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Wrongful-death plaintiff can't pursue excess coverage

Claim is barred on res judicata grounds

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A wrongful-death plaintiff who negotiated a $6 million settlement with an insured and its primary carrier but lost her action to recover $5 million in excess coverage could not bring a new action against the excess carrier after redrafting the settlement, a U.S. District Court judge has determined.

Under the terms of her settlement, plaintiff Lucia Salvati, whose husband died in a workplace accident, received the insured's $1 million policy limits and the right to pursue the remaining $5 million against its excess carrier, American Insurance Co. In exchange, Salvati's action would be dismissed with prejudice.

When AIC disclaimed coverage, citing an exclusion for employment-related accidents, Salvati sued. A federal judge dismissed Salvati's claim, finding that AIC's duty to indemnify was not triggered unless the insured was "legally obligated" to pay damages to her. Without a judgment, the court found, there was no legal obligation to pay.

The 1st U.S. Circuit Court of Appeals affirmed in 2017, noting in its decision that had the settlement been structured differently, a legal obligation might have been created.

Salvati and the insured then re-drafted her settlement as an agreement for judgment and filed a new action against AIC.

But Judge F. Dennis Saylor IV dismissed the action on res judicata grounds.

"The facts underlying the second action are identical to those in the first action, except for the modification of the settlement agreement," Saylor wrote. "Under the circumstances, the claims in the second action are sufficiently related to those in the first action to trigger principles of claim preclusion."

The 14-page decision is *Salvati v. Fireman's Fund Insurance*, Lawyers Weekly No. 02-132-19. The full text of the ruling can be found at masslawyersweekly.com.

Prolonged negotiation

AIC's attorney, Gregory P. Varga of Hartford, Connecticut, declined to comment.

Meanwhile, Frank J. Federico Jr. of Boston, counsel for the plaintiff, emphasized that the underlying settlement was achieved only after prolonged negotiations.

"We were able to provide [the decedent's] family with a substantial recovery from the primary carrier while seeking to permit the administrator to proceed against a disclaiming excess insurer," he said. "Despite the final negative ruling … we are gratified that the recovery in the underlying case will provide financial security for our client."

Boston insurance attorney Michael F. Aylward said Saylor engaged in a straightforward application of the traditional rules of res judicata.

"Although the facts were unusual, the court was correct in its analysis of the issue," he said. "At a more basic level, the District Court was reacting to the facts of the case and the contrived way this settlement was first reached and then reconfigured to avoid what had happened in the proceedings before."

On the other hand, Boston civil litigator Vincent J. Pisegna described the ruling as a "hyper-technical" reading of the facts that did not advance the public policy reasons behind claim preclusion.

"The plaintiff isn't engaging in gamesmanship since everyone agreed she was entitled to $6 million. And there's no squandering of scarce judicial resources because there was never any actual litigation of the substantive coverage issue. It's puzzling to me, but there must be some reason why the court took such an approach to the issue before it."

— Vincent J. Pisegna, Boston

"The plaintiff isn't engaging in gamesmanship since everyone agreed she was entitled to $6 million. And there's no squandering of scarce judicial resources because there was never any actual litigation of the substantive coverage issue. It's puzzling to me, but there must be some reason why the court took such an approach to the issue before it," he said. "Judge Saylor did not rule whether [the parties'] agreement would have been effective as he based his decision on the doctrine of res judicata."

Peereboom also questioned whether such an agreement could be effective in a situation such as the one in *Salvati* as Saylor seemed to view the 1st Circuit's suggestion that a contractual settlement could create a legal obligation to pay damages as dicta.

Barbara A. O'Donnell, who represents insurers in coverage disputes, said "legally obligated" is a threshold requirement in most liability policies but often gets overlooked by both sides.

Insurers often do not raise it because they support the insured's effort to try and resolve the dispute without extensive litigation, said O'Donnell, who practices in Rhode Island and Massachusetts. But unless insureds or underlying plaintiffs really study the policy language, they could find themselves without recourse.

"In hindsight, you can see where the court's saying they're not going to be given a second bite of the apple to do it," she said. "To use the hackneyed phrase 'traps for the unwary,' that's what this is."

O'Donnell also noted that AIC attended the parties' mediation prior to settlement, so it was not kept in the dark that the plaintiff might seek excess coverage.

"We don't know what happened — whether they had more discussions or not," O'Donnell said. "But as a plaintiffs' lawyer, I'd want some assurance that the excess carrier won't raise the 'no legal obligation' defense, leaving both sides still in position to resolve the substantive coverage dispute, before taking the assignment [of rights]."

Coverage dispute

On June 17, 2010, Salvati's husband, Gerardo, was working at the Lovejoy Wharf building in Boston when his supervisor, defendant Robert Easton, told him to climb a ladder to inspect a façade. While on the ladder, a large chunk of brickwork fell on him, causing him to fall to his death.

On Sept. 11, the plaintiff brought a wrongful-death suit against Easton and a group of LLCs that owned the building. They had a $1 million primary policy through Western World Insurance Co. and a $9 million policy with AIC that called on it to pay any excess the insureds should become "legally obligated to pay."

After an unsuccessful mediation, Salvati settled with the insureds in December 2014. The settlement provided for a total payment of $6 million, released the primary insurer and the insureds from any further liability in exchange for a tender of the $1 million primary policy limits, and assigned Salvati the right to seek recovery of the remaining $5 million from AIC.

The Superior Court approved the settlement and dismissed the suit with prejudice without entering a judgment. But AIC declined to defend or indemnify the insureds, citing an employment injury exclusion.

Salvati sued AIC alleging breach of the policy. The case was removed to U.S. District Court, where Judge Rya W. Zobel ruled that absent a judgment determining liability, AIC was not bound to pay the excess. The 1st Circuit affirmed in 2017, remarking in its decision that a settlement structured differently might have triggered the excess policy.

In January 2018, a Superior Court judge granted Salvati's unopposed motion for a judgment in her favor. Salvati also filed a reworded agreement for judgment signed by the insured's attorney but not by AIC.

That May, Salvati sued AIC again. AIC removed the case to federal court and moved to dismiss on res judicata grounds.

Precluded claim

Saylor granted AIC's motion, ruling that Salvati's earlier suit resulted in a final judgment on the merits, the causes of action in both cases were identical or related, and the parties were the same.

Saylor stressed that while the new settlement agreement did not exist at the time of the first action, it was not "new evidence" justifying a new action.

"[T]he first agreement was essentially the product of a litigation choice made by counsel (that is, to structure the settlement in a particular way), and the second agreement was the product of a new choice (that is, to recast the settlement)," the judge wrote. "At all times, the power to shape that agreement was in plaintiff's control."

Accordingly, Saylor concluded, it was "difficult to see why it would be entirely unfair to require plaintiff to live with the consequences of her strategic choices."

Salvati v. Fireman's Fund Insurance

THE ISSUE Could a wrongful-death plaintiff who negotiated a $6 million settlement with an insured and its primary carrier — but lost her action to recover $5 million in excess coverage after a federal judge found that the settlement only guaranteed $1 million from the primary insurer — refile her claim by redrafting the settlement agreement?

DECISION No (U.S. District Court)

LAWYERS Frank J. Federico Jr., Donald R. Grady Jr. and Sara W. Khan, of Sheff Law Offices, Boston (plaintiff)
Jonathan E. Small and Gregory P. Varga, of Robinson & Cole, Hartford, Connecticut (defense)