

Colorado Excess Insurance Carrier's Equitable Subrogation Claim Against Primary Carrier for Refusal to Settle Required Allegations and Proof of Bad Faith

AUTHOR: STEPHEN CARMAN

CONTRIBUTOR: ANTHONY MARTIN

The Colorado Court of Appeals held that an excess carrier asserting an equitable subrogation claim against a primary insurer for a failure to settle a claim within the primary carrier's liability limits steps into the shoes of the insured, and must plead and prove bad faith to recover against a primary carrier for failing to settle.

In the underlying case, a medical malpractice suit was filed against a physician with two separate professional liability policies. The primary insurer's policy provided \$1 million of coverage, with the secondary insurer's excess policy covering any losses exceeding this limit up to an additional \$1 million. The primary insurer defended the suit under its contractual duty to defend, with the policy providing the insurer discretion over whether to accept or reject settlement offers. Acceptance of any settlement offer required the insured's consent.

The tort plaintiff made an offer to the primary insurer to settle the lawsuit for \$1 million, which the insured requested be accepted but the primary insurer rejected. Following this rejection, the excess carrier informed the physician he should accept the settlement, and the excess carrier paid the \$1 million settlement. To attempt to recoup this settlement payment, the excess carrier filed an equitable subrogation claim against the primary insurer. The excess carrier made it clear it was not proceeding on a theory that its claim was derivative or that the primary carrier had acted in bad faith. Instead its claim was for "the general equitable remedy of equitable subrogation." The trial court granted summary judgment for the excess carrier on the equitable subrogation claim. The primary insurer appealed.

On appeal, the primary insurer argued that under Colorado law, the excess carrier's equitable subrogation claim must fail as a matter of law, because the excess carrier steps into the shoes of the insured and *must plead and prove bad faith* on the part of the primary insurer for refusing to settle. The Colorado Court of Appeals agreed and held "we conclude that an excess carrier asserting an equitable subrogation claim against a primary carrier for failing to settle must plead and prove that the primary insurer's settlement decisions were made in bad faith. Without such an allegation, the claim is not legally viable."

The court reached this conclusion because under Colorado law, an equitable subrogation claim is derivative of the rights of the insured. "[A] subrogated insurer has no greater rights than the insured, for one cannot acquire by subrogation what another, whose rights he or she claims, did not have." The excess carrier argued that it was not seeking equitable subrogation in the shoes of the insured, but was instead seeking an independent equitable claim. The Colorado Court of Appeals held this was not a viable theory. Because equitable subrogation is rooted in remedying a mistake, the bad faith must be pleaded and proved to show there is a mistake to remedy.

This case makes it clear that under Colorado law, an excess carrier has no claim against a primary carrier for its settlement payments made to protect its insured unless it pleads and proves bad faith. The excess carrier steps into the shoes of the insured, and there are no rights or causes of action outside of those that the insured has. In reaching its conclusion, the court noted that its ruling was consistent with rulings by many courts from other jurisdictions.