PLUNKETT COONEY

Excess Judgment/Bad Faith, Occurrence Coverage Update

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Excess Judgment/Bad Faith – Eleventh Circuit (Florida Law)

McNamara v. Gov't Emps. Ins. Co.
--- F.4th. ---, No. 20-13251, 2022 WL 1013043 (11th Cir. Apr. 5, 2022)

The U.S. Court of Appeals for the Eleventh Circuit held that a consent judgment constitutes an excess judgment that satisfies the causation requirement for bad faith claims.

McNamara was driving Warren's vehicle when she negligently changed lanes and collided with Bennett, causing her serious injuries. Warren's auto policy provided up to $100,000 in bodily injury coverage per person. Both Bennett and her insurer claimed they made offers to settle within policy limits but were unable to reach a deal. Eventually, Bennett sued Warren and McNamara in state court. The three individuals reached a private settlement and entered into a consent judgment for Warren to pay $474,000 and McNamara to pay $4.74 million. The settlement was contingent on the insurer's agreement that it would not claim breach of the policy by accepting the settlement offer.

Warren and McNamara subsequently brought a state court action against the insurer alleging bad faith for failing to settle the suit against them for policy limits before they entered into a consent judgment. The insurer removed the case to federal court, and the district court granted the insurer's motion for summary judgment, holding that the consent judgments were not qualifying "excess judgments" and, therefore, they could not prove causation in their bad faith action. The district court relied on the 2019 unpublished Eleventh Circuit ruling in *Cawthorn v. Auto-Owners Ins. Co.*, which held that only a judgment following a trial and verdict could qualify as an "excess judgment" for bad faith purposes under Florida law.

On appeal to the Eleventh Circuit, the appellate court overturned *Cawthorn*. Instead, the appellate court held that a consent judgment memorializing a private settlement agreement qualifies as an "excess judgment" that an insured can cite under Florida law to bring a bad faith claim. The appellate court ruled that a jury verdict is not a prerequisite to an excess judgment in a bad faith action, reasoning that, under Florida law, when an insured is subject to a consent judgment that exceeds the limits of a policy, he or she is legally obligated to pay that amount. Therefore, because "Warren and McNamara were subject to excess judgments, they could prove causation in their bad faith case." The

appellate court reversed the district court's grant of summary judgment and remanded the case for further proceedings.

By: Michael Hanchett

'Occurrence' – Northern District of California (California Law)

AIU Ins. Co. v. McKesson Corp.
No. 20-CV-07469-JSC, 2022 WL 1016575 (N.D. Cal. Apr. 5, 2022)

The U.S. District Court for the Northern District of California held that a pharmaceutical company's over-distribution of opioids, which led to some opioids being diverted for illegitimate uses, was not an accident and, thus, not an "occurrence."

National Union Fire Insurance Co. of Pittsburgh, Pennsylvania, AIU Insurance Co. and ACE Property & Casualty Insurance Co. (umbrella insurers) issued umbrella policies to McKesson Corporation (McKesson). McKesson was named as a defendant in several lawsuits brought by municipalities and government agencies, which alleged that McKesson's failure to ensure that the opioids it distributed were used for legitimate purposes resulted in increased costs for the government agencies in responding to the nationwide opioid epidemic, including crime and emergency medical responses. McKesson requested that the umbrella insurers defend and indemnify it against those lawsuits. The umbrella insurers refused, noting that the underlying lawsuits did not allege bodily injury or property damage, nor did they allege an occurrence triggering coverage under the umbrella policies.

The district court first rejected the umbrella insurers' argument that the government agencies could not have suffered bodily injury or property damage, noting that the language in the policies provides coverage for "[d]amages because of Bodily Injury" including "damages claimed by any person or organization for care, loss of services or death resulting at any time from the Bodily Injury." Disagreeing with a recent ruling by the Delaware Supreme Court, the district court found that bodily injury damages need not be incurred by the injured individual; "[r]ather, the policies cover damages claimed by an organization for care resulting at any time from the bodily injury." Because the government agencies were seeking damages, the district court found that this portion of the insuring agreement was satisfied.

However, the district court found that the underlying lawsuits did not allege an occurrence as that term is defined in the umbrella policies. In the district court's view, both the negligence and non-negligence claims in the underlying lawsuit stemmed from McKesson's "deliberate act of distributing opioids" in such large quantities that it was at least foreseeable to McKesson that some of the pills were being diverted for illegitimate purposes: "McKesson's alleged conduct facilitated diversion in ways that made it expected and foreseen as a matter of law: McKesson allegedly shipped more opioids than could have

been legitimately used, routinely and over a period of years." Further, there was no "additional, unexpected, independent, and unforeseen happening produc[ing] the injuries" that could fall within the definition of occurrence in the umbrella policies. The district court concluded that the umbrella insurers had no duty to defend McKesson in the underlying lawsuits because there was no occurrence.

By: Stephanie Brochert