

# Putting Restrictions on Tender of Limits Makes Insurer Liable for Excess

## Judgment

AUTHOR: JOHN SANDBERG

CONTRIBUTOR: STEPHEN MURPHY

Liberty Surplus was the \$1,000,000 primary insurer of an apartment complex where a tenant was involved in a gas explosion and suffered severe injuries. American Guarantee was the excess insurer.

Settlement negotiations before and during trial were unsuccessful. The Opinion has lengthy details about these negotiations. The jury returned a verdict of \$72.96 million and ultimately the case settled for \$15 million with American Guarantee paying \$14 million and Liberty Surplus paying its \$1,000,000.

Then American Guarantee sued Liberty Surplus for equitable subrogation to recover the \$14 million it paid in settlement claiming that Liberty Surplus was negligent in failing to settle the case.

Because Liberty Surplus put conditions on its tender of its \$1million coverage to American Guarantee, Liberty Surplus was negligent and therefore liable to American Guarantee.

It was not a defense for Liberty Surplus that the lowest demand by the injured party was in excess of its primary coverage. The insurer's duty to reasonably consider settlement is triggered when the demand is within the totality of all coverage of the insured, *i.e.*, the primary limits and the limits for all layers of excess. Here the settlement demand by the injured party was within the coverage of all limits. Liberty Surplus should have evaluated said demand as if its policy covered it in its entirety.

In this judge tried case, the recitation of the facts suggest that the judge did not approve of Liberty's tactics once it had decided the verdict would exceed its \$1 million coverage. In other words, if the insurer decides the potential is such that it should tender its limits, it should not put any limitations on such a tender. Here that failure to understand that simple principle cost \$14 million.

Case Citation: *American Guarantee & Liability Insurance Company v. Liberty Surplus Insurance Corporation*  
835 Fed. Appx. 447