

Insurance Bad Faith

Burden Of Proof Issues In Consent Judgments

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Commentary

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[Editor's Note: R. Steven Rawls is a partner with the law firm of Butler Pappas Weismuller Katz Craig LLP, which has offices in Tampa, Chicago, Philadelphia, Charlotte, Mobile, Tallahassee, and Miami. Comments and opinions are those of the author and do not reflect the opinions of Butler Pappas or Mealey's. Copyright © 2014 by R. Steven Rawls. Responses are welcome.]

I. Introduction

When a carrier refuses to defend its insured, the insured may consent to entry of a stipulated judgment.¹ In most jurisdictions the insured (or claimant) bears the burden of proof to show coverage exists as a prerequisite to recovery of an excess judgment.² The burden of proving coverage for a consent judgment can sometimes create problems. Consent judgments raise many other issues beyond the scope of this article.³

II. Elements Of A Consent Judgment

Consent judgments typically contain certain elements. Among other things, a consent judgment will usually identify a stipulated judgment amount. The agreement memorialized in the consent judgment often contains a covenant not to execute against the insured and limits execution of the judgment to the insurance company only. Consent judgments frequently include an assignment of the insured's rights under the policy to the claimant. They may also incorporate statements of fact that bear upon coverage issues.

III. Issues Regarding The Burden Of Proof

A. The Amount Must Be Reasonable And Not Fraudulent Or Collusive

In many jurisdictions, the claimant must show that the amount of a consent judgment is reasonable.⁴ The

parties to a consent judgment may not enter into the judgment fraudulently or collusively.⁵ The carrier bears the burden of proof to show that a consent judgment was fraudulent or collusive.⁶ Some jurisdictions require the claimant to make an initial showing of reasonableness, but permit the carrier to then prove fraud and collusion.⁷ A settlement shown to be reasonable in amount may eliminate the need to consider fraud and collusion.⁸

In a recent case applying Florida law, a federal court considered the extent to which an insured/claimant could relitigate the reasonableness of the amount of consent judgment in a subsequent coverage proceeding.⁹ In *Mid-Continent Casualty Company v. American Pride Building Company, LLC*, the court observed that, in order to recover under a consent judgment, an insured must demonstrate both the reasonableness of the amount of damages as well as the absence of bad faith.¹⁰ However, if a carrier can prove that either of those elements was not satisfied, the consent judgment will not be enforceable.¹¹

The court specifically rejected the claimant's argument that, if a jury found the amount of damages in the consent judgment unreasonable, the jury should then be allowed to proceed to determine a reasonable amount.¹² The court noted that no court had ever permitted such a process to take place.¹³ The court declined to become the first court to so rule.¹⁴

B. The Insured Has The Burden Of Proof To Show Coverage

The carrier bears the burden of proving that the policy does not cover any of the damages in a consent judgment. However, where the judgment includes damages

covered by the policy and also includes damages that the policy does not cover, the claimant/insured bears the burden of allocating damages.¹⁶ The insured's failure to allocate between covered and non-covered damages is fatal to its recovery.¹⁷

In another recent case, a federal court applying Florida law found that a carrier had no duty to indemnify its insured for a consent judgment where the claimant failed to allocate between covered and uncovered damages.¹⁸ In *Trovillion Construction & Development, Inc. v. Mid-Continent Casualty Company*, the court reviewed the burden of proof applicable to a consent judgment in a construction defect case. The consent judgment included damages the policy did not cover. These uncovered damages included both certain types of damages (i.e., the insured's work) as well as damages that took place after the policy expired. Because the claimant "presented no evidence indicating it could apportion damages", the court found that the claimant did not carry its burden of proof.¹⁹

The *Trovillion* court also rejected the claimant's contention that the carrier's wrongful refusal to defend obligated the carrier to pay the entire amount of the consent judgment.²⁰ The court observed that the cases cited by the claimant in support of this contention stood for the proposition that a carrier's inadequate defense makes a carrier liable for "all associated 'collateral' damages, such as hiring alternative counsel."²¹ Those cases did not stand for the proposition that a wrongful refusal to provide a defense negated an insured's burden to prove coverage.²²

A carrier's obligation to notify its insured of the need to allocate between covered and non-covered damages may depend upon whether or not the carrier has defended under a reservation of rights. When a carrier has refused to defend at all, the claimant/insured must independently determine the need for an allocation between covered and non-covered damages. When a carrier defends under a reservation of rights, however, some courts hold that the carrier must notify the insured of the need for an allocated verdict form or the carrier will become liable for the entire undifferentiated judgment.²³ Thus, where a carrier defends under a reservation of rights, the insured will typically be notified by the carrier of the need to allocate between covered and non-covered damages. Conversely, where a

carrier refuses to defend at all, the carrier need not notify the insured of the need to allocate.

IV. Conclusion

In many jurisdictions, the claimant must show that the amount of a consent judgment is reasonable. A recent case has rejected efforts to relitigate the reasonableness of the amount of a consent judgment after a jury in the coverage action has found the amount unreasonable. Where a consent judgment includes damages covered by the policy and also includes damages that the policy does not cover, the claimant/insured bears the burden of allocating damages. A recent case determined that a carrier's wrongful refusal to provide a defense did not do away with an insured's burden to prove coverage. The claimant must present evidence of apportionment, and the insured's failure to allocate between covered and non-covered damages is fatal to its recovery.

Endnotes

1. Consent judgments are sometimes referenced by the names of the early cases discussing them. In Minnesota consent judgments are sometimes called Miller v. Shugart agreements (Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982)); in Arizona practitioners refer to these as "Damron" or "Morris" agreements (Damron v. Sledge, 460 P.2d 997 (Ariz. 1969) and USAA v. Morris, 741 P.2d 246 (Ariz. 1987); Florida courts refer to these as "Coblentz" agreements (Coblentz v. Am. Sur. Co. of New York, 416 F.2d 1059 (5th Cir. 1969)).
2. See, e.g., Blanchard v. State Farm Mut. Auto. Ins. Co., 575 So. 2d 1289 (Fla.1991).
3. See Willging, K., *Consent Judgments: Raising the Stakes in Bad Faith Litigation*, DRI Insurance Bad Faith and Extra-Contractual Liability, June 2013, for a treatment of several issues attending consent judgments.
4. See, e.g., Steil v. Fla. Physicians' Ins. Reciprocal, 448 So. 2d 589, 592 (Fla. 2d DCA 1984).
5. See, e.g., Coblentz, 416 F.2d at 1065.
6. See, e.g., Spence-Parker v. Maryland Ins. Group, 937 F. Supp. 551, 560 (E.D. Va. 1996).
7. Miller, 316 N.W.2d at 734-36.

8. *See, e.g.*, Guillen ex rel. Guillen v. Potomac Ins. Co. of Illinois, 785 N.E.2d 1, 14 (Ill. 2003).
9. Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC, 534 Fed. App'x 926 (11th Cir. 2013).
10. *See also* Chomat v. Northern Ins. Co. of New York, 919 So. 2d 535, 537 (Fla. 3d DCA 2006).
11. Mid-Continent Cas. Co., 534 Fed. App'x at 928.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. U.S. Concrete v. Bould, 437 So. 2d 1061, 1065 (Fla. 1983).
17. *See, e.g.*, Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co., 130 S.W.3d 181 (Tex. Ct. App. 2003).
18. Trovillion Const. & Dev., Inc. v. Mid-Continent Cas. Co., 2014 WL 201678 (M.D. Fla. Jan. 17, 2014).
19. *Id.* at *9.
20. *Id.*
21. *Id.* at *8.
22. *Id.*
23. Duke v. Hoch, 468 F.2d 973 (5th Cir. 1972). ■

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