

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**SCOTTSDALE INSURANCE
COMPANY AND WELLS
TRUCKING, INC.**

APPELLANTS,

**v.
ADDISON INSURANCE COMPANY,
ET AL.**

RESPONDENTS.

DOCKET NUMBER WD75963

DATE: October 1, 2013

Appeal From:

Linn County Circuit Court
The Honorable Gary E. Ravens, Judge

Appellate Judges:

Division Three: Lisa White Hardwick, Presiding Judge, Mark D. Pfeiffer and Cynthia L. Martin,
Judge

Attorneys:

Kenneth M. Lander, St. Louis, MO, and Alan Yuter, for appellants.

John G. Schultz, Jill E. Frost and Suzanne R. Bruss, Kansas City, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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COMPANY AND WELLS
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APPELLANTS,

v.

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Linn County

Before Division Three: Lisa White Hardwick, Presiding Judge, Mark D. Pfeiffer and Cynthia L. Martin, Judge

The trial court entered summary judgment in favor of the primary insurer and against an excess insurer and the insured on seven alternatively pled causes of action, each of which sought to recover the amount the excess insurer contributed toward the settlement of a lawsuit against the insured after the primary insurer allegedly failed to settle within policy limits. We conclude that an excess insurer can recover on a theory of equitable subrogation amounts contributed from an excess policy as a result of the primary insurer's bad faith failure to settle a claim within policy limits. The uncontroverted facts in this case did not negate any of the essential elements of that cause of action.

Affirm in part and reverse in part, and remand for further proceedings consistent with this Opinion.

1. We need not resolve whether Missouri permits the assignment of a claim for bad faith failure to settle. The damages the excess insurer sought to recover could not be recovered through the insured's assignment regardless its lawfulness. Because an assignment delivers to an assignee the rights of an assignor, the assignee becomes the real party in interest entitled to assert the assignor's claim and to recover the assignor's damages. Here, the excess insurer was not seeking to recover damages incurred by the insured. It was seeking to recover the damages it incurred--the amount it paid from the excess policy limits. The assignment lends nothing to the excess insurer's efforts to recover its damages.

2. The contractual subrogation provision in the excess insurer's policy does not create a cause of action against the primary insurer. It merely requires the insured to permit the excess insurer to assert the insured's rights. Any right the excess insurer has to seek subrogation from the primary insurer exists, if at all, as a function of equity, and is thus subsumed in the excess insurer's equitable subrogation claim.

3. A primary insurer does not have a direct duty to act in good faith for the benefit of an excess carrier. The primary insurer's duty to negotiate in good faith for its insured is attendant to the contractual relationship between the insured and the insurer, and is in part a function of that which the insured is entitled to expect upon payment of a premium. In this case, no such relationship exists between the excess insurer and the primary insurer. There is thus no contractual framework within which to superimpose an implied duty to act in good faith.

4. Missouri aligns with the majority of jurisdictions to recognize an excess insurer's ability to recover from a primary insurer for bad faith failure to settle on a theory of equitable subrogation. In such a case, the excess insurer is not enforcing a duty owed directly to it by the primary insurer, but is merely seeking to recover the amounts the primary insurer would have been obligated to pay its insured but for the excess insurer's performance.

5. We take the opportunity to clarify the essential elements of a claim of bad faith failure to settle when asserted by an insured. The elements are:

- (1) that the insurer has the authority to settle a claim against its insured within (or by payment of) the policy limits;
- (2) that the insurer has the opportunity to settle a claim against its insured within (or by payment of) the policy limits;
- (3) that the insurer fails to settle a claim against its insured within (or by payment of) the policy limits in bad faith; and
- (4) that the insured suffers damage as a proximate result.

6. The essential elements of a claim for equitable subrogation asserted by an excess insurer as a result of the bad faith failure of the primary insurer to settle are:

- (1) that the primary insurer had the authority to settle a claim against its insured within (or by payment of) the primary policy limits;
- (2) that the primary insurer had the opportunity to settle a claim against its insured within (or by payment of) the primary policy limits;
- (3) that the primary insurer failed to do so in bad faith;
- (4) that the excess insurer made a payment within the limits of its excess policy to discharge an obligation it owed to the insured; and
- (5) that but for the excess insurer's payment, the insured would have incurred damages in the amount of the payment as a proximate result of the primary insurer's conduct.

7. The trial court erroneously found that two essential elements of a claim for bad faith failure to settle were not established by the excess insurer. The primary insurer's mere payment of policy limits does not operate to negate the element of failure to settle a claim within policy limits in bad faith. The entry of a judgment against the insured in excess of policy limits is not an essential element of a claim of bad faith failure to settle as there are other means by which the insured may incur proximately caused damage.

Opinion by Cynthia L. Martin, Judge

October 1, 2013

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