Excess Insurer Is Not Liable For Claims Against Primary

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Body

An excess insurer is not required to "drop down" and provide coverage where the primary insurer goes insolvent and a guaranty association assumes liability, the Sixth Circuit U.S. Court of Appeals ruled March 24 (Harry P. Pilling, et ux. v. Virginia Property & Casualty, et al., No. 01-5176, 6th Cir.).

(Opinion available 10-040408-006Z)

Fatal Accident

In May 1997, Kenneth Charles and his passengers were killed when he drove his pickup truck the wrong way on a Kentucky highway and collided head-on with a tractor-trailer driven by Harry and Christine Pilling. The Pillings sustained serious physical and mental injuries, and the tractor-trailer was totaled.

Anticipating that their damages would exceed the $100,000 policy limit that Charles' insurer, USAA, had paid them, they asked a Kentucky state court for a declaratory judgment as to the underinsured motorist coverage (UIM) levels provided under a policy issued by Travelers Indemnity Co., which covered the leased tractor-trailer, and Reliance Insurance Co., the Pillings' own insurer. They also asked the court to determine the priority of those policies.

Travelers removed the action to the U.S. District Court for the Western District of Kentucky.

District Court Findings

The District Court found that the Pillings are entitled to $750,000 in UIM coverage from Travelers and $1 million in UIM coverage from Reliance. The court added that these policies are nonstacking and that the total must be reduced by the $100,000 payment by USAA.

The District Court then ruled that Reliance is the primary UIM insurer and Travelers is the excess UIM insurer. All three parties appealed.

Christine Tran

Meanwhile, Reliance was ordered into liquidation by the Commonwealth Court of Pennsylvania and the District Court stayed the appeals. The District Court later lifted the stay and substituted the Virginia Property & Casualty Insurance Guaranty Association for Reliance in the pending cases.

On the eve of oral arguments, the Pillings and Travelers settled and dismissed their actions.

Priority

The Travelers and Reliance policies both said the UIM coverage "provides primary insurance for any covered 'auto' you own and excess insurance for any covered 'auto' you don't own." But on the MCS-90 compliance statement attached to the Travelers policy, the Pillings indicated that they wished the Travelers coverage to be primary.

The District Court concluded that the MCS-90 statement did not alter the priority because it addresses only liability for negligence and leaves "all terms, conditions, and limitations" in the policy "in full force."

The appellate court agreed, noting that the MCS-90 form clearly makes primary the carrier-lessee's insurance for judgments arising from the negligent operation of the vehicle but otherwise leaves in full force and effect the insurance contract, including the contract's terms, conditions and limitations regarding UIM coverage.

Exhaustion Of Remedies

The "exhaustion of remedies" provision in the guaranty act says, "Any person having a claim against an insurer under any provision in an insurance policy . . . shall be required to first seek recovery under the policy covered by the insurer which is not insolvent. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under the insurance policy."

The Virginia fund argued that the Travelers policy, even if excess, is "any" provision in an insurance policy, therefore the Pillings must seek payment from Travelers before the Virginia fund is obligated to make any payment. But the panel noted that the phrase "Any person having a claim against an insurer" requires a determination of whether the Pillings "have a claim against a [solvent] insurer under any provision in an insurance policy."

'Drop Down' Agreement

Because the Travelers policy was written and delivered in Ohio, the panel applied Ohio law to determine whether the Pillings have a claim against Travelers. Under Ohio law, excess insurers do not have a duty to "drop down" and assume coverage in the event of the primary carrier's insolvency unless the excess carrier expressly agrees to provide "drop down" coverage.

The Ohio Court of Appeals has ruled that an excess insurer is not generally liable for any part of the loss covered by other insurance (collectible or uncollectible). Rather, it is liable only for the loss in excess of the coverage provided by all other applicable policies.

In this case, the Travelers policy does not contain an express "drop down" agreement, the panel noted. Furthermore, the language clearly states that the coverage provided by Travelers is excess over the coverage of the Pillings' primary insurance.

Counsel for the Pillings is Henry K. Jarrett III, Ronald S. Smith and Joseph Leonard Rosenberg, of Jarrett & Campisano in Louisville. Travelers is represented by Elizabeth U. Mendel of Woodward, Hobson & Fulton in Louisville. The guaranty association is represented by Robert J. Franco, Julie M. Cho and Richard M. Kuntz of Bollinger, Ruberry & Garvey in Chicago.

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