TRAUB LIEBERMAN

INSURANCE LAW BLOG

June 29, 2022

11th Circuit Determines that Settlement Can Be a Basis for a Bad Faith Claim

BY: Lauren S. Curtis, Ashley Kellgren

In *McNamara v. Gov't Employees Insurance Co.*, 30 F.4th 1055 (11th Cir. 2022), the Eleventh Circuit held that a stipulated judgment that memorialized a private settlement agreement can form the basis for a third-party bad faith claim against an insurer.

The facts of *McNamara* are as follows. While driving Warren's vehicle, McNamara caused a collision that seriously injured Bennett. At the time, Warren was insured under a policy issued by GEICO that provided bodily-injury limits in the amount of $100,000 per person. After settlement efforts were unsuccessful, Bennett sued Warren and McNamara in Florida state court and GEICO provided both a defense. Bennett served proposals for settlement against Warren and McNamara that were in excess of the policy limit and conditioned on the insureds consenting to the entry of final judgments against them in the amount of the proposals. In addition, GEICO was required to confirm that it would not contest the judgments based on the policy's voluntary payments clause. Both proposals were accepted. Although GEICO consented to the insureds' acceptance of the proposal, it did not agree to be a party to the settlement or to be bound to pay the excess judgments.

In the subsequent bad faith case, GEICO argued that the consent judgment cannot be the predicate for a bad faith claim based on the Eleventh Circuit's unpublished opinion in *Cawthorn v. Auto-Owners Ins. Co.*, where the Court held that only a judgment that follows a trial and results from a verdict qualifies as an "excess judgment" under Florida law for the purposes of insurer bad faith claims. 791 F. App'x 60, 65 (11th Cir. 2019). The district court granted summary judgment to GEICO based on the *Cawthorn* decision.

On appeal, the Eleventh Circuit overturned its previous opinion in *Cawthorn* and held that a private settlement agreement qualifies as an "excess judgment" that may be used to prove the causation element of an insurer bad faith claim. The Court reasoned that there is no single way of proving causation under Florida law and, although the existence of an excess judgment is generally the most straightforward way of proving causation, the Florida Supreme Court has identified several "functional equivalents" of an excess judgment. Specifically, Florida courts have identified the following as "functional equivalents" of an excess judgment: (i) a *Cunningham* Agreement, where the insurer and injured party agree to try the bad-faith issues first and, if no bad faith is found, the injured party agrees to settle for policy limits; (ii) a *Coblentz* Agreement, where the insurer refuses to defend and the insured agrees to settle with the injured party for policy limits, or in excess of policy limits, and the injured party may sue the insurer for bad faith; and (iii) an equitable subrogation situation, in which an excess carrier can bring a bad faith claim against a primary carrier if the excess carrier incurs damages because the primary carrier acted in bad faith. 30 F.4th at 1059 (citing *Perera v. United States Fidelity & Guaranty Co.*, 35 So.3d 893, 898-901 (Fla. 2010)).

The Eleventh Circuit examined several recent Florida Supreme Court decisions and concluded that Florida courts do not cast doubt on the notion that a final judgment based on a settlement could constitute proof of causation in a bad faith action. As such, the Eleventh Circuit held that, under Florida law, a judgment that results from a stipulated settlement may be used to prove causation in a bad faith action. Although the Eleventh Circuit reiterated that a plaintiff must still prove the elements of his or her bad faith claim, its opinion in *McNamara* provides another avenue through which a plaintiff may try to prove causation in a bad faith action.