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Fifth Circuit Addresses Priority of Coverage Dispute Between Two Umbrella Insurers

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Great Am. Ins. Co. v. Emps. Mut. Cas. Co., 18 F.4th 486, 488 (5th Cir. 2021), is a coverage dispute between two umbrella insurers. The underlying lawsuit arose from an automobile accident, which settled for \$7 million. The two primary insurers covered the first \$2.6 million of the settlement. Great American and Employers Mutual (“EMC”), two umbrella insurers, did not agree on their respective liability for the remainder of the settlement. Great American paid the balance of the settlement and then brought suit against EMC seeking: (1) a declaratory judgment regarding the priority of coverage between the umbrella policies, and (2) damages for EMC’s breach of its umbrella policy for refusing to fund the underlying settlement. The U.S. District Court for the Northern District of Texas granted EMC’s motion for summary judgment, and Great American appealed.

The Fifth Circuit first considered whether Great American’s policy was excess to EMC’s policy. Both policies afforded coverage for liability “in excess” of a “retained limit.” However, the court drew a distinction between how the policies defined “retained limit.” The EMC policy defined “retained limit” as “the available limits of *all underlying insurance*.” The Great American policy, on the other hand, defined “retained limit” to include “the applicable limits of *any other insurance providing coverage* to the ‘Insured’ during the Policy Period.”

The court held that EMC’s definition of “retained limit” rendered the policy excess of all primary coverage, whereas the Great American definition rendered the policy excess of all other insurance, whether primary or excess. In other words, the Great American policy was a true excess policy and the EMC policy was not. The court, therefore, determined that EMC’s policy afforded coverage before the Great American policy, meaning Great American was not obligated to pay into the settlement until the EMC umbrella policy had been exhausted.