interest is from the date of the loss. *North Pointe* at 978.

In conclusion, following the entry of an appraisal award, so long as coverage has not been denied, the policy terms govern when payment is due and when pre-judgment interest begins to accrue. If, however, coverage was denied and appraisal is later agreed to, a carrier will be required to pay pre-judgment interest from the date of the loss.

*For copies of any of the decisions cited in this article or for further discussion please feel free to contact the attorneys at DLD Lawyers.*

## Cases Cited

### Shielding Senior Officers From Depositions

*General Star Indemnity Company v. Atlantic Hospitality of Florida, LLC*, 57 So.3d 238 (3<sup>rd</sup> DCA 2011)

### Appellate Decisions Addressing Appraisal

*Citizens Property Insurance v. Maytin*, 51 So.3d 591 (Fla. 3d DCA 2010)

*Citizens Property Insurance Corp. v. Gutierrez*, 2011 WL 710148 (Fla. 3d DCA 2011)

*Citizens Property Insurance Corp. v. Mango Hill Condominium Association*, 2011 WL 613518 (Fla. 3d DCA 2011)

*Citizens Property Insurance Corp. v. Michigan Condominium Association*, 46 So.3d 177 (Fla. 4<sup>th</sup> DCA 2010)

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