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Separating Fact From Fiction: Strategies For Contesting The Excess Consent Judgment

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Commentary

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I. Introduction

Few legal maneuvers generate greater skepticism–among courts and insurers–than the excess consent judgment, an increasingly common settlement device used in liability cases. An excess consent judgment is a type of judgment entered by agreement between a third-party claimant and a tortfeasor in an amount above the tortfeasor's liability insurance policy limits. This type of judgment is usually entered in a case where the tortfeasor's liability insurer has allegedly breached its duty to defend its insured tortfeasor. As part of the excess consent judgment, the parties typically agree that the tortfeasor shall have no personal exposure and that the judgment entered against the tortfeasor shall be collectible only against the tortfeasor's insurer. Significantly, the insurer does not give its consent to the settlement or the entry of the judgment. In fact, the insurer probably has no knowledge of the settlement or judgment until the claimant files a lawsuit against the insurer to collect the full amount of the excess consent judgment.

In theory, the excess consent judgment may be viewed as an efficient settlement option in cases where a liability insurer breaches its duty to defend its insured. The device allows the parties to resolve the liability case while preserving the claimant's right to seek recovery against the tortfeasor's insurer. In practice, however, there is a significant likelihood that the excess consent judgment may be the product of collusion between the claimant and the insured tortfeasor. Courts and insurers are particularly skeptical about this type of judgment. This skepticism stems from their recognition that the judgment may not represent the true value of the case because the insured (who will never have to pay the judgment) has nothing to lose by agreeing to a settlement amount that far exceeds the true value of the claim against him. Despite this recognition (or maybe because of it), the excess consent judgment has become a popular tactic, particularly in Florida, where courts have long approved it (subject to several safeguards) as one of the few alternative predicates for a third-party bad-faith action.[1]

The excess consent judgment is typically used in cases where there is considerable doubt as to whether the third-party's claim against the insured is covered under the subject liability policy. In the usual scenario, a third-party claimant sues the insured for an offense that arguably falls outside the scope of coverage, and the insurer declines to defend its insured. Once the claimant is informed that coverage has been denied, the claimant–fearing the lack of insurance proceeds and hoping to collect a big judgment nonetheless–enters into a settlement agreement with the insured (without the permission of the insurer) in which they consent to the entry of an adverse judgment against the insured for an amount in excess of the policy limits that is collectible only against the insurer.[2] Significantly, an excess consent judgment often includes stipulations of facts relevant to the insured's liability or related to key coverage issues.

The insured (or the third-party claimant, individually or as assignee of the insured) then sues the insurer for coverage and bad faith, seeking recovery against the insurer for the amount of the judgment.

Of course, not all excess consent judgments are valid and enforceable against the insurer. Determining whether an excess consent judgment is enforceable against an insurer typically requires, among other things, a close examination of whether the amount of the settlement and stipulated facts (if any) supporting the settlement agreement and judgment are consistent with the actual facts surrounding the accident and the settlement. The determination, in essence, involves the process of separating fact from fiction. This article addresses some of the defenses and strategies an insurer may wish to consider when determining the legitimacy of an excess consent judgment.

II. Strategies

There are a number of strategies an insurer may employ to confirm that it pays only legitimate, reasonable, and non-collusive settlements. The law, however, is not identical in every jurisdiction. Each jurisdiction has its own approach for resolving these issues. Although this article focuses on Florida law, the issues would likely be important considerations in most jurisdictions.

A. Check For Procedural Defects

The timing of the settlement and the insured's assignment of his rights under the policy can have an impact on whether the settlement is enforceable against the insurer. If the third-party claimant agrees to relieve the insured tortfeasor of all liability *before* the tortfeasor assigns his rights under the policy to the third-party claimant, the insurer may have a strong argument that any action to recover amounts in excess of the policy limits (i.e., a bad-faith claim) should be deemed extinguished.[3] This is because the third-party claimant's bad-faith claim is derivative of the insured's bad-faith claim. If the third-party claimant has relieved the tortfeasor of all liability, then the tortfeasor has no excess exposure and, thus, no extra-contractual or bad-faith cause of action to assign.

On the other hand, if the third-party claimant agrees only to a covenant not to execute against the insured tortfeasor (and there is no release or satisfaction of judgment), then any potential bad-faith cause of action would likely not be extinguished, even in cases where the insured did not assign his claim before agreeing to the covenant not to execute.[4]

B. Determine Whether The Insurer Breached Its Duty To Defend

A consent judgment is not enforceable against an insurer if the insurer did not breach its duty to defend.[5] The duty to defend is broader than the duty to indemnify. Thus, if there is no duty to defend, logically there can be no duty to indemnify.[6]

Of course, determining whether the insurer owed or breached its duty to defend is not always easy and is often blurred by the insured's own conduct, particularly in cases where the insured fails to provide timely notice of the loss or otherwise fails to cooperate in the insurer's investigation. Liability policies typically impose upon the insured several post-loss duties requiring the insured to cooperate with the insurer by, among other things, providing notice of the accident (or "occurrence") and information regarding the circumstances of the accident (and the identification of claimants and witnesses). Additionally, liability policies typically preclude the insured from voluntarily making payments or assuming obligations (the "voluntary payments" clause) and preclude the filing of any action against the insurer until the obligation of the insured has been determined by final judgment obtained after actual trial or by an agreement signed by the insurer (the "no action" clause).[7] These provisions are enforceable in cases where the insurer did not breach its duty to defend.

Several factors may be important in determining whether the insurer owed or breached its duty to defend. In the context of an excess consent judgment, however, special attention should be given to the issue of whether the insured tendered its defense and whether the complaint against the insured alleged a covered claim.

I. Check Whether The Insured Tendered Its Defense

In order to trigger an insurer's duty to defend, the insured is obligated to tender the defense of the lawsuit to its insurer. This means the insured must put the insurer on notice of the lawsuit and must notify its insurer that its assistance is desired.[8] Although courts may disagree on whether a formal tender is always required to trigger the duty to defend, courts are generally in agreement that the circumstances must suggest that the insurer's assistance is required.[9]

Thus, if the insured retains personal counsel, ignores communications from the insurer, and then enters into

a settlement with the third-party claimant, the insurer would have a very strong argument that the defense was never tendered because, under the circumstances, the insurer could not reasonably know that a defense was requested. On the other hand, if the insured is unsophisticated, unrepresented by counsel, and the insurer is notified that a default has been entered against the insured, a court may be more likely to excuse the insured from making a formal request for defense.

2. Analyze Whether A Covered Claim Was Alleged

In order to trigger the insurer's duty to defend, the complaint against the insured must allege a covered claim. As a general rule, an insurer's duty to defend its insured against a lawsuit is determined by comparing the policy with the allegations set forth in the third-party claimant's complaint against the insured.[10] This means the duty to defend is usually not based on the actual facts (or the insured's version of the actual facts). The insurer has a duty to defend if the complaint against the insured states a claim that is potentially covered by the policy.[11]

Many complaints can easily be categorized as alleging either a covered or non-covered claim. If the complaint against the insured alleges that the incident was an accident (and the complaint includes supporting allegations), there is a good chance a court would rule that there was a duty to defend. On the other hand, if the complaint against the insured shows a policy exclusion applies, a court would likely rule that the insurer has no duty to defend.[12]

Cases involving excess consent judgments, however, often involve underlying complaints that are not easily categorized as alleging either a covered or non-covered claim. In cases where it is obvious that a covered claim is alleged, the insurer would presumably be very likely to agree to defend the insured (and there would be no breach of the duty to defend and no excess consent judgment). The same is true when there is a close call about whether the complaint alleges a covered claim. However, in cases where it is unclear as to whether the complaint alleges a covered claim, the determination of the duty to defend becomes more complicated. These are the cases that are more likely to result in a wrongful refusal to defend and, ultimately, an excess consent judgment.

Therefore, when addressing the validity of an excess consent judgment, it is important to analyze carefully whether the underlying complaint against the insured alleged a covered claim. It is important to consider all the allegations in the complaint. Personal injury attorneys often tailor their complaints to allege at least one covered cause of action. For example, they may allege the insured committed an assault and battery or engaged in conduct tantamount to attempted murder (and thus excluded from coverage), but they may also set forth, in at least one count, the allegation that the incident was simply an accident (and thus covered under the liability policy).

However, buzz words in a complaint do not create a duty to defend if the words are conclusory or unsupported by other allegations in the complaint.[13] Thus, careful consideration should be given to whether the complaint against the insured merely uses conclusory buzz words, unsupported by other allegations. Buzz words, unsupported by allegations in the complaint, cannot trigger coverage for a cause of action that is not covered.

Moreover, although the duty to defend is typically based solely on the allegations of the complaint against the insured (not the actual facts), there are circumstances in which it is proper to consider facts outside the four corners of the complaint. For example, in cases where the complaint against the insured is silent regarding uncontroverted evidence that places the claim outside of coverage, insurers may properly assert that the court should look beyond the complaint to the actual facts to determine whether the insurer owes a duty to defend.[14]

C. Determine Whether The Insurer Owes A Duty To Indemnify

To hold an insurer responsible for any consent judgment or settlement agreement, a party seeking to recover against the insurer must prove, among other things, that the policy provides coverage, i.e., a duty to indemnify for the amount of the agreement or judgment.[15]

Under Florida law, in cases where a party is seeking to enforce against an insurer a consent judgment, the insurer is permitted to litigate coverage defenses based on the actual facts, not simply the facts agreed upon between the insured and the third-party claimant as part of their settlement agreement.[16] In Florida, such agreements are commonly known as *Coblentz agreements*, named after the Fifth Circuit case from 1969 that acknowledged such agreements are enforceable.[17]

1. Consider The *Coblentz* Case

The *Coblentz* case illustrates one scenario in which a third-party claimant and an insured tortfeasor may decide to enter into a consent judgment. The case also shows how an insurer in a coverage case is free to exercise its right to litigate factual issues related to coverage and is not bound by the facts agreed upon between the claimant and the insured to resolve the underlying tort suit.

The *Coblentz* case involved a fact pattern where a liability insurer withdrew its defense of its insured based on an assault and battery exclusion. The case arose out of a shooting incident that occurred outside the insured's motel.[18] The insured discovered the plaintiff loitering around the motel at 5:00 a.m. The insured confronted the plaintiff, a brief scuffle ensued, and the plaintiff fled. The insured then chased the plaintiff, yelled at him to stop, and fired his weapon, resulting in the death of the plaintiff.[19] The insured denied that he intentionally shot the plaintiff. According to the insured's testimony, the insured fired shots only to frighten the plaintiff, and he claimed one of the bullets ricocheted and struck the plaintiff.

The plaintiff's estate then sued the insured for wrongful death in state court. The insured's liability carrier initially defended the tort action, but later withdrew its defense of the insured based on the assault and battery exclusion. The insured subsequently entered into a stipulation with the plaintiff concerning testimony that would be given by certain witnesses at trial. The evidence that the plaintiff and the insured agreed to present supported the finding that the incident involved an accidental shooting. Additionally, the plaintiff and the insured stipulated that $50,000 would be a reasonable assessment of damages and that the judgment entered in the tort action would not be collectible from the assets of the insured. Significantly, the stipulation did not include certain evidence introduced in an earlier state trial (which resulted in a judgment in favor of the plaintiff that was later reversed) that strongly indicated the insured's actions constituted an assault and battery. The trial court entered a judgment in the tort action based on the stipulated testimony and oral argument. The state court found that the death of the plaintiff was caused by the insured's "negligent and careless use of a gun."[20] The state court then entered judgments for the plaintiff totaling $50,000.

The plaintiff subsequently brought a coverage action in federal court to attempt to collect the judgment from the insured's carrier, American Surety. The federal trial court determined that the state court judgment (which found the insured negligent) was binding on American Surety and, thus, the court entered summary judgment in favor of the plaintiff. The Fifth Circuit, however, reversed the trial court's decision, noting that the "finding of negligence was based upon a stipulation of testimony between the parties–the representative of the deceased and the insured–both of whom would strongly prefer a finding of negligence rather than intentional tort."[21] Because the finding of negligence was based on the stipulated testimony presented in a proceeding "devoid of any conflicting interests between the litigants on the precise issue, and because the proceeding did not include other evidence that strongly indicated the insured's actions did indeed constitute assault and battery," the court held the finding of negligence could not be binding on the insurer.[22] The insurer and the plaintiff then litigated the issue of whether the incident involved negligence (which would have been covered under the policy) or an assault and battery (which would not have been covered under the policy). The jury resolved the issue by general verdict in favor of the plaintiff, finding that the death of the plaintiff was not the result of an assault and battery.[23]

A close reading of the *Coblentz* case is important because it clearly holds that in a subsequent coverage action, a liability insurer is allowed to litigate factual issues pertaining to coverage. In *Coblentz*, the insurer in the coverage case was permitted to litigate the issue of whether the incident involved negligence (i.e., a covered claim) or an assault and battery (i.e., not a covered claim), even though that factual issue had been ruled upon by the trier of fact in the underlying tort action.

2. Determine The Actual Facts

In cases where an insurer breaches its duty to defend, there is a good chance the insured's counsel will assert the position that the insurer cannot avoid its duty to indemnify by raising liability defenses, i.e., affirmative defenses and defenses to liability that the insured failed to raise in the underlying tort action.[24] However, this does not mean that an insurer cannot raise coverage or policy defenses. Although an insurer may not be able to avoid its duty to indemnify by raising certain defenses concerning the insured's liability for the accident or occurrence, the insurer should be free to raise coverage defenses, i.e., defenses to coverage based on the terms of the policy.[25]

Thus, the determination of whether the policy provides a duty to indemnify will depend on the actual facts relevant to coverage, not the stipulated facts (if any) agreed upon by the claimant and the insured. For example, if a policy provides an exclusion for intentional acts, then the insurer has a right to litigate whether the actual facts fall within the scope of the exclusion.[26] If the actual facts show the incident involved an attempted murder, the insurer will not be bound by any stipulated facts agreed upon by the claimant and the insured indicating the incident was simply an accident.

D. Determine If The Settlement Was Reasonable And Entered Into In Good Faith

In addition to proving coverage (i.e., a duty to defend and a duty to indemnify), the party seeking enforcement of a settlement agreement generally must establish that the settlement was reasonable and entered into in good faith.[27] If an insured tortfeasor settles with a third-party claimant "without any effort to minimize his liability," the insurer will have no duty to pay the insured's settlement.[28] Additionally, as a general rule, the following factors (among others) are typically considered relevant in determining whether a settlement agreement is reasonable:

- the third-party claimant's damages;
- the merits of the claimant's liability theory against the insured tortfeasor;
- the merits of the insured's defense theory;
- the extent of the claimant's investigation and preparation of the case; and
- the evidence of bad faith, collusion, or fraud by the insured.[29]

A reasonable-person standard is typically applied in determining whether a consent judgment was reasonable.[30] The specific test is whether a reasonably prudent person in the position of the insured would have settled the case if that person had the "ability to pay a reasonable settlement from his or her funds" and the person makes the settlement decision "as though the settlement amount came from those funds."[31]

E. Analyze Whether The Insurer Breached Its Duty Of Good Faith

As a general rule, when an insurer breaches its duty to defend, the recoverable damages are limited to only those damages caused by the breach (e.g., attorney fees incurred by the insured).[32] The recoverable damages do not extend to the excess consent judgment itself because the breach of the duty to defend did not cause the excess consent judgment. If the excess consent judgment is, in fact, reasonable and entered into in good faith (and without any collusion between the third-party claimant and the insured), then it is likely an excess judgment would have been entered even if the insurer had not breached its duty to defend.[33] Thus, if the insurer breaches its duty to defend and the consent judgment is enforceable against the insurer (up to the policy limits), the prevailing rule is that an insurer cannot be held liable for an excess judgment (i.e., the amount above the policy limits) unless it is shown the insurer acted in bad faith.[34]

Several cases describe the parameters of an insurer's duty of good faith. A liability insurer, while handling a third-party claim against its insured, has a "duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business."[35] This duty includes, among other things, an obligation to settle "where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so."[36] Where the insurer breaches this duty, and an excess judgment is entered against the insured, a common-law third-party bad-faith cause of action against an insurer may arise.

The classic third-party bad-faith case arises when an insurer has an opportunity to settle the third-party's claim against the insured for an amount within the policy limits but, as a result of a breach of the duty of good faith, the claim is not settled and an excess judgment is ultimately entered against the insured.[37] In the classic bad-faith case, the ultimate issue is whether the insurer failed to settle the claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests.[38] The determination of whether an insurer has acted "fairly and honestly toward its insured and with due regard" for the insured's interests has been held to encompass, among other things, consideration of the totality of the circumstances, including the following factors:

- the efforts made by the insurer to obtain a reservation of the right to deny coverage if a defense were provided;
- the efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insured;

- the substance of the coverage dispute or the weight of legal authority on the coverage issue;
- the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and
- the efforts made by the insurer to settle the liability claim in the face of the coverage dispute.[39]

In cases where the excess judgment is the result of a settlement agreement and consent judgment, courts will likely consider, in addition to the foregoing factors, whether the insured would have entered into the consent judgment but for the bad faith of the insurer.[40]

Obviously, the totality-of-the-circumstances standard provides an insurer with many potential defenses and arguments to raise in the bad-faith case. At the very least, a breach of the duty to defend, standing alone, will not be enough to establish a finding of bad faith. Moreover, the existence of any reasonable, good-faith coverage dispute should weigh heavily against a finding of bad faith.

III. Conclusion

When a third-party claimant and an insured tortfeasor enter into a consent judgment with an agreement that the claimant will seek recovery only against the tortfeasor's insurer, the amount of the settlement should be viewed with skepticism because there is a good chance it does not represent the true value of the claim. In a perfect world, the true value of a claim is a function of the claimant's actual damages and the reasonable likelihood that the insured will be found at fault for causing those damages. The problem with a consent judgment is that the insured (who will never have to pay the judgment) has nothing to lose by agreeing to a settlement that far exceeds the true value of the case. Given this problem with consent judgments, there is a significant danger that the excess consent judgment will be the product of collusive and unreasonably large settlement amounts.

There are several strategies and defenses an insurer may employ when contesting an excess consent judgment. This article attempts to address a few of those strategies. As the use of the excess consent judgment becomes increasingly popular, insurers and their attorneys may wish to become familiar with these and other defenses to make sure the insurer pays only legitimate, reasonable, and non-collusive settlements.

Endnotes

1. *See* Perera v. United States Fidelity & Guaranty Co., 35 So. 3d 893, 900 (Fla. 2010) (noting that Florida courts "allow agreements by the insured to a judgment in excess of the policy limits against an insurer who wrongfully refuses to defend and acts in bad faith [citation omitted]"). In *Perera*, the court described three recognized circumstances that may give rise to a third-party bad-faith cause of action. The first circumstance is the classic bad-faith situation, where an excess judgment is entered against the insured without the insured's consent (e.g., an excess judgment entered following a jury trial). The second circumstance involves a stipulation known as a *Cunningham* agreement, which is an agreement entered into between the insurer and the third-party claimant in a situation where there is no previous excess judgment but the insurer and claimant stipulate to try the bad-faith issues first. In a *Cunningham* agreement, the parties typically stipulate that if no bad faith is found, the claimant shall settle for the policy limits, thereby protecting the insured from an excess judgment. The third recognized circumstance involves an excess consent judgment, i.e., a settlement agreement entered into between the third-party claimant and the insured (without the permission of the insurer) that is collectible only against the insurer. This third recognized circumstance is the topic of this article.

2. In Florida, these consent judgments are known as *Coblentz agreements*, named after the United States Fifth Circuit Court of Appeals case, Coblentz v. Am. Surety Co. of N.Y., 416 F.2d 1059, 1063 (5th Cir. 1969). *Coblentz* did not involve an *excess* consent judgment, but Florida courts have extended *Coblentz* to allow settlement agreements involving consent judgments in excess of the policy limits and have held that the excess consent judgment is enforceable against an insurer who wrongfully refuses to defend and acts in bad faith. *See* Shook v. Allstate Ins. Co., 498 So. 2d 498 (Fla. 4th DCA 1986).

3. *See* Fidelity & Cas. Co. of N.Y. v. Cope, 462 So. 2d 459 (Fla. 1985) (holding that if the third-party claimant releases the tortfeasor from all liability, or has satisfied the underlying judgment, before an assignment of the

bad-faith cause of action, then no such cause of action may be maintained against the tortfeasor's insurer); Clement v. Prudential Property & Cas. Ins. Co., 790 F.2d 1545 (11th Cir. 1986) (holding that a settlement agreement in which a third-party claimant agreed not to execute against the insured for excess damages extinguishes any bad-faith claim against the insurer in the absence of a prior assignment of the bad-faith claim).

4. *See* Langeman v. Frank H. Furman, Inc., 697 So. 2d 981 (Fla. 4th DCA 1997) (holding that if only a covenant not to execute is entered into between the third-party claimant and the insured tortfeasor with no release or satisfaction of judgment, then any potential bad-faith cause of action is not extinguished even if there was no assignment before the covenant). *See also* Shook v. Allstate Ins. Co., 498 So. 2d 498 (Fla. 4th DCA 1986), *review denied*, 508 So. 2d 13 (Fla. 1987) (distinguishing *Cope* and holding that a release obtained by the insured tortfeasor from the third-party claimant–which contained a covenant not to execute–did not relieve the insurer of liability for reasonable settlement reached between insured tortfeasor and third-party claimant upon assignment of insured's claims against insurer to third-party claimant).

5. *See, e.g.*, Shook v. Allstate Ins. Co., 498 So. 2d 498 (Fla. 4th DCA 1986).

6. Fun Spree Vacations, Inc. v. Orion Ins. Co., 659 So. 2d 419, 422 (Fla. 3d DCA 1995).

7. Homeowners policies and commercial general liability policies typically have such language. Additionally, there may be statutory restrictions on the accrual of a cause of action against a liability insurer. *See* Fla. Stat. § 627.4136(1) (Florida's Non-Joinder Statute provides that it is a condition precedent to the accrual of a cause of action against a liability insurer by a person not an insured under the terms of the liability policy that he shall first obtain a settlement or verdict against the insured for a cause of action that is covered by the policy).

8. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Cincinnati Ins. Co., 651 N.W.2d 542, 545 (Minn. Ct. App. 2002) ("Tender of defense is a condition precedent to the duty to defend. To constitute tender of defense, the insurer must have knowledge that the insurer's assistance is desired.")

9. *Compare* Castronovo v. National Union Fire Ins. Co. of Pittsburgh, Pa., 571 F.3d 667, 672 (7th Cir. 2009) (Ohio law) ("[T]here was no request for a defense, so there was no duty to act."), and Hartford Accident & Indem. Co. v. Gulf Ins. Co., 776 F.2d 1380, 1383 (7th Cir. 1985) (noting the difference between a "large and sophisticated governmental entity that is advised and assisted by its own counsel" who should not be excused from any sort of formal tender requirement, versus "unschooled laymen" who may be "excused from any sort of active tender.")

10. National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 536 (Fla. 1977).

11. *Id.*

12. *E.g.*, Reliance Ins. Co. v. Royal Motorcar Corp., 534 So. 2d 922, 923 (Fla. 4th DCA 1988).

13. Amerisure Ins. Co. v. Gold Coast Marine Distributors, Inc., 771 So. 2d 579, 582 (Fla. 4th DCA 2000) (holding that use of "buzz words" in a complaint against an insured will not trigger a liability carrier's duty to defend when the cause of action is for a non-covered act). In *Gold Coast*, the court held that the commercial general liability insurer owed no duty to defend its insured under the "personal injury" or "advertising injury" provisions because the suit did not involve a "personal injury" or "advertising injury" as defined in the policy. In *Gold Coast*, the claimant sued the insured for breach of contract, tortious interference with a contract, tortious interference with an advantageous business relationship, and violation of the Florida Restraint of Trade laws. In the complaint, the claimant used the word "defamation" in connection with its allegation that the insured communicated to the claimant's customers that the claimant's distributorship contract was being terminated. The complaint, however, set forth no factual support for the "defamation" allegation. Specifically, there were no allegations in the complaint that the insured made a false statement to a third party that libeled, slandered, or injured the claimant's business reputation. The court held that the use of the word "defamation," without allegations of false statement to a third party, does not state a cause of action for libel or slander and, therefore, there were no allegations which triggered a duty to defend. *Id.* at 581. The court stated that "buzz words" used in the complaint,

i.e., "defamation" and "damage to reputation," were "merely conclusory." *Id.* at 582.

14. *Compare* Tennessee Corp. v. Lamb Brothers Const. Co., Inc., 265 So. 2d 533 (Fla. 2d DCA 1972) (holding that the determination of the duty to defend could be resolved by considering the actual facts in cases where the complaint against the insured is ambiguous); and Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810 (Fla. 1st DCA 1985) (holding that an insurer had a duty to defend its insured, even though the undisputed facts–which were not pled in the complaint against the insured–triggered an exclusion).

15. Steil v. Florida Physicians' Ins. Reciprocal, 448 So. 2d 589, 592 (Fla. 2d DCA 1984) (holding that a settlement may not be enforced against an insurer that breached the duty to defend if the settlement is "unreasonable in amount or tainted by bad faith"); Chomat v. Northern Ins. Co. of New York, 919 So. 2d 535, 537 (Fla. 3d DCA 2006).

16. Coblentz v. Am. Surety Co. of N.Y., 416 F.2d 1059, 1063 (5th Cir. 1969).

17. In Florida, the term *Coblentz agreement* is often used (or perhaps misused) to mean any type of settlement agreement between a third-party claimant and the insured wherein the claimant agrees to seek settlement only against the tortfeasor's insurer. In fact, the *Coblentz* case did not involve a mere settlement agreement. The *Coblentz* case involved a situation where a judgment was entered against the insured by a trier of fact after the claimant and the insured reached an agreement as to the presentation of evidence. Thus, there was not simply a settlement agreement or a consent judgment. In *Coblentz*, a trier of fact was presented with evidence of facts (as stipulated by the parties).

18. Coblentz, 381 F.2d 185, 186 (5th Cir. 1967).

19. *Id.* at 186.

20. *Id.* at 187.

21. *Id.* at 188.

22. *Id.*

23. Coblentz, 416 F.2d 1059, 1061 (5th Cir. 1969) (where the court noted that the case had been remanded "so that the negligence-assault and battery issue could be properly litigated").

24. *See* Wright v. Hartford Underwriters Ins. Co., 823 So. 2d 241 (Fla. 4th DCA 2002) (holding an insurer who breaches the duty to defend cannot avoid its duty to indemnify by raising an affirmative defense of workers' compensation immunity that its insured failed to raise or could have raised in the underlying action against the insured); Gallagher v. Dupont, 918 So. 2d 342 (Fla. 5th DCA 2005) (holding the insurer who breached its duty to defend in the underlying action could not avoid its duty to indemnify by raising as an affirmative defense the argument that the insured should not be liable for the underlying civil rights claim).

25. Sinni v. Scottsdale Ins. Co., 676 F. Supp. 2d 1319, 1332 (M.D. Fla. 2009) (holding that an insurer who breaches its duty to defend was permitted to litigate its policy defenses based on the workers' compensation and employer's liability exclusions); Spencer v. Assurance Co. of Am., 39 F.3d 1146, 1149 (11th Cir. 1994) (holding that an insurer had a duty to defend based on the allegations in the underlying complaint, but that plaintiffs could not recover under a *Coblentz* agreement because the actual facts were such that the plaintiffs' claim did not come within the coverage of the policy).

26. *See* State Farm Mut. Auto. Ins. Co. v. Brown, 767 F. Supp. 1151 (S.D. Fla. 1991) (applying Florida law) (holding that the insurer had a right to litigate its coverage defense that the insured's conduct was intentional and thus excluded by the policy, even though the insurer had defended the insured in the underlying tort litigation in which it was determined on summary judgment that the insured's actions constituted negligence); Insurance Company of North America v. Whatley, 558 So. 2d 120, 122 (Fla. 5th DCA 1990) (holding that collateral estoppel could not be utilized to bind an insurer to a prior factual determination concerning the personal injury victim's status as an "employee" of the insured, because the interests of the insured and the insurer were "antagonistic" with respect to the issue of the victim's status as an "employee").

27. Steil, 448 So. 2d at 592.

28. Taylor v. Safeco, 361 So. 2d 743, 746 (Fla. 1st DCA 1978).

29. *See* Couch on Insurance, 3d Ed. § 203:41; Chomat v. Northern Ins. Co. of New York, 919 So. 2d 535, 538 (Fla. 3d DCA 2006); Home Ins. Co. v. Advance Machine Co., 443 So. 2d 165, 168 (Fla. 1st DCA 1983).

30. Couch on Insurance, 3d Ed. § 203:41; Chomat, 919 So. 2d at 538.

31. Couch on Insurance, 3d Ed. § 203:41.

32. Thomas v. Western World Ins. Co., 343 So. 2d 1298 (Fla. 2d DCA 1977).

33. Some cases hold that an insurer may be liable for an excess judgment where the judgment is shown to be a category of damages caused by the failure to defend. Those cases, however, do not involve excess *consent* judgments. *See* Caldwell v. Allstate Ins. Co., 453 So. 2d 1183 (Fla. 1st DCA 1984) (holding that an insurer may be liable for the excess judgment where it is shown that the insurer breached its duty to defend its insured, and the breach caused the insured to be unrepresented in the accident case, and the insured proves the judgment awarded was substantially greater than the judgment that would have been entered had the insurer provided the insured with legal representation); Thomas v. Western World Ins. Co., 343 So. 2d 1298 (Fla. 2d DCA 1977) (holding that an insurer may be liable for the excess judgment in cases where it is shown that the insurer wrongfully refused to defend, causing the insured to suffer a default or a final judgment without the benefit of an attorney, and the insured can prove that the final judgment would have been lower had the suit been properly defended). The rationale supporting the *Caldwell* and *Western World* decisions was that the insurer's breach of the duty to defend caused the insured to be unrepresented, thereby resulting in a judgment being entered in an amount much higher than it would have been entered if the insurer had not breached its duty to defend. This rationale, however, could not be used to support a ruling that an insurer should be responsible for an excess *consent* judgment, because, as a general rule, an excess consent judgment is not enforceable against an insurer unless it is reasonable and entered into in good faith. *See* Steil, 448 So. 2d at 592. In other words, the party seeking enforcement of the excess consent judgment would not be able to make a persuasive argument because he would be required to assert two inconsistent positions: (1) that the excess consent judgment is in an amount much higher than the judgment that would have been entered if the insurer had not breached its duty to defend (thereby satisfying the rationale of *Caldwell* and *Western World*), and (2) the excess consent judgment is reasonable, non-collusive, and entered into in good faith, taking into consideration the merits of the claimant's case and the merits of the insured's defense theory (thereby satisfying *Steil*).

34. *See* Shook v. Allstate Ins. Co., 498 So. 2d 498 (Fla. 4th DCA 1986); First of Georgia Ins. Co. v. Dube, 376 So. 2d 910 (Fla. 3d DCA 1979); Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063 (Fla. 5th DCA 1991). *See also* Florida Farm Bureau Mut. Ins. Co. v. Rice, 393 So. 2d 552, 555 (Fla. 1st DCA 1980) ("Assuming that bad faith is required for recovery over policy limits [for an excess consent judgment] in a case such as this where there is a refusal to defend, the trial court's finding of bad faith is supported by the evidence.").

35. Berges v. Infinity Ins. Co., 896 So. 2d 665, 668 (Fla. 2004) (quoting Boston Old Colony Ins. Co. v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980).

36. Boston Old Colony Ins. Co., 386 So. 2d at 785.

37. Berges, 896 So. 2d at 668.

38. In Re Standard Jury Instructions in Civil Cases, Instruction 404.4 "Insurer's Bad Faith (Failure to Settle)."

39. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995).

40. Perera, 35 So. 3d at 900 ("Implicit in these decisions is a recognition that the insured would not have entered into the consent judgment but for the bad faith of the insurer and that the insured would otherwise have been exposed to personal liability as a result of the insured being left to 'its own devices.' "). ■

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