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California Law – Excess Insurance – Duty To Accept Reasonable Settlement Offers

Excess Liability Insurer Has No Claim Against Primary Insurer For Failure To Accept A Reasonable Settlement Offer Within The Primary Insurer's Policy Limits Where Suit Is Ultimately *Settled* In Excess Of Those Limits

By David P. Borovsky and Howard M. Garfield

RLI Insurance Company v. CNA Casualty of California – 06 CDOS 6125, California Court of Appeal, Second District, July 7, 2006

Aartman carried liability insurance through CNA (primary), and RLI, (excess). Each policy had liability limits of $1 million. Aartman was involved in a traffic incident in which Bodirsky was killed. Bodirsky's estate sued Aartman, and during litigation, offered to settle their claim for $1 million. The primary insurer rejected the settlement offer, which was within the limit of its policy.

One year later, the suit settled for $2 million, with both the primary and excess carriers paying their $1 million policy limit. The excess insurer then sued the primary insurer, asserting an equitable subrogation claim, and seeking to recover the $1 million it paid, which could have been avoided had the primary carrier accepted the original $1 million settlement offer.

The primary carrier moved for judgment on the pleadings, arguing that because the Bodirsky lawsuit settled, as opposed to being litigated to judgment, the excess carrier had no right to pursue an equitable subrogation claim. The trial court agreed, and the excess carrier appealed.

The appellate court affirmed, reasoning that where a subrogation claim is asserted, the excess carrier has no greater rights than the insured. Moreover, where a primary insurer unreasonably refuses to settle, until and unless an excess *judgment* is entered against the insured, the insured has suffered no tangible harm. Thus, the court concluded, absent an excess judgment, neither the insured nor an excess carrier (whose rights are no greater than the insured) has a valid claim for damages against the primary carrier. For that reason, a settlement in excess of the primary policy limits cannot give rise to a valid cause of action by an excess insurer against a primary insurer.

In reaching this conclusion, the appellate court declined to follow the contrary conclusion reached by another division of the Second Appellate District in ***Fortman v. Safeco Ins. Co.*** (1990) 221

Cal.App.3d 1394. This split of authority in the Second Appellate District calls into question the rights of an excess insurer in such circumstances, and may ultimately lead to review of the issue by the California Supreme Court.

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