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NEWSLETTER

Excess Insurer Can Assert Legal Malpractice Subrogation Claims

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A federal district court, applying Illinois law, has held that an excess insurer could assert claims for conventional subrogation against a number of attorneys defending a discrimination suit asserted against its policyholder, Illinois State University. *TIG Insurance Co. v. Chicago Ins. Co.*, No. 00C2737, 2001 U.S. Dist. LEXIS 986 (N.D. Ill. Feb. 1, 2001). The court also dismissed the excess liability insurer's claim for contribution against a professional liability insurer for the attorneys, holding that no claim for contribution could be sustained because the carriers had not insured the same parties against the same risks.

Illinois State University ("ISU") was sued in a class-action gender discrimination suit in federal district court in Illinois. ISU hired counsel to defend it in connection with the class action, but then charged the attorneys with legal malpractice after the attorneys were sanctioned by the court for abuse of the discovery process during the case. ISU's excess insurer, TIG Insurance Company ("TIG"), paid fees and costs in excess of $700,000 to defend against the motion for sanctions against the attorneys and litigation arising from that motion. TIG then filed this complaint against the individual attorneys to recover those costs. TIG also filed a claim for contribution against Chicago Insurance Company ("CIC"), which had issued a professional liability policy to the attorney defendants. The attorney defendants and CIC filed motions to dismiss.

The court refused to dismiss TIG's claim for conventional subrogation against the attorneys, rejecting the attorney defendants' argument that Illinois public policy barred TIG from asserting ISU's legal malpractice claim against them via the subrogation doctrine. In so holding, the court distinguished the assignment of legal malpractice claims from subrogation claims. The court reasoned that, unlike assignment, subrogation would not lead to the merchandising of malpractice claims, encourage baseless lawsuits, damage the attorney-client relationship or inappropriately increase malpractice litigation. Further, the court determined that TIG had stated a viable claim for conventional subrogation because TIG paid ISU for damages it incurred as a result of the attorney defendants' mishandling of discovery in the class action suit, thus transferring ISU's malpractice claim to TIG via the subrogation clause of the policy.

By contrast, the court dismissed TIG's claim for legal subrogation. To state a claim for legal subrogation, TIG had to allege that: (1) it paid ISU in full for the damages caused by the malpractice; (2) the attorney defendants were primarily liable for the money it paid to ISU; (3) ISU had a right to recover from the attorney defendants, which TIG sought to enforce; and (4) TIG did not voluntarily pay ISU for the damages, but was

legally obligated to do so. Because the court determined that TIG acted as a volunteer when it paid ISU's damages (because the plain language of the policy did not require it to pay legal fees occasioned by the attorney defendants' malpractice), the court concluded that TIG could not state a claim for legal subrogation.

The court also dismissed TIG's claim for legal malpractice because no attorney-client relationship existed between TIG and the attorney defendants. In so holding, it rejected TIG's argument that the "tripartite relationship" that exists among an attorney, an insured and a primary insurer should be expanded to include the excess insurer, reasoning that, unlike a primary carrier, TIG had no authority to direct the activities of the attorney defendants.

Finally, the court rejected as contrary to Illinois public policy TIG's direct action claims against CIC. In addition, the court denied TIG's claim for contribution against CIC, observing that a claim for equitable contribution arises only when two or more insurers have policies that cover the same parties, insurable interests and risks. Because TIG affirmatively alleged that CIC did not insure the same parties against the same risks, the court concluded that no claim for contribution could be sustained.