Bad faith claims against insurers on the rise; how they can remain in good graces

By Michael L. Zigelman, Esq., and Kevin Yombor, Esq., Kaufman Dolowich & Voluck, LLP

AUGUST 18, 2022

It appears that there is a growing trend throughout the United States that is reducing barriers and making it easier for insureds to establish their bad faith claims against their insurers, thereby expanding the scope of an insurer's potential exposure to claims of bad faith. In light of these recent decisions, it is paramount for insurance carriers to take great care to follow the ever-changing landscape in those jurisdictions where they issue policies and/or handle claims.

For example, in *McNamara v. Government Employees Ins. Co.*, (30 F.4th 1055 (11th Cir. 2022)), the 11th U.S. Circuit Court of Appeals recently held that Florida law allows for consent judgments to constitute excess judgments that could satisfy the causation requirement for a bad faith claim.

This is a reversal of the 11th Circuit's prior ruling in *Cawthorn v. Auto-Owners Ins. Co.*, (791 F.App'x 60 (11th Cir. 2019)), which held *Cawthorn* misinterpreted Florida law by holding that an excess judgment was required to be based upon a final verdict reached by the court.

In reversing its decision from two years prior, the *McNamara* court found that the Florida Supreme Court previously held that an "insured is not obligated to obtain the determination of liability and the full extent of his or her damages through a trial and may utilize other means of doing so, such as an agreed settlement, arbitration, or stipulation before initiating a bad faith cause of action." (*Fridman v. Safeco Ins. Co. of Illinois*, 185 So.3d 1214 (Fla. 2016)).

The 11th Circuit later confirmed its holding in *McNamara* when deciding *Potter v. Progressive Ins. Co.*, (No. 21-11134 (11th Cir. July 7, 2022)), which held that a consensual settlement pursuant to a proposal for settlement serves as an excess judgment for the purposes of a bad faith claim. Indeed, these rulings are critical because they eliminate the long and costly barrier that insureds previously had to overcome (i.e. — a final adjudication) in order to establish bad faith claims against their insurers.

Further, New Jersey recently created a statutory individual cause of action for insurance bad faith in connection with the handling and payment of claims for uninsured motorist/underinsured motorist (UM/UIM) benefits. Specifically, on Jan. 18, 2022, New Jersey Gov. Phil Murphy signed Senate Bill 1559 — "New Jersey Insurance Fair Conduct Act" (IFCA) — which provides that "an individual injured in a motor vehicle accident and entitled to the uninsured or underinsured motorist coverage of an insurance policy" may file a lawsuit against an insurer that has "unreasonably denied" the insured's claim for benefits.

The IFCA allows for the recovery of "(1) actual damages caused by the violation of [the IFCA], which shall include, but need not be limited to, actual trial verdicts that shall not exceed three times the applicable coverage amount; and (2) pre-and post-judgment interest, reasonable attorney's fees, and reasonable litigation expenses."

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Notably, New Jersey's IFCA does not appear to be retroactive, thereby limiting the potential exposure to insurers. Indeed, at least two New Jersey courts have held that the language in the IFCA, which states the law is to "take effect immediately," means that the law applies to claims that arise *after* the effective date of the statute. (*Cooper v. Zuziak*, No. CAM-L-585-21 (N.J. Super, Law Div. Mar 18, 2022); *see also Mosquera v. Valquez*, No. MRS-L-0860-21 (N.J. Super. Law Div. Mar. 10, 2022)). This means it will likely be some time before insurers see the full impact of the IFCA.

Further, in *GEICO Indemnity Co. v. Whiteside*, (311 Ga. 346 (Ga. 2021)), the Georgia Supreme Court held that an insurer may be liable for an excess verdict against an insured even when the insurer never had notice that a lawsuit had been filed against the insured.

In *Whiteside*, GEICO received notice about an underlying claim and was unsuccessful in negotiating a resolution of the claim before a lawsuit was filed. Upon being served with the lawsuit, the insured, thinking GEICO also had notice of the lawsuit, threw out the summons and complaint and took no action to defend herself. A default judgment of $2,916,204 was subsequently entered against the insured, which was far in excess of the GEICO policy's $30,000 limit.

GEICO actually found out about the lawsuit for the first time after the default judgment was entered, and then tried, unsuccessfully, to have the default judgment vacated — the multimillion-dollar award remained intact.

In finding against GEICO, the Georgia Supreme Court seemed to have imposed a duty on GEICO (and, in turn, other insurers) to foresee an insured's breach of the insurance policy, and to evaluate potential damages flowing from that breach. In *Whiteside*, the Court found that GEICO knew the insured "was not the named insured on its policy and that she likely would not have a copy of the policy."

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The Court continued, saying GEICO knew the insured did not have a driver's license, lived in "an unrentable apartment with no electricity and no furniture except for a mattress on the floor" and was generally unreliable and lacked "sophistication," and held that "a reasonable insurance company" should have been put on notice that "such a person may not notify it of a lawsuit or respond to one served upon her."

More recently, in *Security Nat. Ins. Co. v. Construction Associates of Spokane, Inc.*, (2022 WL 884911 (E.D. Was. Mar. 24, 2022)) the U.S. District Court for the Eastern District of Washington found that an insurer had committed bad faith when the insurance claim adjuster denied a claim because the adjuster was unaware of a recent Washington Supreme Court opinion that was significant to the issue at hand.

In its opinion, the court recognized that "adjustors are not attorneys in Washington," but continued by finding "that does not excuse an adjustor from having at least a baseline understanding of the relevant state's law necessary to carry out their duties."

The court in *Security* imposed a duty, without any reference to case law or statute, for insurers to "undertake what in practice are reasonably small steps to ensure adjustors are equipped to make reasonable coverage and defense determinations."

To satisfy this newly imposed duty, the court provided suggestions for how an insurer could meet this duty, which "include[s] teaching adjustors to run case searches or, more likely, supplying adjustors with subscriptions to relevant legal newsletters, a resource most attorneys rely on to keep apprised of legal developments."

The new burden established by the court's holding in *Security* is an onerous one on insurance adjusters and heavily favors insureds. In *Security*, a construction site's general contractor sent a tender letter to a subcontractor on Oct. 3, 2019, after receiving a personal injury lawsuit. Thereafter, beginning on or about Oct. 11, 2019, the insurer conducted a coverage investigation before denying coverage on Dec. 3, 2019.

Unbeknownst to the insurance claims adjusters, on Oct. 10, 2019, the Washington Supreme Court issued its decision in *T-Mobile USA Inc. v. Selective Ins. Co. of America*, (450 P.3d 150 (Wash. 2019)), which was dispositive on the issue, and would have required coverage for the general contractor.

The court in *Security Nat. Ins. Co.* held that "ignorance of the applicable case law, even of a relatively new case law, does not excuse the conduct of adjustors who deny defense or indemnification." Otherwise, the court continued, insurers may choose to "intentionally stay ignorant and hide behind their ignorance ..."

These recent decisions suggest that many states are actively looking to continue the trend of reducing hurdles for insureds in the bad faith context, thereby making it easier for such insureds to assert and maintain bad faith claims against their insurers. As such, it is more important than ever for insurance carriers to remain proactive and expansive in how they monitor and handle claims, including keeping in greater contact with their insureds — so as to remain apprised of an underlying claim and any notices/lawsuits that may follow.

The cases summarized also suggest it would be in an insurer's best interest to remain apprised of the latest legislative developments in relevant jurisdictions/markets so as to avoid and/or defend a subsequent bad faith claim.

Michael L. Zigelman is a regular contributing columnist on corporate and professional liability insurance for Reuters Legal News and Westlaw Today.

About the authors

Michael L. Zigelman (L) is the co-managing partner of the New York City office of **Kaufman Dolowich & Voluck, LLP** and chair of its General Liability Coverage Practice Group. He can be reached at mzigelman@kdvlaw.com. **Kevin Yombor** (R) is of counsel in the Ft. Lauderdale, Fla., office and focuses his practice on premises liability, commercial and employment matters. He can be reached at kyombor@kdvlaw.com.

This article was first published on Reuters Legal News and Westlaw Today on August 18, 2022.