

## District of New Jersey Court Clarifies Primary Insurer's Duty of Good Faith to Excess Insurer

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A primary insurer has a duty of good faith to an excess insurer to attempt to negotiate a settlement with a third-party claimant within the primary insurer's limits. However, determining whether that duty of good faith was met presents some difficulty. While an excess carrier may be tempted to argue that any failure to settle within policy limits when there was an opportunity to settle before or during trial evidences a lack of good faith, New Jersey courts have cautioned against using hindsight to prove a breach of good faith.

Earlier this week, the U.S. District Court for the District of New Jersey was faced with this very issue in *Hartford Casualty Insurance Company v. Liberty Mutual Fire Insurance Company*, 2021 U.S. Dist. LEXIS 60663 (D.N.J. March 30, 2021). Hartford, an excess insurer, claimed that Liberty Mutual, a primary insurer, failed to negotiate a third-party claim arising out of an automobile accident in good faith, exposing Hartford to liability for payment of an excess verdict totaling over \$630,000.

Prior to trial, Liberty Mutual had internally valued the "full" value of the claimant's damages between \$525,000 and \$981,000. Liberty Mutual's defense counsel provided an estimated trial range of \$400,000 to \$1.5 million, with a "likely" outcome of \$800,000. Despite these valuations, Liberty Mutual claimed that no one internally valued the case for settlement at a value of over \$500,000.

At mediation, the claim adjuster requested \$500,000 in authority; however, only \$375,000 in authority was received "subject to change with a phone call as warranted." The claimant first demanded \$1 million to settle – the amount of the primary carrier's limits. The defense rejected that demand, and offered \$250,000. The claimant then demanded \$750,000, and indicated that she would not reduce her demand further. The mediation ended without the defense making any further counter-offer. However, the record in the ensuing coverage litigation reflected that, although the claimant refused to settle for less than \$750,000 at mediation, the mediator and claimant's counsel valued the case at a lower amount (\$500,000 and \$600,000 to \$650,000, respectively).

Following the mediation, defense counsel later extended offers of \$350,000 and \$600,000, both of which were rejected. Still later, on the first day of trial, despite discussion with the judge, the claimant refused to accept a \$600,000 settlement or to accept a high/low bracket of \$920,000/\$400,000. At trial, the claimant was awarded \$1.4 million.

In the coverage action, the *Hartford* court was presented cross-motions for summary judgment concerning whether the primary insurer breached any duty to settle owed to the excess carrier. The *Hartford* court provided a useful summary of a primary insurer's duty of good faith to an excess insurer, re-affirming that an insurer has a "positive fiduciary duty" to attempt to negotiate a settlement with a third-party claimant within the primary insurer's limits. Citing to *Rova Farms*, the *Hartford* court noted that "a primary insurer is liable to an excess insurer for an excess verdict where the primary insurer failed to settle with a third-party claimant within the primary policy limit prior to trial, and where, prior to trial, (1) a jury could have potentially found liability for the third-party claimant and the potential verdict could have exceeded the primary policy limit, (2) the third-party claimant was willing to settle within the primary policy limit, and (3) the primary insurer did not negotiate in "good faith."

In order to meet this good faith requirement, the court noted that a primary insurer's "negotiation strategy" must have a reasonable likelihood for a successful outcome for both the primary and excess insurers. The court acknowledged that in considering whether a primary insurer met its duty of good faith, the court was required to consider all factors influencing the advisability of settlement.

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including the primary carrier's "experience, expertise and judgment." The court cautioned against evaluating the good faith duty in hindsight, warning that it could only consider the facts known to Liberty Mutual at the time of the negotiations.

The *Hartford* court ultimately concluded that a series of genuine issues of material fact precluded summary judgment in favor of either insurer. The court noted that both insurers had presented compelling evidence regarding whether Liberty Mutual engaged in good faith negotiations at mediation. The court specifically noted that issues surrounding the internal settlement value of the claim at mediation (and whether that internal settlement value was reasonably calculated) precluded summary judgment because those issues were "critical to assessing whether [Liberty Mutual's] limited extension of authority, to its agents, and subsequent settlement offer to Claimant at Mediation were made in 'good faith.'" The court also noted that a dispute over Liberty Mutual's "hardball" negotiation strategy presented a genuine issue of material fact which precluded entry of summary judgment.

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