UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3897
Summary Calendar

BOSTON OLD COLONY INSURANCE COMPANY,

Plaintiff-Appellant,

VERSUS

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 91 3792 F

May 5, 1993

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[1]

Boston Old Colony Insurance Company, an excess liability carrier, appeals the district court's judgment rejecting its claim against a primary insurer, National Union Fire Insurance Company of Pittsburgh. We affirm.

I.

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

National Union provided maritime employers' liability coverage to Dupre Brothers with limits of $l,000,000. Boston Old Colony provided similar coverage in excess of National Union's underlying limit.

In December l988, Terrell Parfait sued Dupre Brothers in state court for injuries he sustained. After a bench trial the state court awarded judgment in favor of Parfait for approximately $l,650,000, plus costs and interest.

While the Parfait judgment against Dupre was on appeal, Parfait settled his case against Dupre for $995,050. National Union had previously paid plaintiff $l80,000 in weekly benefits and medical expenses. After deducting these sums, National Union contributed the balance of its policy limit or $820,000 toward the settlement. Boston Old Colony made up the difference by paying $l75,000 toward the settlement. Boston Old Colony objected to paying this amount and reserved its right to proceed against National Union. Boston Old Colony sought to recover on two theories: (l) National Union wrongfully refused to pay legal interest on the judgment in addition to its stated policy limit in satisfying the judgment; (2) National Union was guilty of negligence and bad faith in refusing to settle the case below its policy limit.

The district court rejected Boston Old Colony's claim predicated on its first theory. The district court concluded that because this controversy was ended by a compromise and National Union did not agree to contribute interest in addition to the

stated limit, Boston Old Colony had no right to recover more than National Union agreed to contribute.

On Old Colony's alternate theory, the district court concluded that Old Colony did have the right as subrogee of its insured to pursue a claim that National Union was responsible for additional sums by virtue of its negligent handling of the defense of their joint insured. Following this ruling, however, Boston Old Colony voluntarily relinquished its claim predicated on this theory. Consequently, the sole issue presented to us is whether the district court correctly rejected Boston Old Colony's claim predicated on its first theory.

We agree with the district court that our decision in **Elmwood Plantation, Inc. v. Ruud Water Heating Division**, 815 F.2d 1016 (5th Cir. 1987) governs this case. In that case, the plaintiff's restaurant burned down. Plaintiff alleged that the fire was started by a defective water heater and sued the manufacturer of the heater, Ruud, in state court. After a bifurcated bench trial and a finding of liability against Rudd, trial began for a determination of damages. Before the district court determined damages, the parties agreed to a consent judgment holding Ruud liable for $4,500,000 and providing for one lump sum payment, without providing for interest, costs or attorneys' fees.

Rudd's primary insurer agreed to pay only its policy limit of $l,000,000. The excess insurer paid the remainder of the judgment and intervened to recover from the primary carrier a share of interest, costs and fees. The intervention was removed to federal

court. In affirming the district court's rejection of the excess insurer's claim, we held that the primary insurer had no obligation to pay more than its policy limit into the settlement without a contrary agreement. We stated the question as follows:

> whether, in addition to paying its liability limit, a primary insurer has the obligation to contribute to a lump sum settlement an amount representing its share of judicial interest, costs, and attorneys' fees that might be assessed if a judgment had been rendered against its insured when the primary and excess insurers did not agree to apportion part of the settlement as representing payment of the plaintiff's attorney's fees, prejudgment interest and costs.

Elmwood, 815 F.2d at 1020-21. We concluded that "in the absence of [such] an agreement . . . no such obligation exists." **Elmwood**, 815 F.2d at 1021.

Similarly, in this case, no agreement existed between the primary and excess insurers to apportion interests, costs or attorneys fees. The district court correctly rejected Boston Old Colony's claim against National Union.

AFFIRMED.