

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

KATHLEEN SCHMITZ and CRAIG EWING,

Appellants-Respondents,

v.

GREAT AMERICAN ASSURANCE COMPANY a/k/a
GREAT AMERICAN INSURANCE,

Respondent-Appellant.

DOCKET NUMBER WD71160
(Consolidated with WD71198)

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: June 1, 2010

APPEAL FROM

The Circuit Court of Boone County, Missouri
The Honorable Gary M. Oxenhandler, Judge

APPELLATE JUDGES

Division Two: Mark D. Pfeiffer, Presiding Judge, and Victor C. Howard and Alok Ahuja,
Judges

ATTORNEYS

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did not contest the lawsuit and Schmitz and Ewing obtained a judgment in the amount of \$4,580,076.

In the equitable garnishment action to collect on that judgment, the trial court ruled that the insurers should have indemnified CPB. Virginia Surety settled with Schmitz and Ewing. In the settlement agreement filed with the court, Schmitz and Ewing noted that \$700,000 paid by Virginia Surety not only settled the \$1,000,000 liability of Virginia Surety, it also represented a \$1,000,000 credit against Schmitz and Ewing's claims for the liability coverage of Great American.

The trial court interpreted General American's insurance contract to find that its coverage was only reached when the underlying insurance was exhausted by actually paying the full limits of their coverage and not when they settled for an amount less than that coverage.

On appeal Schmitz and Ewing argued that the 1929 case of *Handleman v. United States Fidelity & Guaranty, Co.*, 18 S.W.2d 532 (Mo. App. 1929), stood for the proposition that, as a matter of public policy, exhaustion occurs when a primary insurer settled all claims as long as the excess insurer received credit for the entire amount of the primary insurer's coverage limits irrespective of the language of the excess insurer's contract with the insured. In rejecting this argument, we noted that the cited language of *Handleman* was not essential to their holding and was consequently *obiter dicta*. Even if the language was not *dicta*, the court's discussion in *Handleman* did not establish a policy argument but instead was an interpretation of the insurance contract in that case.

Absent a statute or an established public policy dictating coverage, our review of whether insurance coverage is applicable is governed by a review of the underlying insurance contract. In the instant case, our review of the insurance contract found that Great American's obligation to pay excess liability insurance coverage to appellants occurred only if Virginia Surety's \$1,000,000 of underlying limits of insurance were exhausted *solely* by *payment* of those specified amounts of money *actually paid* in settlement or satisfaction of a claim. Since the relevant whole amount of the specified amount of money is the Virginia Surety liability policy limit of \$1,000,000, the "actual payment" anticipated by the Great American insurance contract is the actual payment of \$1,000,000 by Virginia Surety.

Opinion by: Mark D. Pfeiffer, Judge

June 1, 2010

Dissenting opinion by Judge Alok Ahuja:

The issue confronting the Court – whether Great American has an obligation to pay amounts for which CPB has been found liable in excess of its primary coverage – is directly addressed by the "When 'Loss' is Payable" provision of Great American's excess policy. That provision states that Great American's payment obligations accrue when the insured or its primary carrier are "obligated to pay" amounts in excess of primary coverage, and when the amount of that obligation "has finally been determined." Those conditions are satisfied here. The majority's holding that exhaustion of primary coverage requires actual payment in cash of the underlying policy limits is also inconsistent with *Handleman* and the cases following it,

which hold that “payment” of underlying limits does not require the actual outlay of cash, but can occur where the primary carrier settles the underlying claim against the insured for the full amount of the underlying insurance. That occurred here. Reading the policy as the majority suggests turns Great American’s policy into a reimbursement agreement, under which it would only be required to indemnify CPB for sums which had already been paid by another. Such a construction is inconsistent with multiple provisions of the Great American policy.

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