

Florida Appeals Court Refuses to Enter a Conditional Judgment Awarding Attorney's Fees

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Summary: Insured motorist and his wife brought action against their insurer seeking underinsured motorist (UIM) benefits. After the trial court entered judgment in favor of the insureds, the insurer appealed. The appeals court affirmed but denied the insureds' motion for appellate attorney's fees. The appeals court, sitting en banc, granted the insureds' motion for re-hearing on the denial of appellate attorney's fees. The court of appeals held it could not enter a conditional judgment awarding appellate attorney's fees contingent on the insureds subsequently prevailing on a bad faith claim.

Government Employees Insurance Company v. King, 68 So. 3d 267

Insured was driving a car when it was struck from behind by another vehicle. The liability insurance company for the other vehicle settled the claim of insured and his wife for its policy limits. Subsequently, the insured and his wife filed claims for UIM with Government Employees Insurance Company (GEICO). GEICO did not settle the UIM claims. The insured filed suit against GEICO. Ultimately, a jury returned a verdict in favor of the insured for approximately \$1,588,000 and in favor of his wife for \$50,000. The UIM limits were \$25,000 per person.

Because the trial involved only a claim for UIM benefits under the insurance contract, the judgment on appeal was not a judgment for the full amount of the jury's verdict, but rather a judgment based on the \$25,000 in insurance coverage. After oral argument on appeal, the three judge panel determined that there was no reversible error and affirmed without a written opinion. The three judge panel denied the insureds' motion for attorney's fees because the judgment did not involve a denial of coverage and the insured's proposal of settlement before the trial had been in the amount of \$100,000, which was an amount in excess of the \$25,000 policy limits.

The insured filed a motion for re-hearing noting the appeals court had previously allowed a conditional judgment of attorney's fees for work done at the trial court level in *Allstate Insurance Co. v. Sutton*, 707 So.2d 760 (Fla.2d DCA 1998). The insured argued that logically he should be entitled to a conditional judgment of attorneys fee's for the work in this case at the appellate level.

In Sutton, the trial court first entered a judgment for the limits of the insurance coverage, reserving jurisdiction to determine attorney's fees and costs at a later time. Allstate appealed that judgment, and the appellate court affirmed. On remand, Allstate satisfied the judgment but the trial court proceeded to conduct a hearing on attorney's fees, entering a judgment in excess of \$200,000 even though there had been no determination that Allstate had committed bad faith and there was no legal basis at the time for entering a judgment awarding legal fees. In fact, a bad faith action was pending in federal court when the trial court entered the judgment against Allstate.

Allstate appealed and argued the judgment was "premature" and the appeals court reversed the judgment; however, the appeals court authorized the trial court to enter a so called "contingent judgment" that could be transformed into a real judgment in the event the Suttons prevailed in federal court and the federal judgment exceeded the statutory required 125% of the settlement proposed in the circuit court.

The appeals court in King recognized that in the twelve years since Sutton, the practice of entering contingent judgments had not gained any general acceptance, and courts had criticized the Sutton decision. Recognizing the many difficulties in entering "contingent judgments," including that a "contingent judgment" is not an appealable order, the appeals court found the insured was not entitled to an award of attorney's fees for the appeal, and there was no legal basis for the appeals court to order the trial court to determine a contingent award of appellate attorney's fees for use in any subsequent lawsuit.

The appeals court recognized that an action for bad faith is usually filed as a separate proceeding after the initial case is finished. The damages in a bad faith action involving UIM coverage are specified under the Florida statutes. It is the finder of fact in the subsequent bad faith lawsuit that is entitled to determine the amount of those fees. The appeals court found no authority which allowed it or the trial court to determine the amount of attorney's fees instead of the trier of fact in any subsequent bad faith lawsuit.

To avoid any confusion, however, they noted that if in a subsequent bad faith action the trial court determined that appellate attorney's fees were an element of damages or were otherwise awardable, then that award did not require, as a condition precedent, any order from the appeals court awarding fees on a contingent basis. The appeals court receded from its earlier decision in the Sutton case and denied the insureds' motion for attorney's fees on appeal.

This appears to be an important decision of the Florida appeals court regarding conditional judgments. Florida is a hotbed of bad faith lawsuits and this decision provides some hope to insurers that at least this Florida appeals court no longer will allow conditional judgments relating to potential bad faith claims.