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Texas Court Holds that Failure to Segregate a Settlement Between Covered and Uncovered Claims Bars Excess Insurer from Recovering from Another Excess Insurer

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In *Great American Ins. Co. v. Employers Mut. Cas. Co., et al.*, 2020 WL 6082955 (N.D. Tex. Oct. 15, 2020) (slip op.), the Northern District of Texas recently ruled that an excess insurer must present sufficient evidence to show the segregation of a settlement payment between covered and non-covered claims or be barred from recovery from a non-paying insurer. In *Great American*, an employee of Corona Management Ventures, LLC (“Corona”) was performing tire collection services on behalf of Liberty Tire Recycling, LLC (“Liberty Tire”) when his vehicle collided with two other vehicles, killing one driver and injuring the other.

The resulting lawsuits were settled against all defendants globally for \$7 million dollars, of which \$2,668,537.90 was paid by the primary insurers for Corona and Liberty Tire. The umbrella insurers for Corona and Liberty Tire, Great American Insurance Company (“Great American”) and Employers Mutual Casualty Company (“Employers Mutual”), disputed which insurer was obligated to fund the remainder of the settlement. Great American, which issued a \$30 million umbrella policy to Liberty Tire, argued that its policy applied in excess of the \$1 million umbrella policy Employers Mutual issued to Corona. Employers Mutual disagreed, arguing that its and Great American’s policies applied on a pro rata basis. After Employers Mutual refused to pay its \$1 million, Great American paid the remaining settlement amount, claiming it was “compelled to fully fund” the excess portion of the settlement. Great American thereafter sued Employers Mutual to recover the \$1 million limit of the Employers Mutual umbrella policy.

After assuming without deciding that the Employers Mutual policy applied before Great American’s policy, the Court then addressed the lack of segregation of the settlement between covered and uncovered damages. Specifically, the additional insured language in the Employers Mutual policy only provided coverage, as relevant to the dispute, for Liberty Tire’s vicarious liability for Corona’s conduct, but not for Liberty Tire’s direct liability. As the case was settled, there was no determination of Liberty Tire’s vicarious liability and there was no segregation of the settlement payments in the settlement agreement. Thus, the Court held that Great American failed to offer any evidence allocating the settlement between covered and uncovered damages and thus, “[a]llowing Great American to recover the total value of the Employers Mutual umbrella policy when it cannot produce any evidence as to what Employers Mutual actually owes – if anything – lacks legal authority.” *Id.* at *2.

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While Great American submitted affidavits from Liberty Tire's defense counsel and Great American's claims adjuster purporting to establish the settlement was for a covered exposure, the Court held that the affidavits were conclusory and based on conjecture and were not competent summary judgment evidence. The Court noted that while "allocation doesn't require 'mathematical certainty,' there still needs to be some 'reasonable, reliable, non-arbitrary basis' for allocation of covered from uncovered losses." *Id.* at *3. As there was no such evidence, the Court granted summary judgment in favor of Employers Mutual.