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Utah Supreme Court Advances Policyholder Rights

Utah's highest court rejects an insurance company's attempt to use the equitable doctrines of unjust enrichment and restitution to recoup an above-limits settlement payment made by the insurer in settlement of an underlying claim, holding that recoupment is only available if explicitly provided for in the insurance contract.

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Weighing in on an issue that has split courts, the Utah Supreme Court recently held that a liability insurer that funds a settlement of an underlying claim against its policyholder for more than policy limits cannot later seek reimbursement of amounts paid in excess of policy limits under the "equitable principles" of unjust enrichment or restitution. Instead, the court held that recoupment is available only when the right is expressly provided in the insurance policy. *U.S. Fid. & Guar. Co. v. U.S. Sports Specialty Ass'n*, No. 20090657 (Utah Jan. 24, 2012) (*USF&G*). This decision underscores the need for policyholders to exercise caution before agreeing to any reserved right by an insurer handling the defense or indemnity of an underlying claim.

Background

A commercial liability policy typically provides that the insurer must defend and indemnify the policyholder for underlying lawsuits that do or may fall within the coverage of the policy. In some instances, an insurer may settle a claim against a policyholder even as the insurer contests coverage. When coverage is in dispute, the insurer will often defend and indemnify the policyholder subject to a "reservation of rights" to seek reimbursement from the policyholder if a court determines that the loss is not covered under the policy.

The *USF&G* decision places important limitations on an insurer's ability to recover payments that the insurer has made on behalf of a policyholder. *USF&G* arose when an injured party, seeking damages for personal injuries, sued the policyholder, the United States Sports Specialty Association (USSSA). United States Fidelity and Guaranty (USF&G) defended USSSA under a liability policy with policy limits of about $2 million. The case went to trial, and the jury found against USSSA and awarded the injured party approximately $6.1 million in damages.

USF&G filed various posttrial motions on USSSA's behalf, and the trial court agreed to stay execution of the judgment if USSSA posted a bond for the judgment amount of $6.1 million. USF&G initially posted only the $2 million provided for in the policy limits; USSSA demanded that USF&G post the

entire judgment amount, alleging that USF&G conducted the defense in bad faith.

USF&G offered to post the entire judgment amount—subject to a complete reservation of rights between the parties, including the "right" to seek reimbursement from USSSA of the difference between the $6.1 million judgment and the $2 million policy limits—and asked the policyholder to agree. USSSA rejected this offer and asserted that USF&G's failure to post the entire bond would cause even more harm to USSSA and give rise to additional claims of bad faith.

Faced with the policyholder's resistance, USF&G agreed to post the remainder of the bond under a "unilateral" reservation of rights. USF&G also filed a declaratory judgment action against its policyholder, seeking clarity on its coverage obligations. Meanwhile, USF&G settled the judgment for $4.825 million under another "unilateral" reservation of rights, including the "right" to seek reimbursement of the settlement amount in excess of the $2 million policy limits.

The Utah Supreme Court Decision

The *USF&G* court addressed whether the doctrine of restitution/unjust enrichment permitted USF&G to obtain reimbursement under these circumstances. Relying generally on principles set forth in the *Restatement (Third) of Restitution and Unjust Enrichment* (2011) USF&G argued that an insurer could seek reimbursement if the insurer (i) timely and expressly reserved its rights, (ii) notified the policyholder of its intent to make a "noncovered" payment, and (iii) expressly offered the policyholder the choice of assuming its own defense if the policyholder objected to the payment.

The Utah Supreme Court rejected USF&G's approach. Instead, the court held that under Utah law a claim for unjust enrichment cannot arise when there is an express contract covering the subject matter of the dispute. The subject matter of this dispute was broad—the insurer's and policyholder's relative legal rights under a policy of insurance. The court noted that insurance policies touch upon important public-policy concerns, holding the following:

> "We have an interest in protecting people who endeavor to use the insurance system to manage risk. We want them to make informed decisions. The very nature and existence of insurance revolves around understanding and manipulating the concept of risk: risk management, risk control, risk transference, risk distribution, [and] risk retention." *U.S. Fid. & Guar. Co.*, 2012 UT at ¶ 15, *quoting Ashby v. Ashby,* 2010 UT 7, ¶ 14, and *Iverson v. State Farm Mut. Ins. Co.*, 2011 UT 34, ¶ 19.
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> To this end, the legislature has enacted the Utah Insurance Code. . . . Among its various protections, the Insurance Code requires that parties to an insurance contract bargain for each term and express their agreement in written form. *U.S. Fid. & Guar. Co.*, 2012 UT at ¶ 16.

Using these principles as a guide, the court found that unless the right to reimbursement was "specifically bargained for," such a right "distorts the allocation of risk" between the insurer and the policyholder and "presents a perverse manipulation of risk that has no place in our law."

The Utah Supreme Court also gave no credence to the insurer's argument that disallowing a right to reimbursement would force insurers to pay uncovered losses or face threats of claims for bad faith. All

that is required to defeat a bad-faith claim, according to the court, is for "an insurer to act reasonably in its evaluation of a claim." Even if a policyholder were to demand that an insurer pay more than is due under a policy, that would have no effect on the insurer's obligation to act reasonably in fulfilling its coverage obligations.

Because the right to reimbursement would substantially alter the risk relationship under an insurance policy, and unjust enrichment cannot apply where an express contract addresses the subject matter of the unjust enrichment claim, an insurer has no right to reimbursement unless such right is expressly found in a policy.

Implications

This decision is a reminder to policyholders that they should exercise caution, and perhaps seek counsel, before agreeing to provide an insurer with a "right" that does not already exist in a policy. The insurance policy itself embodies the agreements between the parties and should not be subject to revision through the insurer's purported reservation of rights.

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