

Fifth Circuit: Primary Insurer Relieved of Duty to Defend Without Release of Liability of Insured

In *Aggreko, LLC v. Chartis Specialty Ins. Co.*,¹ the Fifth Circuit affirmed a decision by the Texas District Court and held that a Covenant Not to Execute constituted a “settlement” sufficient to exhaust policy limits and terminate a primary insurer’s duty to defend.

This case arose out of a wrongful death suit filed by the parents of James Brenek II (“Brenek”). In 2014, Brenek was fatally electrocuted by an electrically energized generator housing cabinet while performing work on a rig in Texas for Guichard Operating Company, LLC (“Guichard”), a Louisiana-based drilling subcontractor. Guichard had leased the generator from Aggreko, LLC (“Aggreko”). A rental agreement between Guichard and Aggreko required Guichard to maintain commercial general liability insurance during the lease period and list Aggreko and the rig owner, Rutherford Oil Corporation (“Rutherford”), as additional insureds under the policy.

Guichard’s primary insurance carrier, The Gray Insurance Company (“Gray”), agreed to defend and indemnify Aggreko and Rutherford in the wrongful death suit. The Gray policy had a limit of \$1,000,000, subject to a \$50,000 self-insured retention.

In February 2017, Gray and the Breneks reached two separate agreements to resolve the wrongful death suit. In the first agreement, Gray agreed to pay the Breneks \$50,000 in exchange for a full and complete release of all the Breneks’ claims against Rutherford. In the second agreement, Gray agreed to pay to the Breneks \$950,000 on behalf of Aggreko in exchange for the Brenek’s agreement to execute any subsequent judgment they obtained against Aggreko only against available insurance (the “Covenant Not to Execute”). The second agreement did not release Aggreko from any tort liability or end the Brenek’s wrongful death suit against Aggreko and did not prevent the Breneks from pursuing claims against Aggreko’s own primary insurer, Indian Harbor Insurance Company (“Indian Harbor”).

The Gray policy stated that Gray’s duty to defend ends when the policy limits have been used up in payment of any judgments or settlements. After Gray issued the total of \$1,000,000 in payment to the Breneks, it notified Aggreko that it had exhausted its limits and intended to withdraw its defense in the wrongful death claim.

Indian Harbor filed a declaratory action in the United States District Court for the Eastern District of Texas, seeking an order that Gray continue defending Aggreko. Gray filed a motion for summary judgment in which it sought a declaration that its policy limits were exhausted, and it therefore no longer had a duty to defend Aggreko. In opposition to Gray’s motion, Indian Harbor argued that under Texas law, the Covenant Not to Execute did not constitute a “settlement” of the Brenek’s claims because it did not release Aggreko from any tort liability or end any part of the Brenek’s lawsuit against Aggreko, and therefore Gray had an ongoing duty to defend Aggreko.

¹No. 18-40325, 2019 WL 5866880, at *1 (5th Cir. Nov. 11, 2019).

The Fifth Circuit rejected Indian Harbor's argument and found that the Covenant Not to Execute was a settlement because it was a binding contract and it included mutual concessions (i.e., Gray agreed to pay \$950,000 on Aggreko's behalf, and the Breneks agreed not to execute any tort judgment directly against Aggreko). The Fifth Circuit further held that the fact that the Covenant Not to Execute did not release Aggreko from liability was not dispositive of whether Gray's obligations to Aggreko under the Gray policy were exhausted.

Pursuant to the Fifth Circuit's holding, a primary insurer can enter into a settlement that does not fully release its insured from liability but does exhaust the policy limits, thereby terminating the primary insurer's duty to defend. As such, policyholders should always place all available insurance on notice of the loss, to ensure that excess or other coverage can be accessed upon exhaustion of the primary policy. Furthermore, the Fifth Circuit's opinion including a warning that insurers who enter into agreements like this one must be careful to properly investigate the claim and avoid hastily paying out their policy limits in order to rid themselves of the duty to defend, or else face liability for bad faith.

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