

Jury Clears Excess Insurer After Multimillion-Dollar Verdict

By **Catherine Marfin**

Law360 (December 9, 2022, 9:58 PM EST) -- A Texas federal jury on Friday evening said an excess insurer didn't have to pay back its primary insurer after the primary was hit with a multimillion-dollar judgment.

The jury, which came back with its verdict after three hours of deliberations on Friday afternoon, was tasked with determining whether the primary insurer, Westport Insurance Corp., acted the way an "ordinary prudent insurer" would when its insured, Insurance Alliance, declined — via Westport — four settlement demands from its policyholder, a Texas marina, between May 2009 and November 2010.

Westport was ultimately hit with a multimillion-dollar judgment and asked excess insurer Pennsylvania National Mutual Insurance Co. to kick in. The jury decided Friday that Penn National wasn't required to pay Westport.

The jurors were instructed to apply the Stowers test — a Texas doctrine that states insurance providers have to act fairly when they are offered settlement demands within the limits of the insured party's policy — to Westport's actions when deciding its verdict.

The jury said an ordinary, prudent insurer would have accepted the settlement demands at the time they were offered.

"I think the jury paid attention," John G. H. Davis, an attorney representing Pennsylvania National Mutual Insurance Co., told Law360 after the verdict was announced on Friday.

Westport and Penn National agreed to a damages model before the trial began. It's now up to the parties to determine the final damage outcome, Davis said.

Lake Texoma Highport LLC, which owns a popular marina on a reservoir that sits on the border of Texas and Oklahoma, sued Insurance Alliance in 2008, alleging its insurer failed to procure the right insurance policy following flood damage in Grayson County, Texas. Westport declined four settlement demands from Highport before the case went to trial.

In 2012, a jury sided with Highport and awarded it more than \$8.7 million in damages. But the actual amount Insurance Alliance owed wasn't clear until June 2016, after the court determined how much of a credit Insurance Alliance was entitled to based on a settlement the marina reached with another insurance agency.

Westport appealed the case and obtained a bond to stay payment of the judgment until the appeal was decided. It lost the appeal in early 2016 and eventually paid the bond insurer more than \$9 million.

Westport then sued Penn National, arguing it should pay it back for what Westport paid above its \$5 million primary liability policy limit. A federal judge granted partial summary judgment to each side in September 2018, finding Penn National was required to reimburse Westport, but only once the court determined the final amount the agency had owed in June 2016.

Davis told the jury during closing arguments on Friday that Westport should have settled the case

much sooner, and that "screw-ups have consequences."

"An ordinary, prudent insurance carrier doesn't sit around and say, 'Nuh-uh,' for three years," Davis said, crossing his arms and shaking his head.

Davis said all four of Highport's settlement demands — \$2 million in May 2009, \$2.2 million in September 2009, \$3.6 million in July 2010 and \$3.6 million in November 2010 — were within its policy limits and thus should have been accepted.

"Insurance Alliance through Westport fought them tooth and nail," Davis said.

Davis also appealed to the local business aspect of the case, telling the jury of two women and five men that Highport was a popular spot in a town ravaged by a flood and that Westport should have taken that into account when assessing damage payouts.

But Christopher A. Wadley, an attorney representing Westport, said the company acted the way any insurer would, given the information it knew at the time.

Wadley said the first demand in May 2009 was only open for a 45-minute window at 10 p.m., and that it was "premature" because the marina's coverage claim was still open. He added that Westport didn't have the time to evaluate whether the claim matched the actual damage.

"If you insure your Chevy and wreck it, you don't get to go out and buy a Mercedes and say it should be covered," he said.

At the time of the second offer, the marina had just settled with another insurance company, and Westport didn't have time to evaluate how that settlement offer was going to affect what it was willing to pay.

During mediation over the third offer in July 2010, two other insurance companies involved in the suit rejected the proposal, while Westport accepted. The terms of the mediation required all parties to agree, so that was out of Westport's control, Wadley said.

"You look at this case not in hindsight," he told the jury during closing arguments. "You look at what info Westport had at that time."

Wadley did not immediately return a request for comment after the verdict was issued, and declined to comment on the case earlier in the day.

Westport is represented by Christopher A. Wadley, Christopher J. Shannon, Stephen O. Venable, Avniel J. Adler, and Douglas W. Walker of Walker Wilcox Matousek LLP.

Penn National is represented by John G. H. Davis, Michael D. Williams, and Nicholas J. Cenac of Brown Sims PC.

The case is Westport Insurance Corp. v. Pennsylvania National Mutual Insurance Co., case number 4:16-cv-01947, in the U.S. District Court for the Southern District of Texas.

--Editing by Michael Watanabe.