

11th Circuit Affirms District Court Decision on Duty To Defend Case Against City Of Jacksonville

Washington, DC – April 25, 2008 Ross, Dixon & Bell, LLP partner [Rebecca Ross](#), working in connection with Florida counsel at Hogan & Hartson, led a team of attorneys to a successful defense on appeal for insurer client CNA, saving the client potentially tens of millions of dollars. In a decision very favorable to insurers, the United States Court of Appeals for the Eleventh Circuit clarified the need for the insured to cooperate with insurers who are providing a defense under a reservation of rights and held that the insured may not settle without the insurer's consent.

The Eleventh Circuit affirmed all respects of the summary judgment secured for plaintiff CNA from Judge Harvey Schlesinger of the U.S. District Court for the Middle District of Florida on September 11, 2007. RDB and Hogan & Hartson represented CNA in the original case as well as on the appeal, saving their client what the policyholder described as a \$175 million claim, consisting of an underlying settlement of bodily injury and property damage claims by thousands of residents of the City of Jacksonville, Fla. (*Williams* litigation) and environmental remediation costs.

In 2003, the City was sued in state court by thousands of its residents, who claimed physical and emotional injuries caused by their exposure to lead, PCBs, arsenic, and other contaminants from incinerators and dump sites owned and operated by the City. CNA's subsidiary, Transportation Insurance Company, agreed to provide a defense – with a reservation of rights – for the City, its insured. After Transportation spent millions of dollars defending the City, the City settled with the bulk of the plaintiffs without Transportation's consent and entered into a consent judgment for \$75 million plus an agreement to remediate the sites.

Transportation filed suit, claiming that the City had breached the cooperation and voluntary payments clauses by settling without Transportation's consent. After a period of extensive discovery, RDB and Hogan & Hartson proved that Transportation had met its obligation to “foster cooperation,” but that its efforts to do so were futile because the City engaged in behind-the-back negotiations to settle without Transportation's consent. The district court agreed, and the City filed an appeal.

The Eleventh Circuit agreed with the district court, finding that Transportation fulfilled its legal duty to defend and that the “undisputed facts demonstrated ‘the City's duplicity’ with respect to its communications with Transportation throughout the *Williams* litigation.” In its decision, the Eleventh Circuit stated that “The City's continued attempts to avoid the issue of its cooperation by framing the issue as whether Transportation exercised bad faith in settlement negotiations fail here....”

Quoting several instances in which Transportation communicated its need to be involved in all settlement negotiations with the *Williams* plaintiffs and “the City's numerous failures to inform Transportation of the schedule for important settlement discussions or provide full information of the details of those discussions,” the Eleventh Circuit agreed with the district court that “Transportation exercised due diligence and good faith in securing the City's cooperation and that the City's dishonesty rendered Transportation's attempts to secure its cooperation futile.” The Eleventh Circuit affirmed the district court's grant of summary judgment and dismissal of the City's counterclaims with prejudice, stating that the “City's material breach of the cooperation clause was substantially prejudicial to Transportation, which satisfied their duty to defend.”

The Eleventh Circuit's decision is attached. To read more about the district court's decision, please go to http://www.rdbl原因.com/mte/091807_ar1/ or <http://www.rdbl原因.com/Victories/Detail.aspx?victory=179>.