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News

FIFTH CIRCUIT UPHOLDS NO-DEFENSE EXCESS LIABILITY POLICY

Newsbrief
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Last week, the Fifth Circuit examined the defense obligations of excess carriers, affirming summary judgment for an excess insurer whose policy included a right, but not a duty, to defend the insured after exhaustion of the underlying policy limits. *Tex. Disposal Systems, Inc. v. FCCI Ins. Co.*, ---F.3d ---, No. 20-50274, 2021 WL 1805865 (5th Cir. May 5, 2021) involved an insured who had four stacked insurance policies providing a total tower of $17 million. FCCI, the primary carrier, defended the insured against a wrongful death case. At the top of the four-insurer tower sat Arch. Like many excess policies, Arch's policy did not impose a duty to defend the insured, while the three policies below it included a duty to defend.

Ultimately, the first three insurers reached partial settlements with various plaintiffs that exhausted their limits. Once the settlements were paid, they tendered the remaining unsettled claims to Arch, and FCCI terminated its defense. Arch declined to assume the defense, pointing out its policy did not require it to do so. The insured defended itself through the conclusion of trial and then sued both FCCI and Arch for the disputed defense costs and extra-contractual damages.

In the ensuing coverage lawsuit, the insured contended Arch either modified the policy by agreeing to defend it, or had already assumed the defense and was prevented from withdrawing it. The Fifth Circuit rejected the notion that a contract could be modified by the unilateral acts of one party without a clear meeting of the minds reaching a new agreement supported by consideration. There was no evidence that any such agreed modification had occurred here. The court also reasoned that the policy terms actually *prevented* Arch from assuming the insured's defense until the underlying policies had been exhausted by payment of judgment or settlements, which protects the underlying insurers from having their defense of the insured interfered with by a meddling excess carrier. Arch told the insured it would not be assuming the defense before the partial settlements were finalized and thus before the underlying policies were exhausted, and therefore Arch could not have already assumed the defense. While there was evidence Arch had retained an attorney who may have represented the insured, there was no evidence he ever took over the role of lead counsel from the attorney hired by FCCI – thus Arch did not "assume" the defense, but at most merely associated with the defense being conducted by FCCU.

Having concluded Arch did not breach its contract, the court summarily upheld summary judgment in Arch's favor on all extra-contractual claims that had been asserted.

Editor's Note: Although this case resulted in a win for the excess carrier, the court's discussion of the evidence suggests this coverage lawsuit might have been avoided if there had been clearer and earlier communication of Arch's intention not to assume the insured's defense, which it had the right but not the duty to do. However, that same clarity of communication might have prevented the partial settlements from ever being achieved, as the insured argued it would not have agreed to them if it had known it would lose its defense. The trial of the remaining unsettled claims resulted in an additional $1.1 million judgment against the insured, which was within the remaining available policy limit. It is not clear how much the insured incurred in defense costs after FCCI terminated its defense.