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News

OVERPAYING CARRIERS CONTINUE TO HAVE DIFFICULTY COLLECTING FROM UNDERPAYING CARRIERS IN TEXAS

Newsbrief
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Last week, a federal judge in Dallas undertook the difficult task of allocating damages covered by two umbrella policies when the underlying suit is settled without trial. *Great American Ins. Co., v. Employers Mut. Cas. Co.*, No. 3:18-CV-01819-X, 2020 WL 6082955 (N.D. Tex. Oct. 15, 2020) (slip op.) involved a fatal auto accident and a driver defendant who was an employee of one insured (Corona), while performing duties in the course of another insured's business (Liberty Tire). The resulting death claim was settled for a total of $7 million. Corona's and Liberty Tire's two primary policies funded the first $2 million, but their umbrella insurers disputed who must fund the remaining $5 million.

Employers insured Corona for $1 million, and Great American insured Liberty Tire for $30 million. Great American contended Liberty Tire was an insured under Corona's policy, and therefore Employers must exhaust its $1 million limit before Great American's $30 million limit would be triggered. When Employers refused to pay its limit, Great American funded the remainder of the settlement and brought this suit to recover the $1 million from Employers. (There was some evidence Employers had offered to pay pro rata by limits, which Great American rejected.)

The court concluded Employers' policy was triggered first, but only to the extent the settlement was actually covered under Employers' policy. While Corona was the named insured under the Employers policy and its liability was clearly covered, Liberty Tire was what is sometimes referred to as an "omnibus insured;" that is, only an insured to the extent of its vicarious liability for Corona's acts. The court went on to hold that Great American could only recover from Employers to the extent it could prove the settlement had been for Liberty Tire's vicarious liability by way of Corona, and not for Liberty Tire's own direct liability.

Without a trial resulting in specific jury findings on these issues, answering the question of how much of the settlement was for Liberty's vicarious liability versus its direct liability turned out to be nearly impossible for Great American. Even after putting on two sets of affidavits from the defense attorneys evaluating the various exposures of the insureds, the court still found the affidavits to be conclusory and not adequate summary judgment evidence. Therefore, the court granted summary judgment in favor of Employers.

Editor's Note: This result leaves open the question of how Great American could have proven the settlement was covered under Employers' policy, short of refusing to pay and forcing the underlying suit to trial. All its after-the-fact efforts failed, but it remains conceivable that writing terms into the settlement agreement specifying exactly what was being paid for each set of exposures might have been sufficient. Considering settlement agreements are generally the result of arms-length negotiations between all the parties, this may be easier said than done.

This ruling appears to follow in the footsteps of *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765 (Tex. 2007) in cementing the maxim that in Texas insurance, no good deed goes unpunished. Although the court's reasoning here was somewhat different from that in *Mid-Continent*, the fundamental outcome is the same – an insurer who overpaid to settle the case and protect its insured was rebuffed in its efforts to collect from the underpaying insurer. And we predict this ruling, like *Mid-Continent*, has the potential to chill insurers' reasonable efforts to put the protection of their insureds first and work out allocation disputes between carriers later. This result will likely be appealed to the Fifth Circuit, and will we watch it carefully and report on further developments.