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Florida Appellate Court Confirms that Insurers Have No Duty to Enter Into a Consent Judgment in Excess of Policy Limits

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In *Markuson v. State Farm Mut. Auto. Ins. Co.*, 2023 Fla. App. LEXIS 6455 (2nd Dist. Ct. App. Sept. 15, 2023), Florida's Second District Court of Appeal held, as a matter of law, that an insurer had no duty to enter into a *Cunningham*-type agreement for the purposes of expediting bad faith litigation, as such an agreement was the functional equivalent of an excess judgment.

The appeal arises out of a 2006 automobile accident. On September 10, 2008, the injured claimant sued the driver of the other vehicle involved in the accident, Erik Saterbo, and his father, Stephen Saterbo, who owned the vehicle. At the time of the accident, the Saterbos had an insurance policy with State Farm, which provided policy limits of $300,000 against liability for bodily injuries sustained from an automobile accident. State Farm retained defense counsel to represent the Saterbos in connection with the lawsuit. On January 15, 2009, State Farm, through defense counsel, made a settlement offer to the injured claimant to resolve his claim against both insureds for the policy limit. This offer was not accepted.

Instead, in 2011 and 2012, the injured claimant issued two largely identical settlement offers to the Saterbos. The settlement offers required State Farm to: (1) tender the $300,000 policy limit to the claimant; (2) authorize the Saterbos to enter into a consent judgment in the amount of $1.9 million that would not be recorded or enforced against the Saterbos; and (3) authorize the Saterbos to assign their rights in any claims against their insurance agent. In return, the claimant would execute a release of all claims against the Saterbos and a satisfaction of the consent judgment. The offer made no indication as to whether State Farm would be released from any bad faith liability. The claimant also issued a more straight-forward proposal for settlement, requiring payment of $1.5 million within twenty days. State Farm declined all three proposals and the case continued to trial, eventually resulting in a jury verdict in favor of the claimant, awarding him $3,084,074.00 in damages.

Following the verdict, the injured claimant and the Saterbos brought a bad faith action against State Farm. The claimant's settlement offers formed the basis of the bad faith action against State Farm, alleging that State Farm acted in bad faith when it failed to settle the underlying lability action by declining the claimant's settlement proposals. State Farm moved for summary judgment as to the claims premised on its rejection of the settlement proposals. State Farm argued it did not act in bad faith by declining the settlement offers, because the settlement offers included consent judgments above the policy limits and it owed no duty to enter into a consent judgment in excess of the policy limits. The trial court agreed, finding that "each of the three proposals exposed State Farm to extra-contractual claims or payment" and nothing in the proposals suggested State Farm would be released by entering into the proposed consent judgments. In granting State Farm's motion for summary judgment, the trial court relied on *Kropilak v. 21st Century Ins. Co.*, 806 F. 3d 1062 (11th Cir. 2015), where the Eleventh Circuit held that "an insurer owes no duty under Florida law to enter into a so-called *Cunningham* agreement and likewise owes no duty to its insured to enter into a consent judgment in excess of the limits of its policy."

In general, *Cunningham* agreements allow the parties to enter into an agreement to try a bad faith action before trying the underlying negligence claim, stipulating that if no bad faith is found, the insured's claim would be settled for the policy limits, and the insured would not be exposed to an excess judgment. Courts have consistently held that insurers are not obligated to enter into *Cunningham* agreements because "entering into a *Cunningham*-type agreement, such as a consent judgment, for purposes of expediting bad faith litigation, is indeed 'the "functional equivalent" of an excess judgment.'" *Kropilak*, 806 F. 3d at 1070; *Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 899 (Fla. 2010).

Relying on these authorities, the Florida District Court of Appeal held that the trial court correctly determined that State Farm had no duty to enter into a *Cunningham*-type agreement or otherwise authorize its insureds to consent to a judgment more than five times the policy limit. Because there was no duty to accept the proposals, the Court reasoned that declining the proposals could not serve as the basis of the bad faith claim. Although the Court affirmed summary judgment as to this theory of bad faith, it found that the trial court erred in entering final judgment in favor of State Farm. In reaching this conclusion, the Court explained that the Eleventh Circuit's holding in *Kropilak* is not so expansive as to eliminate other theories of bad faith—such as how State Farm handled the claim against its insureds. Those theories of bad faith required analysis under the "totality of the circumstances" standard set forth in *Boston Old Colony Insurance Company v. Gutierrez*, 386 So. 2d 783 (Fla. 1980) and its progeny. Accordingly, the Court reversed the partial final judgment and remanded for further proceedings.