
Reinsurance/ Follow-the-Fortunes

Court Denies Reinsurer's Post-trial Motions, Holding That the Jury Had Sufficient Evidence to Conclude That a Reinsurer Breached a Reinsurance Agreement, and That the Claims of the Reinsured Were Not Barred by a Late Notice Defense

Dispute over Reinsurance for Asbestos Claims

Utica Mutual Insurance Co. v. Fireman's Fund Insurance Co., 287 F.Supp.3d 163 (N.D.N.Y. 2018)

Case at a Glance

After a jury returned a verdict on a dispute over a reinsurance agreement that resulted in a \$64 million judgment in favor of the reinsured, the reinsurer filed post-trial motions. The motions attacked the decisions of the jury on coverage, follow-the-fortunes, and late notice issues, and contended that there was a clerical error in the pre-judgment interest calculation. The arguments focused largely on the sufficiency of the evidence to support the decisions of the jury, and not the appropriateness of the jury instructions or rulings by the court on disputed legal issues. The court denied the post-trial motions, finding sufficient evidence in the record to support the jury's decisions. The court found that the pre-judgment interest issue presented was substantive, and not clerical, and therefore improper to present in a FRCP 60 motion.

Summary of Decision

Utica Mutual Insurance Company ("Utica") issued seven primary general liability policies and seven umbrella liability policies to Goulds Pumps that were in effect between July 1, 1966 and July 1, 1973. Fireman's Fund Insurance Company ("Fireman's") provided reinsurance to Utica through seven facultative reinsurance policies, which Fireman's contended reinsured only the risks insured by the umbrella policies. Claims were submitted to Goulds

in the late 1990s for bodily injury due to asbestos in Goulds' pumps, and Goulds and its insurers, including Utica, became involved in litigation concerning coverage for those loss claims. Goulds and Utica settled their disputes in February 2007 for \$325 million. Utica provided notice to Fireman's of the Goulds loss in July 2008, and submitted a reinsurance claim. When Fireman's did not pay the reinsurance claim, Utica filed this lawsuit.

The case was tried before a jury on a claim for breach of contract over a three week period in November and December 2017. The jury returned a verdict in favor of Utica. With prejudgment interest, the court entered judgment in favor of Utica in the amount of \$64,092,191.78. Fireman's filed post-trial motions for judgment as a matter of law, for a new trial, and to "correct" the pre-judgment interest calculation, pursuant to Federal Rules of Civil Procedure 50, 59, and 60. The district court denied Fireman's post-trial motions, and Fireman's has filed a notice of appeal.

Fireman's post-trial motions presented the following issues: (1) whether the reinsurance certificates cover the loss at issue; (2) whether the follow-the-fortunes doctrine applies; (3) whether late notice by Utica should bar its claims due to its failure to implement routine claims procedures, economically prejudicing Fireman's and amounting to gross negligence or recklessness by Utica; and (4) whether there was a clerical error in the calculation of pre-judgment interest. With respect to the coverage issue, Fireman's contended that it reinsured the obligations of the umbrella policies but not the primary policies, and that due to ambiguity as to when coverage under the primary policies for bodily injury stopped, and the umbrella coverage incepted, there was insufficient proof that the bodily injury claim settlement was covered by the umbrella policies, and hence by its reinsurance agreements. The court held that the jury had been properly instructed that the coverage issue raised by Fireman's was a factor for the jury to consider in determining whether Goulds' settlements were objectively reasonable for purposes of applying the follow-the-fortunes doctrine.

With respect to the follow-the-fortunes doctrine, the jury was simply instructed to decide whether both parties had fulfilled their obligations under the reinsurance agreements. There was no separate follow-the-fortunes jury instruction. The court stated

in its order that “[a]lthough there was not a specific jury question asking such, by answering in the affirmative that Utica did what it was obligated to do under those policies, the jury made an implicit finding that Utica’s settlement decisions regarding the Goulds settlement were objectively reasonable, or stated another way, that FFIC [Fireman’s] did not prove that Utica’s settlement decisions were objectively unreasonable. Accordingly, the follow the settlements provision would apply.” Fireman’s argued that Utica’s settlement decision was not objectively reasonable because one of the reasons it made the settlement decision was to push the losses to its reinsurance, and that it would never have made the decision it made “in arm’s length negotiations if the reinsurance did not exist.” The court found that there was sufficient evidence in the record to support the jury’s decision on this issue.

Fireman’s did not dispute the appropriateness of jury instructions relating to its late notice defense, but rather argued that the only reasonable conclusion to be drawn from the evidence was that it had proven its late notice defense. The court disagreed, finding that there was evidence from which a reasonable jury could have concluded that Fireman’s had failed to prove that it suffered tangible economic injury from any late notice on Utica’s part with respect to the claims for which it sought reinsurance coverage. The court also found that evidence Utica presented of its claims procedures was sufficient for the jury to conclude that Utica’s late notice to Fireman’s Fund in this instance was not the result of gross negligence or recklessness.

With respect to the pre-judgment interest issue, Fireman’s argued that the amount of pre-judgment interest awarded was based on the faulty assumption that the entire \$35 million that the jury found Fireman’s owed Utica came due on September 22, 2008, when Utica first provided Fireman’s with a claims narrative and billings. The court found the motion to be procedurally improper, as the relief requested in the motion “would be substantive rather than clerical,” as it required findings regarding each of the multiple days on which Fireman’s argued its obligation to pay Utica accrued, findings that would contradict the jury’s finding that Utica provided Fireman’s with sufficient proof of loss as of September 22, 2008. The court found that such a reconsideration of the jury’s factual findings was beyond its authority

under Rule 60, and it denied the motion relating to pre-judgment interest on that basis.

Comment

Fireman’s arguments seem to be based largely if not entirely on arguments as to the sufficiency of the evidence to support certain decisions made by the jury, rather than on disputes over contested jury instructions or other allegedly improper legal rulings by the court. That frequently is an uphill battle, especially after a long trial encompassing many witnesses and documents. This case is not yet over, as Fireman’s has filed a notice of appeal to the Second Circuit. // Goss

Uninsured Motorist Coverage/ Hit-and-Run Accidents

Michigan: Uninsured Vehicle Must Strike Insured Auto, Not Vice Versa, to Trigger Coverage

Vehicle Hit Dumped Debris, Not The Opposite

Drouillard v. Amer. Alternative Ins. Corp., ___ N.W. 2d ___, 2018 WL 1075385 (Mich. App., Feb 27, 2018)

Case at a Glance

The Michigan Court of Appeals has found no uninsured motorist coverage where the insured vehicle struck debris dumped by an unidentified pickup. Comprising three decisions by three judges, the opinion recognizes and exacerbates the confusion over the intended scope of UM coverage.

Summary of Decision

In October 2014, an ambulance driver was en route to an emergency call in St. Clair County, Michigan, when her vehicle suddenly struck a mound of construction materials lying in the middle of the road. Her partner, Jeremy Drouillard, sustained a back injury in the accident that disabled him. Witnesses told the EMTs the materials had slid from the bed or