

Delaware Supreme Court Enforces Consent To Settle Clause

September 2009

The Supreme Court of Delaware, applying Missouri law, has held that an insurer acted in good faith in objecting to a settlement reached at a mediation that it did not attend pursuant to an agreement with the insured. *Hilco Capital, LP v. Fed. Ins. Co.*, 2009 WL 2426674 (Del. Aug. 10, 2009). The court also affirmed a jury finding that the insurer acted reasonably in withholding its consent to the settlement.

The insured, a now-defunct hardware supplier, was sued by two of its former lenders for alleged misrepresentations during the lending process. The complaint alleged that the insured misrepresented the value and amount of its inventory when it sought financing from its lenders. The insured had obtained multiple layers of directors and officers insurance coverage. The particular insurer involved in this appeal provided coverage excess of a \$10 million primary policy. The primary policy contained a consent to settle clause providing that the insured "shall not . . . enter into any settlement agreement . . . without the prior written consent of the Insurer. . . . The Insurer's consent shall not be unreasonably withheld."

During the course of the underlying litigation, the parties participated in a mediation. Although the primary insurer attended, the insured, the primary insurer and the excess insurer agreed that the excess insurer should not attend because the reasonable value of the claim was within the primary limits. At the mediation, without advising the excess insurer, the parties agreed to a so-called "high-low" arrangement calling for arbitration of a single issue. In the event the lenders prevailed, it would recover an amount that would require a substantial contribution by the excess carrier. The insured, however, did not seek the excess insurer's consent to this arrangement. Additionally, the insured signed an agreement assigning its rights against its insurers to the lenders on the eve of a settlement conference with the court. After being presented with the arrangement, the excess insurer objected at the settlement conference. The arbitration nonetheless was held, and the lenders prevailed. The lenders commenced this coverage litigation pursuant to the assignment from the insureds to recover the portion of the settlement allegedly payable under the excess policy.

The insured argued that the excess insurer breached its obligation of good faith and fair dealing in opposing the arbitration arrangement and settlement. The insured argued that although the excess insurer had the "sole discretion" to participate in a settlement conference, it violated the implicit duty of good faith and fair dealing by insisting that the primary policy be exhausted or that the primary insurer agree to contribute its full policy

limit before joining settlement negotiations. Although the court acknowledged that the insurer did have a duty of good faith that tempered its "sole discretion," the court explained that there was no violation in this case because it was agreed that the excess insurer would not participate in the settlement negotiations, and the insured agreed to the arbitration arrangement and assigned its rights under the excess policy before contacting the excess insurer. According to the court, challenging this arrangement was the excess insurer's "only recourse" and therefore not in bad faith.

The insured also argued that the excess insurer could not rely on the consent to settle provision contained in the primary policy to deny coverage. The court disagreed. The court held that the excess policy incorporated the provisions of the primary policy. As to the application of the consent to settle provision, the insured challenged the trial court's jury instruction because it included the following statement: "it is not enough for the [claimants] to show that the settlement offer was reasonable, or that other individuals or insurers might have consented to the settlement under the same circumstances." According to the insured, this instruction incorrectly posed a "subjective" standard. The insured asserted, in contrast, that it should be sufficient that the settlement was reasonable. The court disagreed, concluding that the jury instruction was appropriate and that the reasonableness of the settlement amount constitutes one of many factors that the jury could appropriately consider in assessing whether the insurer reasonably exercised its right to withhold its consent to the settlement.