Excess Insurer v. Primary Insurer:
Court of Appeals Recognizes Right of Excess Insurer to Recover from Primary Insurer for Bad Faith Failure to Settle Within Policy Limits

Scottsdale Ins. Co. v. Addison Ins. Co., et al.,
2013 WL 5458918 (Mo.App. W.D. October 1, 2013)

In a matter of first impression, the Missouri Court of Appeals, Western District, held in *Scottsdale Insurance Company v. Addison Insurance Company, et al.*, that an excess insurer may recover on a theory of equitable subrogation amounts contributed from an excess policy as a result of the primary insurer's bad faith failure to settle a claim within policy limits.

The underlying personal injury claim arose out of an automobile accident involving a Wells Trucking employee and which resulted in the death of the other driver. Wells Trucking had a primary liability policy with United Fire & Casualty Co. ($1,000,000 limit), and an excess policy with Scottsdale Insurance Co. ($2,000,000 limit). The Scottsdale policy specified it would not apply unless and until the underlying United Fire policy had been exhausted.

The decedent's family demanded (and Scottsdale requested) United Fire settle for its $1,000,000 policy limits, but United Fire failed to do so. The decedent's family later increased their settlement demand to $3,000,000. United Fire and Scottsdale participated in mediation with the family, and the family agreed to accept a total settlement of $2,000,000, with United Fire and Scottsdale each contributing $1,000,000.

Scottsdale filed suit against United Fire, asserting seven alternative theories of recovery, including one for equitable subrogation.[1] United Fire filed a motion for summary judgment, arguing Scottsdale had no right under Missouri law to bring an equitable subrogation claim for an alleged bad faith failure to settle a claim within policy limits. The trial court granted United Fire's summary judgment motion and entered judgment in its favor.

On appeal, Scottsdale raised several issues, including that the trial court erred in entering summary judgment because Missouri law should permit an excess insurer to pursue a primary insurer for bad faith failure to settle within its policy limits under an equitable subrogation theory.

The *Scottsdale* court acknowledged that Missouri courts have recognized equitable subrogation claims in other contexts, but Missouri courts had yet to determine whether equitable subrogation could be employed to permit an excess insurer to recover for a primary insurer's bad faith failure to settle. The *Scottsdale* court looked to other jurisdictions and found that most jurisdictions have recognized these claims. The court decided that Missouri should align itself with the majority of jurisdictions on the issue.

The court's stated rationale was twofold: (1) to be consistent with the intended import of excess coverage as being implicated only after exhaustion of primary coverage; and (2) to promote the policy of encouraging settlements. To hold otherwise would permit a primary insurer to benefit from the fortuity of the insured's excess coverage and act as a disincentive to negotiate in good faith to settle a claim within primary policy limits.

Based on the foregoing rationale, the *Scottsdale* court held that the trial court erred as a matter of law in entering judgment in favor of United Fire on the equitable subrogation count. Before the court could determine whether the trial court's legal error necessitated reversal, however, it had to determine whether

[1] This article will focus solely on the equitable subrogation claim and will not discuss Scottsdale's six alternative theories of liability.

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the trial court erred in concluding that the uncontroverted facts negated Scottsdale's ability to establish the essential elements of the claim.

Noting that the Missouri Supreme Court has not expressly delineated the essential elements of a claim for bad faith failure to settle, the *Scottsdale* court set forth four essential elements, based on its review of other Missouri appellate opinions: (1) the insurer has the authority to settle a claim within policy limits; (2) the insurer has an opportunity to settle within policy limits; (3) the insurer fails to settle within policy limits; and (4) the insured suffers damage as a result.

The court concluded that the trial court erred in ruling that Scottsdale could not establish all of the essential elements of the claim. First, the trial court erred by concluding that a judgment in excess of the policy limits is an essential element of the claim. There is no binding authority in Missouri to support that and, while many bad faith failure to settle cases are filed after an excess judgment is entered, that is not the only means that can give rise to such a claim. For example, a settlement in excess of the policy limits, like the one in *Scottsdale*, can give rise to a claim. Therefore, the lack of an excess judgment was immaterial to whether Wells Trucking could have established a claim for bad faith failure to settle, and also immaterial to whether Scottsdale could establish a right to equitable subrogation.

Second, the trial court erred by concluding that United Fire did not actually fail to settle within its policy limits because it in fact had paid its policy limits following the settlement reached at mediation. Rejecting that argument, the *Scottsdale* court found that a primary insurer's mere payment of its policy limits, at some point, does not negate the essential element of failing to settle within the policy limits. "Unless the payment of policy limits alone yields a resolution of the claim, it is axiomatic that the primary insurer has failed to settle the claim within its policy limits." In other words, the insurer does not satisfy its duty to protect the financial interests of an insured merely by remitting payment of its policy limits, if the evidence demonstrates that the insurer had the opportunity to fully settle a claim within the policy limits but failed in bad faith to do so. Therefore, it was legally irrelevant that, at a later point in time, United Fire contributed its $1,000,000 policy limits towards a settlement that exceeded the limits of the primary policy.

In summary, the *Scottsdale* court held that the trial court committed legal error when it determined that Missouri does not recognize an excess insurer's ability to recover from a primary insurer for bad faith failure to settle on a theory of equitable subrogation. The trial court also committed legal error when it concluded that Scottsdale could not establish the essential elements of the claim based on the uncontroverted facts. As a result, the appellate court reversed the trial court's judgment as to those points and remanded for further proceedings.

The case is significant for primary insurers because it shows that the mere payment of the primary policy limits may not insulate them from liability for a bad faith failure to settle claim if the primary insurer had an opportunity to settle the claim within the policy limits and failed to do so. The case is significant for excess insurers because it provides precedent for equitable subrogation claims to recoup monies paid to resolve claims that could have been resolved earlier without reaching the excess coverage layer.

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