BINDING AUTHORITY
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Seven Mississippi Rush: State's Appeals Court Allows Excess Insurer to Get Two Hands On Negligent Defense Counsel

This is usually the part of *Binding Authority* where I say something silly – sometimes Sophomoric – and then attempt, with mixed results, to connect it to the coverage decision under review. Some of you have told me that this is also the only part of *Binding Authority* that you actually read. If you are one of those, take comfort in knowing that you are not alone.

But this issue of *Binding Authority* is all serious. That is the only way that I can express my thanks for your tremendous support for "General Liability Insurance Coverage -- Key Issues In Every State." After less than two weeks on sale the book is going into a second printing. It is currently sold-out on Amazon (except for a few copies from Amazon retailers) and I've been told by Oxford University Press that its supply is very low. The readers of *Binding Authority* have been a huge factor in the book's early success. After all, there are only so many copies I can get my relatives to buy. Jeff and I both express our sincere thanks for your support and the kind words about the book that some of you have shared. [If you attempt to order the book, and are informed that it is back-ordered, I have been told by Oxford that this back-order period will be very short.]

Moving on…This week's decision from the Mississippi Court of Appeals in *Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer* does not involve a "coverage" issue, in the usual sense of that term. However, it clearly involves the amount of an insurer's liability for a covered claim.

At issue was whether an excess insurer can sue its insured's defense counsel, alleging that, because counsel mishandled the defense, it resulted in an unnecessarily large settlement, which increased the excess insurer's liability. It is not entirely surprising that a situation like this would arise.

In general, defense counsel is chosen by the primary insurer. Unlike the primary insurer, who may have a long panel relationship with defense counsel, the excess insurer may not know defense counsel from Adam. The excess insurer may not be getting the same frequency of status reports as the primary insurer – and may not be as involved in day to day activities as the primary insurer. Not to mention that, if defense counsel is not making the excess insurer aware of the true potential for an unfavorable outcome, or painting too rosy of a picture of the insured's liability or damages, then the excess insurer

may not be monitoring the case as closely as it otherwise would, if it were known to be a case that had a greater chance of impacting its policy.

Given all of this, when a case goes south, it may come as more of a surprise to the excess insurer than the primary insurer. Clients do not like surprises. What's more, if defense counsel commits malpractice, or fails to accurately report on the problems in a case, it may be no harm – no foul for the primary insurer. After all, the claim may have exhausted the primary limits no matter what defense counsel did. The consequences of defense counsel malpractice, or overly optimistic reporting, are no doubt greater for the excess insurer than the primary insurer.

Here was the situation in *Great American* – a brief, clear and to the point opinion.

Shady Lawn Nursing Home was named as a defendant in nursing home liability suits. Shady Lawn was insured by Royal under a primary policy and had an excess policy through Great American. Royal hired the Quintairos firm to defend the cases against Shady Lawn. Quintairos sent Royal and Great American periodic updates regarding the status of proceedings and estimated settlement value of the cases. However, Great American alleged that the status updates consistently undervalued the underlying cases so as to intentionally avoid giving Great American notice that its excess coverage may be needed. Other concerns with the Quintairos firm were that the partners and trial counsel were not licensed to practice law in Mississippi and the attorneys had failed to designate medical experts in a timely manner. Great American contended that it did not learn of these problems until Quintairos issued a litigation report valuing the expected cost of the case to be between $3 million and $4 million. Quintairos had previously projected the cost to be $500,000. *Great American* at 3.

The Mississippi Court of Appeals first held that the excess insurer could <u>not</u> bring a direct claim for malpractice against defense counsel. The court held that, because no Mississippi case law existed abolishing the requirement of an attorney-client relationship in regard to an excess insurer, the Court did not have authority to sanction a direct action for legal malpractice. *Id.* at 7.

However, the court held that Great American could recover through equitable subrogation, which would permit Great American to enforce the existing duties of defense counsel to the insured and recover damages if negligence is found. *Id.*

The *Great American* court explained its decision as follows:

It is logical that an excess-insurance carrier should be allowed to pursue a claim in the insured's place. Shady Lawn had no incentive to pursue a legal-malpractice claim against Quintairos even if it believed Quintairos to be negligent because it had insurance in place to pay the settlement. Also, Royal had no incentive to pursue a claim if it believed the settlement valueto be at or near the policy limits of the primary coverage regardless of the alleged malpractice. The only winner produced by an analysis precluding liability would be the malpracticing attorney. We recognize that a possibility

exists that this may result in frivolous claims by excess-insurance carriers; but, for this Court to prohibit legitimate claims would leave the attorney who allegedly committed malpractice free from consequences if the primary insurer declined to pursue a claim. Also, we find that a conflict is not created by allowing Great American to seek equitable subrogation against Quintairos for legal malpractice. Great American and Shady Lawn have the same interest in this litigation – Shady Lawn's competent representation. Further, Quintairos has already shared attorney-client communications and work product with Great American in the underlying cases.

Id. at 7-8 (citation and internal quotes omitted).

The moral of the story for defense counsel is obvious, as is the significance of the right that the *Great American* court handed to excess insurers. Again, when a case goes south, the consequences for an excess insurer can be monumental, while the consequences for the primary insurer may be non-existent.

A copy of *Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer* can be accessed here:

http://www.mssc.state.ms.us/Images/Opinions/CO67159.pdf

Please let me know if you have any questions.

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