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## The Bad News About Good Faith for Excess UM Carriers

By Robert L. Tucker\*

It often happens that an individual involved in an automobile accident can potentially recover under three or more policies of insurance. Suppose that Passenger is riding in a vehicle driven by Owner. A third party, Tortfeasor, negligently causes an accident in which Passenger is injured. Passenger obviously has a claim against Tortfeasor, which Tortfeasor's liability insurance carrier may pay, but if Tortfeasor is uninsured, or if his liability policy limits are not adequate to cover Passenger's injuries, Passenger will have to look for uninsured or underinsured motorist coverage. Passenger will probably qualify as an additional insured under the omnibus clause of Owner's insurance policy and have the right to claim UM benefits under that policy. He will likely have UM coverage available under his own personal automobile insurance policy as well.

Each state has its own rules for determining which policy has primary coverage and which policy is excess when an individual has UM coverage under more than one policy. Ohio courts, for example, have consistently held that the owner's policy provides primary UM coverage for a passenger's injuries and that the passenger's personal UM coverage is excess.<sup>1</sup>

Regardless of which policy is primary and which is excess, friction can arise between the two carriers. Suppose, for example, that, after exhausting Tortfeasor's policy limits, Passenger brings suit against the two carriers providing the primary and excess UM coverage for his injuries. Further suppose that Passenger offers to settle for an amount within the policy limits of the primary UM carrier. Needless to say, the excess UM carrier will want the primary UM carrier to accept the settlement de-

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<sup>1</sup> See, e.g., *Curran v. State Auto. Mut. Ins. Co.*, 25 Ohio St. 2d 33, 39, 266 N.E.2d 566 (1971).

mand, so that the excess carrier will have no exposure under its own coverage. But the primary UM carrier may refuse to consent to the Passenger's settlement demand, particularly if that demand is at the high end of its policy limits. What duty, if any, does a primary UM carrier owe to an excess UM carrier to settle a UM claim of their mutual insured within the primary UM carrier's policy limits?

There are no reported cases (or unreported cases available through LEXIS or WESTLAW) that have directly addressed this issue. Because the issue is one of first impression, one can infer an answer only by comparing and contrasting our hypothetical UM coverage situation with the parallel situation involving primary and excess liability insurance policies. In the liability insurance context, virtually every state recognizes that a cause of action exists in favor of an excess liability carrier when the primary liability carrier fails to exercise good faith in attempting to settle within the primary liability carrier's policy limits.<sup>2</sup> In almost every state, the excess liability carrier's cause of action against the primary liability carrier is based on the doctrine of subrogation. The cases have generally recognized that when there is no excess insurer, an insured becomes his own excess insurer. His primary liability insurer owes him a duty of good faith to protect him from an excess judgment and from personal liability. If the insured purchases excess coverage, he in effect substitutes the excess insurer for himself. It follows, therefore, that when the excess insurer pays a portion of a judgment against the insured, the excess insurer steps into the insured's shoes and is subrogated to any rights of action that the insured may have against persons responsible for the excess judgment, including the insured's cause of action for bad faith against the primary liability carrier for its failure to settle within policy limits.<sup>3</sup>

Apart from this right of subrogation, an excess liability carrier generally has no other basis for alleging the existence of a duty owed to it by the primary liability carrier. Certainly, there is no contract between the two carriers that imposes such a duty. Most courts have held that a primary liability insurance carrier, in handling the defense and settlement of a claim, owes no independent duty directly to an excess liability insurance carrier.<sup>4</sup>

In the UM context, when the excess UM carrier is called upon to pay benefits to the insured due to the primary UM carrier's failure to settle, the excess carrier in no sense pays a debt that its insured would owe but for the existence of the excess coverage. The insured has no bad faith claim against the primary carrier to which the excess carrier may subrogate. Thus,

the liability insurance cases, which base the excess carrier's cause of action for bad faith against the primary carrier on subrogation principles, provide no basis for recognizing a cause of action for bad faith in the excess UM carrier against the primary UM carrier.

In the context of liability insurance, when the primary liability carrier fails to settle within policy limits, the insured is put at risk of potential financial liability to a third party, a risk that the primary carrier could have avoided by accepting the third-party claimant's policy limits settlement offer. By contrast, in the UM coverage situation, if the primary UM carrier fails to settle the insured's UM claim within policy limits, the insured bears no risk whatsoever of any resulting financial liability. To the contrary, in the event of a judgment over the primary UM carrier's policy limits, the insured winds up better off financially than he would have been had the primary UM carrier accepted his settlement demand within the policy limits. One can hardly say that the primary UM carrier's refusal to accept a policy limits settlement demand damaged the insured, for the insured receives more money than he would have received had his settlement demand been accepted.

### Conclusion

Under well-established principles of subrogation law, the subrogee steps into the shoes of the subrogor and has no rights superior to those of the subrogor.<sup>5</sup> So, if the insured had a claim against the primary UM carrier, the excess carrier would be subrogated to it.<sup>6</sup> But in the UM context, the insured can only be better off, not worse off, if the primary UM carrier refuses to settle the insured's UM claim within its policy limits. Because the insured can have no cause of action against the

<sup>4</sup> *St. Paul Ins. Co. v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 278 (5th Cir. 1991) (Louisiana law), *noted in* 7 BAD FAITH L. REP. 196 (1991); *Great S.W. Fire Ins. Co. v. CNA Ins. Cos.*, 547 So. 2d 1339 (La. Ct. App. 1989), *aff'd*, 557 So. 2d 966, 971 (La. 1990), *noted in* 5 BAD FAITH L. REP. 214 (1989); *Commercial Union Ins. Co. v. Medical Protective Co.*, 426 Mich. 109, 124-25, 393 N.W.2d 479, 486 (1986), *noted in* 3 BAD FAITH L. REP. 14 (1987). *Contra*, *Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 137 A.D.2d 401, 524 N.Y.S.2d 202 (1988), *noted in* 4 BAD FAITH L. REP. 86 (1988).

<sup>5</sup> *See, e.g.*, 73 AM. JUR. 2D *Subrogation* § 106 (1974) ("The rights to which the subrogee succeeds are the same as, but no greater than, those of the person for whom he is substituted."); *Western Fire Ins. Co. v. Garafolo*, 1983 Ohio App. LEXIS 13657, at \*3 (1983) ("In our opinion, it is manifestly sound that the subrogee stands in the shoes of the subrogor. This means that the claim of the insurance company is no better than the claim of [its insured].")

<sup>6</sup> *See, e.g.*, *Millers Casualty Ins. Co. v. Briggs*, 100 Wash. 2d 9, 665 P.2d 887 (1983) (holding that an excess insurer, which paid its personal injury protection limits only after being told that the primary insurer had already paid its policy limits and that the insured's medical expenses exceeded the primary insurer's policy limits, was subrogated to the insured's right to collect on the primary insurer's obligation to pay when it subsequently learned that the medical expenses had not been paid and the primary insurer's coverage had not been exhausted).

<sup>2</sup> *See generally* Annotation, *Excess Carrier's Right to Maintain Action Against Primary Liability Insurer for Wrongful Failure to Settle Claim Against Insured*, 10 A.L.R. 4th 879 (1998).

<sup>3</sup> *See e.g.*, *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio St. 2d 221, 404 N.E.2d 759 (1980).

primary UM insurer for failing to settle the insured's own UM claim within the limits of the primary UM policy, there is no basis for allowing an excess UM insurer to assert a cause of action against the primary insurer for its failure to settle. The "excess" judgment over the primary UM carrier's policy limits merely means that the excess UM carrier must now bear a risk that it voluntarily assumed when it accepted its insured's UM premiums. The primary UM carrier owes no duty to assist the excess UM carrier avoid its potential liability under that voluntarily-assumed risk.