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BAD FAITH BLOG

Missouri Court of Appeals Recognizes an Excess Insurer's Claim of Equitable Subrogation to Recover for a Primary Insurer's Bad Faith Failure to Settle

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In *Scottsdale Ins. Co., et al. v. Addison Ins. Co., et al.*, No. WD75963 (Mo.App.W.D. Oct. 1, 2013), a "case of first impression," the Missouri Court of Appeals both redefined the elements of a third-party bad faith failure to settle claim and recognized for the first time an excess carrier's right to pursue a primary carrier under a theory of equitable subrogation to recover for a primary insurer's bad faith failure to settle.

http://www.courts.mo.gov/file.jsp?id=66553

Scottsdale Insurance Company ("Scottsdale") filed a seven-count petition against Addison Insurance Company and United Fire & Casualty Company (collectively referred to as "United Fire"), seeking to recover $1 million Scottsdale paid to settle a lawsuit filed against Wells Trucking insured by Scottsdale and United Fire (the "Underlying Lawsuit"). The Underlying Lawsuit was filed after a Wells Trucking employee operating a Wells Trucking vehicle struck another vehicle killing the other driver. At the time of the August 2007 accident, United Fire provided $1 million of primary insurance coverage, with Scottsdale providing $2 million of excess coverage over and above United Fire's policy. Scottsdale's policy expressly stated it would not apply unless and until the United Fire policy was exhausted.

In April 2008, decedent's family made a policy limits demand upon United Fire, unaware of Scottsdale's policy. United Fire rejected the settlement offer, and the decedent's family filed suit. Decedent's family renewed its demand for United Fire's $1 million limit, which United Fire again declined, this time countering with a $250,000 offer, which the decedent's family declined. In September 2008, Scottsdale learned of the suit, and the decedent's family learned of Scottsdale's policy. Despite knowledge of the excess coverage, decedent's family renewed its $1 million demand to United Fire, and both Wells Trucking and Scottsdale demanded United Fire settle for its limits. United Fire again declined.

In August 2009, decedent's family increased its demand to the $3 million combined limits, and in October 2009, United Fire, Scottsdale, and decedent's family attended pre-trial mediation, wherein the parties agreed to settle claims against Wells Trucking for $2 million, with United Fire and Scottsdale each paying $1 million. In the settlement agreement, Scottsdale expressly reserved its right to pursue United Fire for bad faith failure to settle, and secured a written assignment from Wells Trucking of its bad faith failure to settle claim. Scottsdale subsequently filed its seven-count petition against United Fire, the most relevant being the Count II Equitable Subrogation claims. United Fire filed for summary judgment, which the trial court granted in full, from which Scottsdale timely appealed. The trial court's ruling was based in part on Scottsdale's untimely response and other procedural defects in addition to finding that there was no legal theory recognized in Missouri allowing Scottsdale to recover

The appellate court first extensively reviewed Missouri bad faith failure to settle law, finding the claim first recognized in *Zumwalt v. Utilities Ins. Co.*, 288 S.W.2d 750 (Mo. 1950). The court next addressed *Dyer v. General American Life Ins. Co.*, 541 S.W.2d 702 (Mo.App. 1976), a bad faith case often cited for its statement of the elements of the claim. The court described Dyer's statement of the "elements" as nothing more than *obiter dicta*, noting that the court in *Dyer* stated the elements of the tort "*appear to be* that: (1) the liability insurer has assumed control over negotiation, settlement, and legal proceedings brought against the insured; (2) the insured has demanded that the insurer settle the claim brought against the insured; (3) the insurer refuses to settle the claim within the liability limits of the policy; and (4) in so refusing, the insurer acts in bad faith, rather than negligently."

Noting that only the third and fourth "essential elements" in *Dyer* were arguably tied to the discussion in *Zumwalt*, the court reviewed several cases citing *Dyer* in which the insurer was successful, the most recent being *Purscell v. TICO Ins. Co.*, ___ F.Supp.2d ___, 2013 WL 2450825, at *4 (W.D.Mo. May 24, 2013) (summary judgment in favor of the insurer because insured never made a sufficiently definite demand for settlement within policy limits). The court in *Purscell* interestingly found Missouri may actually recognize a fifth element of the tort, that being an offer of settlement actually made by the injured third party. Rejecting *Dyer*'s elements, the appellate court constructed its own set of essential elements for bad faith failure to settle:

1. That the insurer has the authority to settle a claim against its insured within (or by payment of) the policy limits;

2. That the insurer has the opportunity to settle a claim against its insured within (or by payment of) the policy limits;

3. That the insurer fails to settle a claim against its insured within (or by payment of) the policy limits in bad faith; and

4. That the insured suffers damage as a proximate result.

Regarding the first element, the court stated that, "one can envision a case where a primary insurer refuses to contribute its policy limits to a settlement proposal that is in excess of the policy limits, but where the insured and/or the excess insurer has agreed to pay all sums in the settlement proposal above the primary insurer's limits; then, as a result of the failure to achieve settlement, the insured or the excess insurer is subjected to a later judgment or settlement in a higher amount. The parenthetical "or by payment of" anticipates this scenario.

Turning to Scottsdale's claim against the primary insurer, the court noted that "equitable subrogation to recover for bad faith failure to settle is no different in its effect than equitable subrogation employed in the factual scenario involved in *MOPERM,"* 399 S.W.3d at 74 (*MOPERM* involved an excess carrier seeking equitable subrogation from a primary insurer for amounts paid to settle a case on behalf of a joint insured, which was consistent with Missouri case law encouraging one insurer to pay the claim and pursue a subrogation action where multiple insurers cannot agree which is primary). The court then recognized for the first time an excess insurer's claim for equitable subrogation premised on a primary insurer's bad faith failure to settle. To recover, the excess insurer must establish the following essential elements:

1. That the primary insurer had the authority to settle a claim against its insured within (or by payment of) the primary policy limits;
2. That the primary insurer had the opportunity to settle a claim against its insured within (or by payment of) the primary policy limits;
3. That the primary insurer failed to do so in bad faith;
4. That the excess insurer made a payment within the limits of its excess policy to discharge an obligation it owed to the insured; and
5. That but for the excess insurer's payment, the insured would have incurred damages in the amount of the payment as a proximate result of the primary insurer's conduct.

The court clarified that a primary carrier's eventual tender of its limits towards settlement does not negate the "failing to settle within policy limits" element. Addressing United Fire's actions, the court found that if United Fire could have settled the claim against Wells Trucking for its $1 million policy limits, but failed to do so in bad faith, it is irrelevant that United Fire at some later point contributed its $1 million policy limits. Because United Fire had more than one opportunity to settle within its policy limits before the ultimate settlement, it seems that the only issue is whether its failure was "in bad faith."

Conclusion:

Recognizing Scottsdale's right to assert a claim for equitable subrogation premised on a primary insurer's bad faith failure to settle within its policy limits, the appellate court reversed and remanded for further proceedings. In abandoning *Dyer*'s first two bad faith elements, the court reduced potential defenses available to carriers. In particular, the defense that the insured failed to make demand that the insurer settle within its policy limits was eliminated. Further, in a footnote, the court suggests a jury may consider whether the insurer has attempted to settle a claim within its policy limits even in the absence of settlement demands from a claimant. Finally, in recognizing an excess carrier's right to pursue a tort claim against a primary carrier for its bad faith failure to settle, primary carriers may now face significant extra-contractual exposure well-beyond its primary policy limits. Only time will tell if this ruling becomes accepted law or is just an aberration.