

# Insurer Not Entitled To Recoup Settlement Payment Absent Express Provision in the Policy

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The United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, has held that an insurer may not assert a breach of contract claim for reimbursement of settlement payments that it was not obligated to pay absent an express provision in the policy permitting reimbursement. *AXIS Spec. Ins. Co. v. The Brickman Group LTD, LLC*, 2010 WL 4720754 (E.D. Pa. Nov. 18, 2010). The court further held that an insurer could seek to recoup settlement payments under an unjust enrichment theory, but not under the circumstances in this case.

In 2006, a third party commenced an action against the insured landscape maintenance company and a hardware store for failure to remove snow from the hardware store parking lot. During the relevant time period, the landscape maintenance company was self-insured for the first \$250,000 of liability and maintained a \$750,000 excess policy and a \$5 million umbrella policy. The excess carrier tendered its limit to the umbrella insurer and permitted the umbrella insurer to negotiate a settlement with the claimant.

Counsel for the umbrella insurer negotiated a settlement with the third party resolving the claims against the insured for \$1.15 million. Counsel for the umbrella insurer informed counsel for the insured that the settlement would be comprised of the full excess policy limit and \$400,000 from the umbrella policy layer. In a subsequent conference call, both the landscape management company and the excess insurer objected to the proposed settlement on the grounds that it did not include a release of the hardware store, but counsel for the umbrella insurer insisted on moving forward because it was in his client's best interest. On the same call, counsel for the umbrella insurer also suggested that the parties address the issue of the retention at a later date, as the umbrella insurer had not yet determined whether or not the insured's payment of defense costs had exhausted the \$250,000 retention.

A few months after the settlement, the umbrella insurer determined that the insured was permitted to satisfy the retention only through payments to a third party, and not through payment of its own defense costs, and sought reimbursement from the insured for the full retention amount.

Finding no Pennsylvania case law addressing whether an insurer is entitled to reimbursement for settlement payments that it later determines it was not obligated to pay, the court looked to the case law addressing two analogous situations: (1) whether an insurer is entitled to reimbursement of defense costs when a court later determines that the insured was not entitled to indemnity coverage; and (2) whether an insurer is entitled to reimbursement for a state court judgment it paid for non-covered claims. Based on that analysis, the court determined that, under Pennsylvania law, an insurer that contributes amounts to a settlement when under no obligation to do so may assert a breach of contract claim for reimbursement only if the policy includes a specific provision permitting reimbursement. The court further determined that an insurer could seek reimbursement for settlement payments under an unjust enrichment theory only if: (1) it did not make the payment due to a mistake of law; (2) the insurer provided notice that it disputed its obligation to pay at the time of payment; (3) it did not make a payment primarily to protect its own interest; and (4) permitting reimbursement would not upset the incentive structure unique to the insurer/insured relationship.

Applying that reasoning, the court held that the umbrella insurer could not prevail on its breach of contract claim because the policy did not provide for reimbursement. The court further found that the insurer could not recover on an unjust enrichment theory because: (1) the insurer never issued a reservation of rights letter or otherwise conveyed that it disputed the insured's ability to satisfy the \$250,000 retention through payment of defense costs; (2) the insurer's initial belief that defense payments could erode the retention was a mistake of law; and (3) the insurer's decision to settle over the objection of the insured was primarily for its own benefit. Accordingly, the court granted partial summary judgment in favor of the landscape maintenance company on the insurer's claims for reimbursement of settlement funds.