

# Supreme Court of Hawaii: Excess Insurers Can Pursue Bad Faith Claim Against Primary Insurers

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**Summary:** The Hawaii Supreme Court held that an excess insurance company can pursue an equitable subrogation bad faith cause of action against a primary insurer which had in bad faith failed to settle a claim within the primary policy limits.

*St. Paul Fire & Marine Ins. Co. v. Liberty Mutual Ins. Co.*

Liberty Mutual Insurance Company (Liberty Mutual) was the primary insurer and St. Paul Fire & Marine Insurance Company (St. Paul) was the excess insurer for Pleasant Travel Service, Inc. (Pleasant Travel) in 2010. Pleasant Travel was sued in Hawaii circuit court as the result of an accidental death. Although it appears Liberty Mutual had multiple opportunities to settle the case within the \$1 million primary liability limits, the case proceeded to trial which resulted in a \$4.1 million verdict. Thereafter, the case was settled for a confidential amount. Nevertheless, St. Paul filed a bad faith action against Liberty Mutual in circuit court which was then removed to federal court. The U.S. District Court of Hawaii certified a question to the Supreme Court of Hawaii whether Hawaii recognized such an action.

A unanimous Supreme Court of Hawaii held that an excess insurer can proceed with a bad faith claim against a primary insurer under a doctrine of equitable subrogation for three general reasons. First, Hawaii state courts had broadly applied the doctrine of equitable subrogation. An excess insurer pursuing such an action was consistent with prior Hawaii law. In addition, that broad application of the law was consistent with the rulings of a majority of the states considering the issue. Finally, the Supreme Court of Hawaii ruled that allowing an excess insurer to subrogate to the rights of the insured to assert a bad faith failure to settle claim protects the public interest in ensuring equity in insurance matters and encouraging settlement.

In making this ruling the Supreme Court of Hawaii relied upon the Kingdom of Hawaii's recognition of equitable subrogation in 1885, long before it became the 50th State. Furthermore, the Court noted that its recognition of an equitable subrogation theory is consistent with the rulings of other state supreme courts, such as Arizona and Michigan. In particular, this application of equitable subrogation would prevent primary insurers from gambling with the excess insurers' money rather than settling within their limits. Furthermore, allowing an excess insurer to stand in the shoes of its insured was reasonable: but for the presence of the excess layer, the insured would have that bad faith right of action against the primary insurer.

The Court cited rulings by the Ninth Circuit Court of Appeals and the Supreme Courts of Arizona, Michigan, Minnesota, and Oregon when finding that a "majority of courts faced with the issue before us have permitted excess carriers to bring a claim of bad faith against a primary insurer under the doctrine of equitable subrogation."

Finally, the Supreme Court of Hawaii turned to the Hawaii Insurance Code. Allowing bad faith equitable subrogation causes of action by excess insurers against primary insurers was consistent with that Code. It would promote the duty of insurance companies to "accept reasonable settlements" by placing appropriate pressure on the primary insurer to settle claims within its limits, which should be settled. The Court concluded: "the public interest in encouraging reasonable settlements is best served by permitting an excess insurer to seek relief under the doctrine of equitable subrogation."

Hawaii now joins the majority of courts which have considered the issue. St. Paul's bad faith case against Liberty Mutual will now proceed (or settle) in the U.S. District Court for Hawaii.

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