



COUGHLIN DUFFY LLP

CASE ALERT, NO. 24

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SIXTH CIRCUIT HOLDS THAT EXCESS INSURER MAY SUE PRIMARY INSURER FOR FAILURE TO SETTLE WITHIN PRIMARY POLICY LIMITS

On July 30, 2007, the United States Court of Appeals for the Sixth Circuit (applying Kentucky law) held that an excess insurer may pursue a claim against a primary insurer for failure to settle an underlying claim within primary policy limits under the doctrine of equitable subrogation. National Surety Corp. v. Hartford Cas. Ins. Co., ___ F.3d ___, 2007 U.S. App. LEXIS 18049 (6th Cir. 2007). This decision is significant as it includes Kentucky among the majority of jurisdictions which have adopted this rule.

When Sufix U.S.A. ("Sufix") was sued by a consumer for a design defect, its primary insurer, Hartford Casualty Insurance Company ("Hartford") undertook Sufix's defense and entered into settlement negotiations with the consumer. After Hartford rejected the consumer's settlement offer of \$1 million -- Hartford's policy limit -- a jury trial ended in a verdict of approximately \$6.5 million in favor of the consumer.

Sufix's excess carrier, National Surety Corporation ("National"), which issued a \$10 million excess \$1 million policy and was advised of the litigation only two weeks prior to trial, sued Hartford for its failure to settle the underlying claim within its policy limits. The District Court of Kentucky dismissed the complaint, opining that the

Kentucky Supreme Court would not recognize such a claim. The Sixth Circuit disagreed and reversed the decision.

Specifically, the Sixth Circuit reasoned that the Kentucky Supreme Court, which had never addressed the issue at hand, would adopt the majority rule that an excess insurer may bring a failure to settle claim against a primary insurer. The court based its decision on the fact that Kentucky had already recognized that (1) an insured may sue its insurer for failure to settle in good faith and (2) an insurer may step into the shoes of its insured under the doctrine of equitable subrogation. Combining these two rules, the Sixth Circuit concluded that National was able to sue Hartford for a failure to settle within the primary limits. The Court reasoned that without such a rule primary insurers would invariably reject settlement offers which were near or at its policy's limits. Instead of paying their policy limits to settle a case, primary insurers would be tempted to gamble with excess insurer's money.

This decision affirms an excess insurer's right or interest in ensuring that primary insurers handle claims in good faith.

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