

BAD FAITH BLOG

No Excess Judgment, No Problem: Excess Insurer Has Claim Against Primary Insurer

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Summary: An employer's excess insurer brought an action for bad faith against the primary insurer, which had defended the employer against a worker's personal injury action that resulted in a settlement in excess of the primary insurer's limits. The excess insurer alleged the primary insurer should have settled the case within the primary carrier's policy's limits. The trial court dismissed the claim finding it was not actionable when there was no excess judgment entered against the insured. The Court of Appeals reversed and remanded.

Ace American Ins. Co. v. Fireman's Fund Ins. Co.

A film industry worker was seriously injured on a film set. He sued his employer, Warner Brothers Entertainment, Inc., for damages and loss of consortium. Warner Brothers was insured by a primary policy with Fireman's Fund and an umbrella policy with Fireman's Fund. Ace American provided Warner Brothers with an additional excess policy above the umbrella policy. Fireman's Fund provided Warner Brothers with a defense, and the case eventually settled with the participation of and contribution from both insurers. Following the settlement, the underlying case was dismissed with prejudice.

Ace American then sued Fireman's Fund for equitable subrogation and breach of the duty of good faith and fair dealing alleging Fireman's Fund was unreasonable by not settling the case when the worker initially made demands within the policy limits of the Fireman's Fund policies. Fireman's Fund contended there was no actionable claim because there was no excess judgment entered against Warner Brothers due to the settlement. The trial court dismissed on this basis, and Ace American appealed.

On appeal, the California Court of Appeals found that because Ace American alleged it was required to contribute to the settlement of the underlying case due to the primary insurer's failure to reasonably settle the case within its policy limits, the lack of an excess judgment against the insured in the underlying case did not bar an action for equitable subrogation or breach of the duty of good faith and fair dealing.

The court explained California recognizes “an implied duty on the part of the insurer to accept a reasonable settlement demand on [covered] claims within the policy limits.” An insurer that breaches its duty of reasonable settlement is liable for all the insured’s damages proximately caused by the breach, regardless of policy limits. The court further explained “[e]quitable subrogation allows an insurer that paid coverage or defense costs to be placed in the insured’s position to pursue a full recovery from another insurer who was primarily responsible for the loss.”

After resolving conflicts in previous cases from the same district, the court concluded in an equitable subrogation action, “an excess insurer which has settled and discharged the insured’s liability may recover from the primary insurer an amount in excess of the primary insurer’s policy limits if the excess insurer can prove the primary insurer’s unreasonable refusal to settle within its policy limits resulted in loss to the excess insurer.” Further, the court held an excess judgment against the insured in the underlying case is not a required element of a cause of action for equitable subrogation or breach of the duty of good faith and fair dealing. It is sufficient if the excess insurer actually contributed to an excess settlement. The court reversed and remanded for further proceedings.

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