

JOSEPHS JACK

TRIAL & APPELLATE LAWYERS A NEWSLETTER

LEGAL UPDATE

VOLUME 2 . ISSUE 3. MARCH 2007

IF IT WALKS LIKE A DUCK AND QUACKS LIKE A DUCK: COMMON SENSE PREVAILS.

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Common sense prevailed in several Florida appellate decisions at the start of 2007. We discuss them below.

AUTOMOBILE EXCLUSION IN COMMERCIAL GENERAL LIABILITY POLICY:

In *Underwriters at Lloyds of London v. McCaul*, 32 Fla. L. Weekly D 596 (Fla. 3DCA February 28, 2007), a passenger was killed when the car she was riding in hit a van parked on the side of the road. The plaintiff's theory of liability in the ensuing wrongful death lawsuit was that the van owner negligently failed to place traffic cones on the roadway to warn of the presence of the work and the vehicle. The trial judge ruled that the insurance carrier had a duty to defend and indemnify under its commercial general liability policy, even in the face of the automobile exclusion that provided: "This insurance does not apply to: bodily injury... arising out of ownership, maintenance, use or entrustment to others of any... auto... owned or operated by... any insured. Use includes operation and loading or unloading."

The Third District Court of Appeal disagreed and reversed for entry of a declaration of no coverage, citing "common sense" and "a plain reading of the policy." The appellate court observed, "In sum, under whatever deconstruction of the present facts and circumstances, the insured's alleged liability grows from its vehicle use and thus falls within the pertinent exclusion."

COURT FINDS A MANIFEST INJUSTICE IN AN ATTORNEY'S FEE AWARD

In *Progressive Express Insurance Co. v. Schultz*, 32 Fla. L. Weekly D548 (Fla. 5th DCA February 23, 2007), the court reversed an attorney's fee award in a PIP case that amounted to \$1,000 an hour,

after observing that the plaintiff had failed to present any evidence that he had any difficulty obtaining competent counsel to pursue his PIP case. The concurring opinion observed, "Common sense also plays a role here. We are not so isolated from the world around us to know that few people have any difficulty retaining competent counsel in these circumstances. Our docket, and the dockets of the trial courts in Central Florida, have hundreds, and perhaps thousands, of PIP suits pending at any given time. It seems that few insureds, if any, have difficulty obtaining competent counsel to represent them. To the contrary, every television station and telephone book, and many billboards and buses, call out with ads from lawyers seeking to represent the injured."

COVERAGE DISPUTES BETWEEN CARRIERS:

The Third District Court of Appeal exercised a common sense approach in *Fidelity and Casualty Company of New York v. State Farm Fire and Casualty Company*, 32 Fla. L. Weekly D 262 (Fla. 3DCA January 24, 2007). There, Fidelity had issued an auto and excess liability policy for the period of September 15, 1999 to September 15, 2000. Toward the end of the policy period, the insured applied to State Farm for motor vehicle and excess liability coverage and State Farm issued a binder effective September 13, 2000. Fidelity's policy provided for coverage on a pro-rata basis where other excess policies applied, but its policy also contained an automatic termination provision that stated: "If you obtain other insurance, any similar insurance provided by this policy will terminate on the effective date of the other insurance."

On September 14, 2000, the insured was involved in a serious accident

and later was sued. State Farm settled for \$5 million and Fidelity brought a declaratory judgment action seeking a determination that it owed no coverage for the loss and had no obligation to reimburse State Farm for any part of the settlement. The trial judge decided that Fidelity was liable for a pro-rata share of the settlement, but the Third District Court of Appeal reversed: "Here the clear and unambiguous terms of the automatic termination provision in the policy issued by Fidelity applied to preclude coverage. The provision effectively terminated Fidelity's coverage one day prior to the subject accident."

Along the same common sense lines is *Progressive American Insurance Company v. Nationwide Insurance Company*, 32 Fla. L. Weekly D 449 (Fla. 1DCA February 14, 2007). There, an injured pedestrian sued the driver, insured by Nationwide, and his employer, insured by Progressive. Nationwide had \$100,000 of coverage; Progressive provided \$1 million. Both insurance policies had "other insurance clauses." Nationwide's policy stated that it would be liable "for only our share of the loss if there is other collectible liability insurance. Progressive's policy characterized its coverage as "excess over any other valid and collectible insurance whether primary, excess or contingent."

The appellate court concluded that Nationwide was the primary carrier and Progressive was the excess carrier because "where two policies each contain other insurance clauses but one is pro rata and the other is excess insurance, effect is given to the latter."

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