

CALENDAR CALL

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“PASSENGERS” NOT IN CAR – WHO CARES?

Several individuals claimed that they were passengers in a cab that was struck in the rear.

The initial action against the other car was dismissed on a finding that the other car was not involved in any collision.

These same individuals then demanded arbitration of their claim for uninsured motorist benefits under the cab’s insurance carrier.

The carrier brought a proceeding to permanently stay arbitration on the grounds that

the dismissal of the first action was not binding on them. This case was referred to a Judicial Hearing Officer (JHO) to “determine all issues preliminary to arbitration...”.

The JHO conducted a hearing and agreed with the first court that the other car was not involved. In addition the JHO found that these “passengers” were also not involved. That is, that they were not in the cab at the time of the alleged accident.

The Supreme

Court granted the petition and stayed the arbitration. The “passengers” appealed that ruling, and the Appellate Division reversed.

The Appellate Division found that the JHO had exceeded his authority in finding that these “passengers” were not actually in an accident and therefore directed that the arbitration proceed.

Apparently, a finding that someone was not actually in an accident is not a “preliminary issue” to arbitration.

DISCLAIMING FOR LACK OF COOPERATION

The Appellate Division of the Second Department reversed a Supreme Court judge’s holding that the defendant’s insurance carrier established a lack of cooperation on the part of the defendant.

The appellate court found that the carrier failed to demonstrate that it met the three prong test. That is, that it acted dili-

gently in trying to obtain the insured’s cooperation; that their efforts were reasonably calculated to obtain the insured’s cooperation; and finally, that the insured’s failure to cooperate was willful.

The court noted that the burden of proving lack of cooperation by an insured is a heavy one.

An insurance carrier must establish all

three elements of proof as set forth in NYS Insurance Fund v Merchants Ins. (5 AD 3d 449) in order for a court to find that the carrier properly disclaimed coverage.

These three grounds were first established by the Court of Appeals in the Thrasher case, and they have created a nearly impossible burden to meet.

JEFF SIEGEL REMEMBERS THE FIRST TEN YEARS

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...we were able to get into the building and secure the holy grail—our calendar book. Under the tree which my office overlooks, we methodically doled out the assignments for Monday, with the entire firm chipping in to offer assistance where needed. We then wished everyone a nice cool weekend and we all went on our way.

The following Monday, court went

without a hitch.

That day stands out in my memory as one of the finest here. It meant more to me than a triumphant victory at trial or a favorable decision upon a motion. For that was the day I remembered why I left my prior firm to assist in the development of this one. It was a day when I realized that despite the arguments, the laughs, the meltdowns, the stress –

this office is a team. Our victories are OUR victories; our defeats are OUR defeats. We all share in these – Partners, Associates and support staff alike.

So on this tenth anniversary, I thank Craig and Vince for asking me to take a leap of faith, and I thank you all for your hard work, dedication and friendship throughout these past ten years, and I look forward to many more.

STUPID HUMAN TRICKS

Its freedom of religion man.

Joseph Butts was arrested in Franklin County, MO, when the police found 338 pounds of marijuana in his car during a traffic stop.

At the time of the stop, Mr. Butts told the arresting officer that hassling him would constitute an anti-religious “hate crime”. He stated that he was a special courier who was merely transporting religious instruments to a member monastery of the Church of Cognizance, and that the marijuana was a sacrament.

Mr. Butts is presently conducting his

prayers in the Franklin County jail without the benefit of his blessed sacrament.

“I’ve been driving for more than 70 years”. Well maybe its time to stop.

A Dearborn, MI, man who was 89 years old backed his car into his own garage, then panicked and accelerated across the street where he drove his car into his neighbor’s living room.

An 87 year old from Orlando, FL, drove through the front of an eye doctor’s office. Apparently it was time for a stronger prescription.

An 86 year old from Brookfield, WI,

drove through the front of a McDonald’s.

Ten people were injured in Rochester, NY, when an 89 year old plowed through an open air market.

Safety first!

The homeland security officials from the state of Indiana learned that the highway security money from Washington was being well utilized.

Although the money was used to erect special emergency-only highway message boards, it turned out that elected officials in Vermillion County were using the signs to advertise their charity fish fry.

THE COURTS ARE AT IT AGAIN

A recent Court of Appeals case reminds us that there is no interpretation of the facts that is too farfetched if it establishes liability on an insurance carrier.

Rosa Alzate, Amanda Alzate and Jorge Aguirre were sitting in a parked car when that car was struck from behind by a hit-and-run driver.

The car in which they were sitting had Supplementary Uninsured/Underinsured Motorists (SUM) coverage.

An attorney who claimed to be representing all three individuals sent a letter to the carrier stating that they were making a claim and included no-fault claim forms. The carrier sent a letter back acknowledging the no-fault claims and included claim forms for making a claim under the SUM provisions of the policy. In addition the letter included the notice requirements of the policy and, in fact, quoted the appropriate section.

The claimants never returned the required claim forms.

Instead the claimants did nothing for approximately nine months at which point they served a request for uninsured motorist arbitration. The carrier thereupon commenced a proceeding to permanently stay the arbi-

tration.

The Court of Appeals held in favor of the claimants.

The Court simply discounted the fact that no actual claim was filed and found that the insurer “became aware” of the grounds for denying coverage when the claimants did not return the “properly filled-out proof-of-claim forms”.

Apparently, the court could not conceive of the possibility that the claims were not filed because there was no claim to be made. It appears that under the holding of this case, an insurer must send an official denial of claim even if no claim was ever made.

The dissenting judges saw the “Catch-22 quality” of this ruling which cancels the requirement that a claimant submit a timely claim form. The dissent wrote that “The Court today holds, in substance, that this requirement was nullified because the insurance company did not, as soon as possible after as soon as practicable, send claimants a notice that they had failed to send a notice.”

If this case is a *Catch 22*, the next one is from *Alice in Wonderland*.

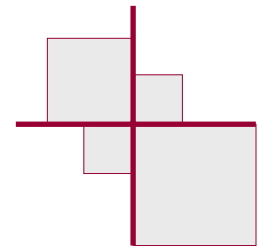
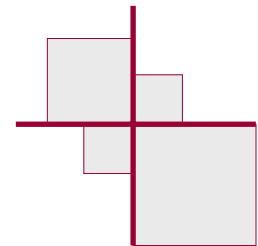
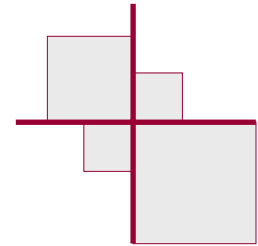
A homeowner, Mr. Cook, shot and killed

a former business partner, Mr. Barber, who had entered the house without permission and was threatening to take property as repayment of a disputed debt. Mr. Cook drew his gun and Mr. Barber laughed at the small size of the gun, at which point Mr. Cook went and got a 12 gauge shotgun from his bedroom. When Mr. Barber advanced on him, Mr. Cook shot Mr. Barber in the stomach and killed him.

Mr. Cook was found not guilty at his criminal trial on his claim of self-defense.

Mr. Barber’s estate brought a wrongful death action against Mr. Cook and Mr. Cook’s insurer disclaimed on the grounds that the killing of Mr. Barber was an intentional act and therefore not covered.

The Court of Appeals held that the carrier had the duty to defend because the policy covers occurrences which are defined as accidents and an accident can include an intentional event. In addition the court found that it is uncertain that the act of intentionally shooting Mr. Barber in the stomach at point blank range with a 12 gauge shotgun would establish an intent to cause the death of Mr. Barber.



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JEFFREY SIEGEL ~ OUR FIRST TEN YEARS

Ten years ago, on August 1, 1996, seven attorneys left the comforts of a mid-size defense firm and began what was then known as Bruno & Gerbino.

I am proud to say that I was one of those seven. Those of us that are amongst the original seven that still remain, have their own stories of the week leading up to the formation of this firm. It was a risk for Craig, and he understood that he was asking the rest

of us to join in that risk.

In the years since that day, this firm has had some lows, but fortunately many more highs. We were together through National tragedies (9/11) as well as having the privilege of watching young attorneys grow into seasoned professionals.

However, the moment that sticks out most in my mind was the day of the East Coast Blackout. The lights went out in our

office late on Thursday afternoon. With 9/11 fresh in our minds, we were unsure of what exactly was happening and how we should react.

In true BG&S fashion, a few associates headed out into the parking lot for a quick whiffleball game to avoid the traffic. The next day however, with still no electricity, the majority of the firm appeared at our office for work. Despite being denied access to the building,...

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