

Excess Insurer Entitled To Recover Partial Refund Paid By Trustee To Primary Insurer Following Policy Limits Settlement With Primary Insurer

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Applying Texas law, the United States Bankruptcy Court for the Northern District of Texas has held that a primary insurer that "exhausted" its policy limits by agreeing to pay the insured's bankruptcy estate its remaining policy limits, while stipulating that a significant portion of this payment would be returned to the insurer by the estate's bankruptcy trustee, was required to reimburse the excess insurer the value of the returned payments made by the trustee. *Yaquinto v. Admiral Ins. Co., Inc.* (In re Cool Partners, Inc.), 2010 WL 1779668 (Bankr. N.D. Tex. Apr. 30, 2010).

Prior to filing for chapter 7 bankruptcy in 2002, the insured raised approximately \$20 million through stock sales. Various lawsuits were filed against the insured and certain of its directors and officers as a result of alleged fraud and misstatements in connection with the stock sales. The insured tendered the lawsuits to its primary D&O insurer, which provided \$5 million in coverage, as well as its excess insurer, which provided an additional \$5 million in coverage. The excess policy contained a condition precedent specifying that coverage did not attach until the primary policy's limits were exhausted.

During a mediation with the underlying plaintiffs, the bankruptcy trustee, and the two insurers, the plaintiffs and trustee agreed to settle with the primary insurer for payments constituting the remainder of the primary policy limits. After learning of this settlement, the excess insurer entered into a high/low settlement agreement with the trustee with respect to the remaining \$1.6 million sought by the plaintiffs and the trustee to resolve the underlying claims. When the settlement agreements were publicly filed as part of the bankruptcy approval process, the excess insurer learned that, although the primary insurer had paid its remaining policy limits towards settlement, the primary insurer was to recoup as much as \$1 million from the insured's estate through satisfaction of various unsecured claims asserted by a subsidiary of the primary insurer against the estate. The excess insurer then filed suit against the primary insurer and its subsidiary on the basis of the previously undisclosed payment to the primary insurer's subsidiary, and argued that the primary insurer had not actually exhausted its policy limits because it ultimately recouped some of the policy payments from the trustee.

In the ensuing litigation, the excess insurer pursued claims for fraud, violation of the Texas Insurance Code, equitable subrogation and unjust enrichment. The court dismissed the fraud cause of action, holding that the primary insurer had no legal duty to disclose the terms of the settlement to the excess insurer. The court also dismissed the Texas Insurance Code cause of action, holding that the statutes relied upon by the plaintiff were not designed to protect excess insurers from the conduct of primary insurers. With respect to the equitable subrogation and unjust enrichment causes of action, however, the court found for the excess insurer, concluding that it was "flim-flammed" by the primary insurer and the trustee. The court held that the excess insurer should have received the benefit of the funds received by the subsidiary of the primary insurer as a result of the settlement agreement. Accordingly, the court ordered the primary insurer to pay the excess insurer the amount it received as a result of the unsecured claim of its subsidiary, plus interest. In addition, pursuant to Texas law, the court awarded the excess insurer its attorneys fees in litigating the adversary proceeding.