BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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Between A Clock And A Hard Case: Insurer Faced With Time Limit Demand To Settle For Policy Limits For One Insured And Not Another

Sometimes there is an insurance coverage situation even more controversial than an insurer disclaiming coverage in a mega-damages case. That is -- paying its limits in such case. Consider an insurer that is defending an unquestionably at-fault insured, in a claim involving damages that could easily exceed the insured's policy limits and a plaintiff that is willing to settle for such limits. This should be a hot knife through butter situation for the insurer. And often-times it is. But sometimes it is just the opposite. For various reasons, problems sometimes abound for an insurer that just wants to write a check for its policy limits. I've always marveled at this strange contradiction.

Last week a Texas District Court issued an opinion in one of these impossible-to-please-everyone situations for an insurer. In *Pride Transportation v. Continental Casualty Company*, the court was faced with the following situation.

Krystal Harbin, an employee of Pride Transportation (an interstate motor carrier), was involved in an accident in which she rear-ended a pick-up truck driven by Wayne Hatley. Mr. Hatley was rendered a paraplegic. Pride was insured under a $1 million primary policy and a $4 million excess policy. The primary insurer undertook the defense of both Harbin and Pride.

The Hatleys made a time limit settlement demand to Harbin alone to settle their claims for the combined $5 million limits of both policies. The demand did not include their

claims against Pride. Pride's counsel demanded that the primary insurer tender its policy limits to the excess insurer, which it did. The excess insurer then took over the settlement negotiations.

The excess insurer attempted to respond to the Hatleys' offer by seeking permission to make a counteroffer settling all claims against both defendants for the limits of both policies. The Hatleys, however, refused to include Pride in the settlement. Harbin's counsel demanded that the excess insurer accept the offer on behalf of Harbin. The excess insurer accepted the offer on Harbin's behalf. The Hatleys signed a formal settlement agreement containing a release of all of the Hatleys' claims against Harbin. Because its policy limits were now exhausted, the excess insurer withdrew from further defense of Pride. Pride then settled the Hatleys' claims for an additional $2 million.

This was not an easy situation for the excess insurer. There was an opportunity to settle the case for Harbin and Harbin's counsel demanded that the excess insurer accept the offer on behalf of Harbin. Any failure to settle for Harbin would invariably lead to a bad faith claim by Harbin. Of course, since any settlement for Harbin will exhaust the policies – leaving nothing for Pride, either in the way of defense or limits for any future settlement – it will invariably lead to a bad faith claim by Pride. And it did.

While the case has various complexities and delves into Texas's *Stowers* doctrine, the court confronted head-on the situation of an insurer that has an opportunity to settle a case for one insured, where such settlement will exhaust the limits of liability and leave nothing under the policy for another (non-settling) insured. The court concluded that the excess insurer's decision to settle the case for Harbin, notwithstanding that it exhausted the policy for Pride, was acceptable:

[A]n insurer "faced with a settlement demand arising out of multiple claims and inadequate proceeds ... may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims .... Such an approach ... promotes settlement of lawsuits and encourages claimants to make their claims promptly."

Pride Transportation at 7 (quoting *Tex. Farmers Ins. Co. v. Soriano,* 881 S.W.2d 312, 315 (Tex.1994)).

A settlement offer given to only one insured that would exhaust coverage under the liability limit of the policy creates a dilemma for the insurer. An insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds. By accepting the offer the insurer would avoid being subjected to liability exceeding the policy limits due to its rejection of a reasonable offer. Further, any settlement would benefit all insureds by decreasing the total amount of liability in the underlying suit.

Id. at 8 (quoting *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil,* 959 S.W.3d 864, 870 (Mo. Ct. App. E.D. 1997)).

The absence of a rule that allows insurers to settle for one insured, without being in bad faith to another insured, would allow plaintiffs' attorneys to game the system, and leave insurers powerless to stop it. Anytime a plaintiff's attorney was representing a client with claims against two or more insureds – especially under a policy with insufficient limits -- he or she need only make a limits demand against one insured. If such a demand should obviously be accepted, but the insurer cannot do so because it would mean committing bad faith against the non-settling insured, the plaintiff's attorney has now performed insurance alchemy -- turning a policy with low limits into one with no limits.

A copy of the Northern District's of Texas's March 31, 2011 decision in *Pride Transportation v. Continental Casualty Company* can be accessed here:

https://ecf.txnd.uscourts.gov/cgi-bin/show_public_doc?2008cv0007-180

If you have any questions, please let me know.

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