2008
CASE LAW SUMMARY

Insurance Coverage

Attorney's Fees

Continental Casualty Co. v. Ryan Inc. Eastern, 974 So.2d 368 (Fla. 2008).

Landowner and contractor entered into an agreement to build a golf course. After completion of the golf course, the landowner sued the contractor and his surety for damages resulting from contaminated grass. As a result of this claim, the contractor's surety settled the case. Thereafter, the contractor and the surety instituted a declaratory judgment action against the contractor's insurer and excess insurer for failing to defend and indemnify the contractor and the surety in the claim. The trial court granted summary judgment in favor of the insurer and excess insurer and The Second District reversed in favor of the contractor and the surety and granted a Motion for Attorney's Fees. The Supreme Court held that a surety that has no written assignment from the insured, is not a named insured or omnibus insured or named beneficiary under the insurance policy is not entitled to attorney's fees pursuant to Fla. Stat. §627.428.

Cardillo v. Qualsure Insurance Corp., 974 So.2d 1174 (Fla. 4th DCA 2008).

Cardillo was a defendant in a personal injury action and filed a declaratory relief action against his insured. The trial court, which had jurisdiction over the cases, entered an order finding that insurance coverage existed under the policy and also ordered that all remaining issues of liability and damages would proceed to a jury trial set the following month. More than 3 months after the entry of the order, the insured moved for attorney's fees, pursuant to Fla. Stat. §627.428. The trial court denied the motion for attorney's fees as untimely and the appellate court affirmed, pursuant to Rule of Civ. P. 1.525, which requires a motion for attorney's fees be filed no later than 30 days after filing of a judgment; finding that the order determining coverage existed was a final order as it pertained to the declaratory relief action.

Oquendo v. Citizens Property Insurance, 998 So.2d 636 (Fla. 3d DCA 2008).

Insured prevailed against insurance company and sought an award of attorney's fees pursuant to Fla. Stat. §627.428. The trial court awarded attorney's fees for time spent in the trial aspect of the case, as well as, for time expended on the issue of entitlement to attorney's fees. The trial court denied an award for attorney's fees for preparing and participating in the evidentiary hearing to set the amount of the attorney's fees relying upon the Florida Supreme Court's decision in *Lugassy*, 636 So.2d 1332 (Fla. 1994). The insureds argued that *Lugassy* was distinguishable because their retainer agreement with counsel included the following language: "The client agrees to compensate [his attorney] $350.00 per hour for any time, costs, and effort for litigating the amount of court awarded attorney's fees if the court does not award attorney's fees for time spent litigating the amount of attorney's fees." The Third District rejected this argument and reversed the award of fees for fees.

FIGA

Florida Insurance Guaranty Association v. Soto, 979 So.2d 964 (Fla. 3d DCA 2008).

Insurance company reached a settlement with its insured and paid its casualty loss. Before a motion for attorney's fees was heard, the insurance company became insolvent. Subsequently, the trial court granted the motion for attorney's fees and expert witness costs. FIGA took the position that the attorney's fees and costs payable under the pre-insolvency settlement agreement were not covered by FIGA. The trial court disagreed with this position and The Third District affirmed that this was a covered claim eligible for payment by FIGA. They added that while FIGA is not responsible for further attorney's fees and costs incurred by the insured after the insolvency, FIGA was not relieved of the obligation to pay the insured's attorney's fees and costs incurred pre-insolvency for prevailing on a covered claim.

Insurance – Commercial General Liability

Auto-Owners Insurance Co. v. Pozzi Window Co., 984 So.2d 1241 (Fla. 2008).

Contractor built a multi-million dollar house and used windows manufactured by Pozzi Window Co. After moving into the house, the owner complained of water leakage around the windows caused by the defective installation of the windows. Homeowners sued Pozzi, the builder and the sub-contractor who installed the windows. Pozzi entered into a settlement with the homeowner agreeing to remedy the defective installation of the windows and also settled with the window installer. They then sued the builder's insurer as the builder's assignee. The contractor's insured had paid the homeowner for personal property damage caused by the leaking windows, but refused to provide coverage for the cost of repair or replacement of the windows. The Supreme Court held that a post-1986 standard form CGL policy with products-completed operations hazard coverage issued to a general contractor does not provide coverage for the cost of repair or replacement of a sub-contractor's defective work, because the defective work itself does not constitute "property damage."

United States Fire Insurance Co. v. J.S.U.B., 979 So.2d 871 (Fla. 2008).

The Supreme Court held that defective work performed by a sub-contractor that causes damage to a contractor's completed project and which is neither expected nor intended from the standpoint of the contractor, can constitute "property damage" caused by an "occurrence" as those terms are defined in a standard form Commercial General Liability Policy.

Insurance - Coverage

First Specialty Insurance Company v. Caliber One Indemnity Co., 988 So. 2d 708 (Fla. 2d DCA 2008).

Verdict was entered against the insured which included an award of punitive damages. Subsequently, the Second District reversed the underlying directed verdict and reversed the amount of the punitive damages against the insured. The defendant's primary insurer filed a declaratory action seeking a determination that its insurance policy did not provide coverage for punitive damages and attorney's fees awarded to the plaintiff in the wrongful death action. The defendant's excess insurer intervened in the case asserting that its policy covered only those types of damages covered by the primary insurance policy. The underlying policy provided that the insurance company would pay those sums to which the insured became legally obligated to pay as damages.

The policy defined "damages" as "any compensatory amount which an insured is legally obligated to pay for any claim to which this insurance applies." Further, the policy's exclusions stated that coverage did not apply to "[a]ny civil, criminal or administrative fines or penalties levied against an insured." The policy did not use the term "punitive damages" and did not expressly exclude payment of attorney's fees.

The Second District noted that punitive damages are not "compensation" for an injury and because the insurance contract limited the scope of coverage to compensatory amounts, it was clear from the policy's plain language that it intended to cover compensatory damages and not punitive damages. They also relied upon the policy's exclusion which eliminated payment of civil penalties or fines levied against an insured noting that punitive damages are "nothing more than civil fines determined by juries instead of judges."

The Second District also held that attorney's fees were not covered by the policy and would only be provided if fees were considered damages and noted that multiple appellate courts have held that attorney's fees were not damages. The case was remanded to allow the insured to try to prove that coverage for punitive damages was provided under a theory of promissory estoppel.

Freeburg Enterprises v. Transportation Casualty Insurance, 993 So. 2d 1104 (Fla. 2d DCA 2008).

An insurance company sought a declaratory judgment that it was not obligated to provide coverage after an accident involving a driver of its insured. The trial court found in favor of the insurance company finding that the insured failed to have its employee approved by the insurance company before allowing him to drive one of their vehicles. The policy provided that no coverage would be provided to any driver newly placed in service until that driver was reported to the insurance company and the insurance company advised in writing that he or she was acceptable and was covered under the policy. The policy also provided, "notwithstanding the foregoing, we will pay up to $10,000 in property damages and no-fault benefits as required by Florida law." Accordingly, the Second District reversed with the directions for the trial court to enter an Amended Final Judgment declaring that there was $10,000 in coverage for the accident.

Insurance – Duty of Cooperation

Continental Casualty Company v. City of Jacksonville, 2008 WL 1793259 (C.A. 11 4/22/08)[1].

Jacksonville residents filed a state court action against the City alleging physical and emotional injury caused by exposure to toxins from incinerators and dump sites owned and operated by the City. Ten months after litigation began, the City sent written notice to the insurance company requesting a defense. The insurance company agreed to defend the City under a reservation of rights. The City chose a law firm and paid almost $4 million in attorney's fees and costs. The City accepted the defense by the insurance company, but contended that it had the right to control the defense because the insurance company was defending under a reservation of rights. The 11th Circuit noted that an insurance company does not breach its duty to defend an insured when it provides a defense under a reservation of rights.

The City settled the case with the underlying plaintiffs and assigned the City's rights against the insurers. In reaching the settlement, the court found that the City failed to inform the insurance company of the settlement discussions or provide full information regarding the details of the discussions. The insurance company had attended a mediation and sent a letter to the City advising "during the mediation the City agreed that they would discuss any potential offer with [the] insurance company...prior to making such an offer and allow [the insurance company] to voice any objection it has." The Court held that the City breached its cooperation clause with the insurance company thus relieving the insurance company of its obligation to indemnify the City.

Insurance - Exclusions

Itnor Corporation v. Markel International Insurance, 981 So.2d 661 (Fla. 3d DCA 2008).

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[1] This 11th Circuit Court of Appeals decision was not selected for publication in the Federal Reporter. (See Federal Rule of Appellate Procedure 32.1 which generally governs decisions issued on or after January 1, 2007. See also 11th Circuit Rules 36-2, 36-3.)

Injury was sustained by an independent contractor during the course and scope of her employment with the insured. The insurance company provided coverage which excluded coverage for bodily injuries arising out of operations performed for the insured by independent contractors. The Third District held that this exclusion was unambiguous and, therefore, coverage was properly excluded for this loss.

Martinez v. Citizens Property Insurance Corp., 982 So.2d 57 (Fla. 3d DCA 2008).

A homeowner's insurer issued a policy which stated that it did not provide coverage "for bodily injury or property damage arising out of the ownership, maintenance, use, loading or unloading of motor vehicles. . ." The insured's tenant undertook preparations to change the oil in the insured's automobile on the subject property. The tenant drove the automobile onto ramps on the driveway and positioned himself under the car. Subsequently, the concrete driveway suddenly collapsed and caused the vehicle to fall on the tenant. The tenant advised that he was merely checking the vehicle and had neither commenced the oil change or touched the car at the time of the collapse. The insurance company's engineer determined that the crack in the concrete slab resulted in the car wheel load, however, the engineer also opined that the crack in the slab would not have occurred if it had been properly constructed. As such, the court found that the automobile was a mere instrumentality of the injuries to the tenant and therefore, held that the exclusion from coverage was not applicable to the facts of this case.

State Farm Florida Insurance v. Campbell, 33 FLW D2610 (Fla. 5th DCA 11/7/08).

Plaintiff sued a podiatrist and her practice for podiatric malpractice. It was alleged that an x-ray technician was positioning the plaintiff's foot to take an x-ray and the patient lost her balance and fell backwards. The physician submitted the claims to their malpractice carrier and their business liability carrier. The State Farm policy (business liability), contained a provision excluding coverage for bodily injury due to rendering professional services. The Fifth District determined that there was no coverage, finding that the act of positioning the patient's foot was excluded as a professional service.