SANDBERG PHOENIX

BAD FAITH BLOG

Eleventh Circuit, applying Florida law, concludes a consent judgment does not satisfy the requirement of an excess judgment for a bad faith claim.

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A commercial vehicle was involved in a motor vehicle accident resulting in paralysis to a passenger. The commercial vehicle was insured under a Garage policy and a Commercial Umbrella policy, with a total amount of potential coverage of $3 million. In addressing the causation element of a bad faith claim under Florida law, the Court addressed the "excess judgment rule" and concluded a consent judgment is not an excess judgment for purposes of a bad faith claim and does not fall within the three exceptions to the general rule that an excess judgment is required.

The injured passenger was the son of the owner of the named insured. After the insurer asked for medical authorizations, the owner of the named insured became disgruntled and hired a lawyer on behalf of his injured son to file suit against the named insured and the driver of the vehicle. Insurer then hired a lawyer to defend both the named insured and the driver and also tendered to the Plaintiff its applicable $3 million limits. Plaintiff returned the $3 million, and, after a failed mediation, Plaintiff made a settlement offer that included tender of the insurer's $3 million limits to release the named insured, and the entry of a $33 million consent judgment against the insured driver of the vehicle with an accompanying covenant not to execute against the driver. The insurer responded by indicating it remained willing to pay its $3 million limits and to continue to defend the driver and further stated it was between Plaintiff and the driver as to whether or not to enter into the covenant not to execute. Settlement negotiations then continued without the insurer's involvement. The settlement terms mirrored the terms previously proposed by the Plaintiff except that the consent judgment against the driver was for $30 million instead of $33 million.

The issue on appeal was whether the causation element of a bad faith claim under Florida law was satisfied by the $30 million consent judgment. The Eleventh Circuit affirmed the district court's conclusion that a consent judgment is not an excess judgment and, therefore, does not satisfy the causation element of a bad faith claim. In affirming summary judgment for the insurer, the Court first noted the general rule that causation is only proven by an excess judgment, as this prevents courts from proceeding without jurisdiction – because absent an excess judgment, there is no case or controversy for the court to decide. The Court then discussed, and quickly dismissed as inapplicable, the three exceptions to this general rule: a *Cunningham* agreement (where insurer and injured third party agree to try the bad faith case first and insurer agrees to pay policy limits if no bad faith is found), a *Coblentz* agreement (where injured third party and insured settle after insurer denies coverage and refuses to defend), and where an excess insurer is damaged because of a primary insurer's bad faith.

The Eleventh Circuit concluded none of the three exceptions applied because insurer did not sign the settlement agreement (*Cunningham* exception), the insurer had not denied coverage (*Coblentz* exception), and there was no dispute between a primary and excess carrier. The Court then determined the issue was the interpretation of the word "judgment," which it stated means a final judgment reached by a fact finder. The Court concluded this does not include a consent judgment, which is "akin to a private contract, one that it is simply acknowledged and recorded by a court." If it were to conclude that a consent judgment satisfied the causation element, the Court found it would be creating a fourth exception to the general rule, noting that "Florida law protects insurance companies with the excess judgment rule. If consent judgments were enough to show causation, that protection would be eliminated … [S]urely no court would eviscerate the well-established safeguards without paying any attention to the gravity of the decision." Thus, the district court's judgment was affirmed based on the facts of this case.

Case citation: David Madison Cawthorn v. Auto Owners Insurance Company *(*2019 WL 5491557, not cited in Federal Reporter)