**Settlement of an Underlying Tort Case against Insured Does Not Bar Insured's Action against Intermediary for Failure to Procure Excess Insurance unless Settlement Completely and Unequivocally Insulates Insured from Liability for Damages**

*Summary Judgment for Intermediary Reversed*

*Terrain Tamers Chip Hauling, Inc. v. Insurance Marketing Corporation of Oregon*, 152 P.3d 915 (Or.App. 2007)

### Case at a Glance

An insured's $5.75 million settlement with injured party, providing that the injured party would receive the insured's $2 million liability policy limit, that the insured would sue its agent for failure to procure excess liability insurance, that the injured party would have a security interest in any recovery from the agent, and that the party would not execute on settlement judgment during pendency of litigation against the agent, did not unambiguously and unconditionally release the insured from further liability, and thus did not preclude insured's action against the agent.

### Summary of Decision

An employee of Terrain Tamer caused a car accident, which resulted in serious injuries to an another person who was not employed by Terrain Tarmer. Insurance Marketing South Corp (IMCO), an insurance intermediary, had promised to procure both primary and excess coverage for Terrain Tamers, but it had failed, through its own neglect, to procure the excess liability policy. In the underlying suit, Terrain Tamers stipulated to the entry of a judgment against it in the amount of $5.75m. The primary carrier paid $2 million—its policy limits. Terrain Tamers agreed to sue IMCO for failing to procure the additional $3m in excess coverage and "further agreed to grant a security interest in favor of the [tort plaintiffs], effective at the time of the agreement, in any recovery that Terrain Tamer obtain from IMCO on such a claim." IMCO moved for summary judgment contending that the settlement agreement extin-

guished any liability for which IMCO might have obtained liability coverage. The trial court agreed, relying on policy language limiting coverage to "sums which the insured shall be legally obligated to pay," and *Oregon Mutual Ins. Co. v. Gibson,* 746 P.2d 245 (Or. App. 1987) (agents were not liable to insured for failure to advise or procure automobile insurance, where covenant between victims and insured unambiguously stated that insured was not legally obligated to pay them any more than what was paid on his behalf by insure).

The Oregon Court of Appeals reversed and remanded. It had doubts about the continuing authority of the *Gibson* case, but it held that even if the case were valid law, it was not controlling because "the agreement in this case does not unambiguously release Terrain Tamers from further liability[.]" Under Oregon law, when a defendant has continuing liability for which there should have been insurance, as a consequence of an antecedent agreement to procure insurance, then the intermediary may have liability. The court of appeals relied upon *Lancaster v. Royal Ins. Co. of Am.*, 726 P.2d 371 (Or.1986), for this proposition.

Significantly, the defendant in the underlying case had not assigned its right to obtain a remedy from this insurance intermediary. Instead, it had retained its right; it had contractually agreed to pursue the rights; and it had provided the plaintiff in the underlying case with an interest in its recovery against IMCO. Its liability had not been eliminated. Its obligation to pay on its liability had not been eliminated; Terrain Tamers could—at least in legal theory—be required to pay more than had already been paid. Consequently, the key component of the *Gibson* case was not met.

**Comment**

In order to understand the difference between what happened in the trial court in this case and what happened in the court of appeals, one has to draw a distinction between what is written down regarding rights and duties and what life is really like. Almost certainly, the trial court concluded that the convoluted settlement between the insured and the plaintiff in the underlying case was designed to keep alive the possibility that the plaintiff could get more money for his injury. It was therefore designed to create the impression that the insured would somehow actually be required to pay more money. Consequently, although it was not reflected in any of the writings, it is a virtual certainty that the insured would not actually have to pay additional sums to the injured plaintiff, since it probably—indeed, almost certainly—didn't have the money to pay and was unlikely to obtain it.

Almost certainly, the trial court recognized this fact, and invoked the jurisprudential philosophy of *Legal Realism* to determine rights and duties. The district court said to itself: "Since Tamers will not actually pay any more money, and since the plaintiff knows this, while what was signed is not really a release, given economic and financial reality, it might as well be one." Upon this ground it applied the rule in *Gibson*; historical facts are equivalent to legal relations.

The court of appeals, however, held that in situations like this one economic and financial facts have nothing to do with legal rights and duties. In other words, the court of appeals applied the jurisprudential philosophy of *Legal Formalism*. Interestingly, the history of *Legal Realism* associates it very closely to the history of the philosophy of *American Pragmatism*. Oliver Wendell Holmes was a hero of both movements, and John Dewey (plus some of his students) was a central figure in both of them. From the practical point of view of getting actually injured people genuinely compensated, however, in a case like this one, *Legal Formalism* is far more pragmatic than legal realism.

If this case is tried, there will be an interesting issue. To be sure, the intermediary fouled up? Will this count as breach of contract, or will it count as a type of negligence. Clearly, if it is only the latter, there may be an affirmative defense issue. Shouldn't Tamers have noticed the problem that it wasn't getting what it wanted? Now, what if the legal theory is breach of contract? Might there not be an analogous affirmative defense? If so, what is it? // Quinn