



## **Covenant Judgments in Washington – Reasonableness Determined on Five Days' Notice to the Insurer and Without a Jury: *Bird v. Best Plumbing and Farmers Insurance Exchange***

Melissa O'Loughlin White • 206.373.7240 • [mwhite@cozen.com](mailto:mwhite@cozen.com)

Nicholas J. Neidzowski • 206.224.1249 • [nneidzowski@cozen.com](mailto:nneidzowski@cozen.com)

In *Bird v. Best Plumbing Group, LLC and Farmers Insurance Exchange*, Wash. No. 86109-9 (October 25, 2012), the Washington Supreme Court held that: (1) insurers have no constitutional right to a jury determination of whether covenant judgments are reasonable and (2) due process is not violated when the presumptive amount of damages in a future bad faith action is set at a reasonableness hearing without a jury following five days' notice to the insurer.

### **The Underlying Facts**

The underlying case in *Bird* arose after an employee of Best Plumbing Group, LLC (Best Plumbing), cut a pressurized sewage pipe, causing sewage to escape into the home of James Bird. This sewage burst occurred just as Bird returned to his home, with sewage entering his eyes, nostrils and mouth. Efforts to repair the pipe were not successful and sewage continued to escape for eight months, resulting in hillside instability and toxic mold. Bird suffered a heart attack he attributed to the stress of physically removing sewage-laden material from his property.

Bird sued Best Plumbing, alleging trespass and negligence. Best Plumbing's liability insurer, Farmers Insurance Exchange, appointed defense counsel without a reservation of rights. Although the trespass statute authorized treble damages, evidence was presented that

Bird's own attorney alleged trespass only "as a scare tactic." Best Plumbing's defense counsel believed that its defenses "were excellent." Bird made a settlement demand in the amount of \$2 million, equal to the limits of the policy issued by Farmers. Farmers made a settlement offer in the amount of \$350,000.

### **The Covenant Judgment and the Reasonableness Hearing**

Best Plumbing settled with Bird by entering into a covenant judgment that included: (1) a stipulated or consent judgment between Bird and Best Plumbing in the amount of \$3.75 million; (2) Bird's covenant not to execute on that judgment against Best Plumbing; and (3) an assignment to Bird of Best Plumbing's coverage and bad faith claims against Farmers. Bird asked the trial court to approve the settlement as reasonable under RCW 4.22.060, which is Washington's contribution statute. Farmer's filed several motions in response.

The trial court granted Farmer's motions to intervene, for continuance and for discovery, but denied its motion for a jury trial. During a four-day reasonableness hearing, in which Farmers actively participated, the trial court evaluated the nine reasonableness factors set forth in *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803

*P.2d 1339 (1991)*.<sup>1</sup> After doing so, the trial court concluded the \$3.75 million covenant judgment settlement was reasonable based, in part, on a determination that damages from the trespass claim would be trebled. Farmers appealed and both the Court of Appeals and Washington Supreme Court affirmed.

### **Procedures Approved; No Constitutional Violations**

The Washington Supreme Court approved the trial court's procedures as "typical" when an insured and a claimant enter into a covenant judgment. Even though the contribution statute RCW 4.22.060, is a tort reform measure designed to allocate liability among joint tortfeasors, *Bird* confirmed that the statute applies to reasonableness hearings that involve covenant judgments. Notably, RCW 4.22.060 provides that only "five days' written notice" be provided. After concluding that reasonableness hearings are equitable in nature, the court held that an insurer does not have a constitutional right to a jury trial.

Under *Bird*, the amount of the stipulated judgment, once deemed reasonable by the court, creates a presumptive measure of damages in any related bad faith action against the insurer. This presumption does not violate due process, according to the court, because the insurer can rebut

the presumption by demonstrating the settlement was the product of fraud or collusion. The dissenting opinion, however, noted the presumptive damages amount is "practically irrebuttable" in the subsequent proceeding.

After confirming that trial courts retain "broad discretion" in determining reasonableness, the court affirmed the trial court's determination that the \$3.75 million settlement was reasonable.

### **Conclusion**

Although trial courts have been inconsistent in the extent they have allowed insurer involvement in reasonableness hearings, *Bird* affirms insurers have the right to meaningfully participate. Therefore, because a stipulated settlement that is deemed "reasonable" sets the presumptive amount of damages in a later finding of bad faith against the insurer, it is imperative insurers (even insurers, like Farmers, that provided a defense without reservation) act as quickly as possible to file motions and actively participate in the reasonableness hearing as warranted.

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<sup>1</sup> The *Chaussee* factors are: (1) the releasing party's damages; (2) the merits of the releasing party's liability theory; (3) the merits of the released party's defense theory; (4) the released party's relative fault; (5) the risks and expenses of continued litigation; (6) the released party's ability to pay; (7) any evidence of bad faith, collusion or fraud; (8) the extent of the releasing party's investigation and preparation; and (9) the interests of the parties not being released.

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**Melissa O'Loughlin White** leads the Global Insurance Group's Appellate Practice Area. She can be reached in the Seattle office at 206.373.7240 and at [mwhite@cozen.com](mailto:mwhite@cozen.com).

**Nicholas J. Neidzwski** is an associate in the Global Insurance Group in the Seattle office. He can be reached at 206.224.1249 and at [nneidzwski@cozen.com](mailto:nneidzwski@cozen.com).