

IN THE GEORGIA STATE-WIDE BUSINESS COURT

GREAT AMERICAN INSURANCE)
COMPANY OF NEW YORK,)
))
Plaintiff,)
))
v.)
))
STARR SURPLUS LINES INSURANCE)
COMPANY,)
))
Defendant.)

Civil Action File No. _____

JURY TRIAL DEMANDED

COMPLAINT FOR DECLARATORY AND OTHER RELIEF

COMES NOW GREAT AMERICAN INSURANCE COMPANY OF NEW YORK (“Great American”), by and through counsel, and pursuant to O.C.G.A. § 9-4-1 *et seq.*, files this Complaint against STARR SURPLUS LINES INSURANCE COMPANY (“Starr”), showing this Honorable Court as follows:

PRELIMINARY STATEMENT

1. This is a claim for declaratory and other relief by Great American, a second-layer excess insurance carrier, against Starr, a first-layer excess insurance carrier, arising out of Starr’s negligent failure to settle a personal injury/premises liability claim made against their common insured The Kroger Co. (“Kroger”) in the action *LaQuan Tremell Taylor v. The Kroger Co.*, Case No. 15A57407E3, in the State Court of DeKalb County, State of Georgia (the “Taylor Action”).

2. Handed numerous demands from the plaintiff squarely within its policy limit, and despite repeated warnings from defense counsel and Great American of the possibility of a runaway jury verdict that could penetrate deep into Kroger’s excess coverage, Starr dug in and refused to settle or to offer its policy limit to attempt to settle. Instead, it rolled the dice and let the case be taken out of its hands and placed in the hands of a jury. The jury returned an \$81 million

verdict. After hearing post-trial motions, the Court granted a remittitur and entered a Final Judgment against Kroger of \$61,441,494.20, *i.e.*, an amount more than \$31 million in excess of the combined total limits of the Starr excess policy, underlying policy, and self-insured retention.

3. If Starr had simply settled within its \$25 million policy limit, it could have preserved the entirety of Kroger's next layer of excess coverage. Starr's decision to gamble on a jury verdict is a violation of its duty under Georgia law to act as an ordinary prudent insurer would and settle claims – within its policy limit in good faith – that it knew or should have known would result in a substantial excess verdict against its insured.

4. After the verdict, Starr refused to contribute more than its policy limit, forcing Great American to step in to protect its insured and settle the Taylor Action (the “Confidential Settlement”).

5. Great American seeks a declaration, pursuant to O.C.G.A. § 9-4-1 *et seq.*, that Starr negligently failed to settle the claims made against Kroger in the Taylor Action within its policy limit, or offer its policy limit when it had the opportunity to do so. Great American also seeks a declaration that it is entitled to recoupment from Starr of the amount it contributed to the Confidential Settlement. Great American further seeks its costs in bringing this action.

SUBJECT MATTER JURISDICTION

6. The Court has subject matter jurisdiction over Great American's claims under O.C.G.A. § 9-4-2(a) because an actual case or controversy exists between Great American on the one hand, and Starr, on the other hand, related to liability for the excess judgment in the Taylor Action in light of Starr's negligent failure to settle the claims. Subject matter jurisdiction further exists, pursuant to O.C.G.A. § 9-4-2(b), because the ends of justice require that a declaration

should be made regarding the parties' rights and responsibilities for the excess judgment in the Taylor Action.

PARTIES

7. Plaintiff Great American is a New York corporation with its principal place of business at 301 East 4th Street, Cincinnati, Ohio. Plaintiff Great American is a leading provider of innovative custom insurance products and specializes in serving the needs of niche marketplaces.

8. According to the Georgia Secretary of State records, Defendant Starr is a Delaware corporation with its principal place of business at 399 Park Avenue, Suite 2000, New York, NY. Starr is a global insurance and investment organization providing property and casualty insurance solutions to business and industry.

9. Pursuant to O.C.G.A. §§ 9-10-91(1) and (2) and 15-5A-3(a)(1)(A)(xiv), Defendant Starr is subject to the jurisdiction of this Court because it does business in this state and committed a tortious act in this state by negligently failing to settle the Taylor Action. Pursuant to O.C.G.A. § 14-2-1510, Starr can be served with service of process through its registered agent, CT Corporation System, at its registered office located at 289 S Culver St, Lawrenceville, Gwinnett County, Georgia, 30046-4805.

VENUE

10. Venue is proper in this Court as to Starr under O.C.G.A. §§ 14-2-510(b)(4) and 15-5A-2(e)(1) because this is a declaratory judgment action related to the payment of damages for a tortious act committed by Starr within DeKalb County by negligently failing to settle the Taylor Action pending in the State Court of DeKalb County.

BACKGROUND FACTS

11. Great American and Starr's dispute arises out of a personal injury/premises liability suit filed against Kroger and others by LaQuan Tremell Taylor ("Mr. Taylor"), a 27-year-old navy veteran, who was robbed, carjacked, and shot at least twelve times in the parking lot of a Kroger grocery store located in Atlanta, Georgia. By some miracle, Mr. Taylor survived the incident, but his life was forever changed. After three weeks in a medically-induced coma, roughly a year in the hospital, thirteen or more surgeries, and multiple millions of dollars of medical treatment and rehabilitation, Mr. Taylor will live the rest of his life a partial paraplegic from a severe spinal cord injury. He has extensive scarring across his entire body as a result of his gunshot wounds and intensive surgical procedures and continues to experience periodic excruciating nerve pain. There was no question that a jury would be sympathetic to Mr. Taylor's situation.

12. In his original complaint dated October 16, 2015, Mr. Taylor asserted causes of action for negligence against Kroger; Norred & Associates, Inc. (Kroger's third party security guard company); and Western Union Financial Services, Inc. (an operator of a money order and money transfer service in Kroger's store). Norred & Associates, Inc. and Western Union Financial Services, Inc. are not covered by any of the insurance policies issued by Great American or Starr that are the subject of this lawsuit. On December 11, 2018, the court granted Western Union Financial Services, Inc.'s summary judgment motion leaving only Norred & Associates, Inc. and Kroger to face trial. Norred & Associates, Inc. was granted a directed verdict in its favor at trial.

13. In substance, Mr. Taylor alleged that Kroger was negligent in (1) failing to institute proper security measures in the Kroger parking lot despite having actual or constructive knowledge of high criminal activity in the area, (2) negligently permitting criminal activity to occur on the

premises, and (3) failing to warn Mr. Taylor of the criminal activity. According to the complaint, the risks were foreseeable and the negligence was a material cause of Mr. Taylor's injuries.

14. Mr. Taylor sought recovery of all damages permitted by Georgia law. Because the actual assailants are in jail and recovery from them was impossible, Kroger was by far the most likely defendant to pay the bill when it came due.

15. Kroger's insurance coverage program in effect on the day of the shooting, January 14, 2015, worked as follows:

- a. Kroger had a self-insured retention of \$3,000,000 per occurrence and controlled the defense within that retention limit.
 - b. Above Kroger's self-insured retention, ACE American Insurance Company provided insurance with a liability limit of \$2,000,000 per occurrence (the "ACE Policy"). Upon information and belief, Kroger paid all of its premiums due under the ACE Policy.
 - c. Above the ACE Policy, Starr provided excess coverage with a \$25,000,000 per occurrence limit (the "Starr Policy"). Upon information and belief, Kroger paid all of its premiums due under the Starr Policy.
 - d. Above the Starr Policy, Great American provided excess coverage with a \$25,000,000 per occurrence limit (the "Great American Policy"). Kroger paid all of its premiums due under the Great American Policy.
 - e. XL Insurance America and Chubb Group of Insurance Companies provided excess coverage above Great American's limits.
16. Kroger defended itself with competent defense counsel through pretrial

proceedings, dispositive motions, and eventually at trial. Everyone, including Starr, knew or should have known this would be a difficult case to try given the attack on Mr. Taylor occurred in Kroger's parking lot, the extent of Mr. Taylor's injuries, and Mr. Taylor's ability to present well to a jury. Specifically, the facts included:

- a. This particular Kroger store was located in a high crime area. Kroger's loss prevention team ranked this store 10 on a scale of 1 to 10 in identifying the need for security. Kroger also assigned the store one of the highest scores in Kroger's Atlanta Division on its internal security index scale;
- b. Kroger delayed implementation of improved parking lighting despite identifying the need for improved parking lighting before the shooting occurred;
- c. Kroger delayed implementation of increased parking lot security despite identifying the need for security just a few months before the shooting occurred;
- d. The Burger King that shared a parking lot with the Kroger fuel center had been robbed;
- e. Other local businesses within walking distance of Kroger had hired security guards;
- f. There had been threatened gun violence in the Kroger parking lot;
- g. There had been at least six instances of car thefts from the Kroger parking lot in the nine-month period before the shooting;
- h. One of Mr. Taylor's assailants was a known loiterer at Kroger's store; and
- i. Two weeks before the shooting occurred, that particular assailant approached a Kroger employee at a coin laundromat across the street from Kroger's store, demanded money and an unidentified witness indicated the assailant had a gun.

The employee reported the incident to Kroger. Kroger took no action.

17. Pre-trial settlement talks were slow, but escalated quickly as trial approached.

18. Jury selection was scheduled to begin on April 4, 2019 and opening statements on April 9, 2019.

19. Jury selection did not start out well for Kroger. After day 1 of voir dire, the judge dismissed the entire 40 member panel because too high of a percentage of the panel was biased against Kroger.

20. On or about April 5, 2019, Starr gave defense counsel permission to increase Kroger's settlement offer. Plaintiff's counsel initially rejected the offer without a counteroffer, but then made a demand that placed the Taylor Action entirely within Starr's control to settle.

21. Given defense counsel's assessment of the case, the potential for a runaway verdict, and Mr. Taylor's offer to settle within Starr's policy limit, Great American demanded that Starr make every effort to settle. On April 8, 2019, Kroger also demanded that Starr settle the case within its limits.

22. Trial proceeded. Plaintiff's counsel put on its case in chief.

23. On April 12, 2019, the final day of testimony for Mr. Taylor's case in chief, plaintiff's counsel called Kroger's Senior Loss Prevention employee. He testified that:

- a. crime was on the rise at the property;
- b. it was foreseeable that a crime might occur;
- c. the store at issue had one of the worst risk ratings of all Kroger stores;
- d. a parking lot guard was needed and recommended at least two months before the shooting occurred;

- e. Kroger had the resources to put a guard in place immediately and failed to do so;
- f. that one of assailants was a frequent loiterer in front of the store;
- g. the same assailant had been seen with a gun across the street as reported by a Kroger employee; and
- h. no one followed up on the Kroger employee's report.

24. That same day, plaintiff's counsel indicated that Mr. Taylor would accept a settlement offer of a certain amount in Starr's layer and Great American again demanded that Starr settle the case within its policy limit and put Starr on notice that its failure to do so would leave it responsible to pay the excess judgment.

25. On or about April 13, 2019, plaintiff's counsel made a time-limited demand that expired at 6:00 p.m. on April 14, 2019. Settlement of the Taylor Action continued to remain entirely within Starr's control.

26. On April 13, 2019, Great American again demanded that Starr settle the case within its policy limit and put Starr on notice that its failure to do so would leave it responsible to pay the excess judgment.

27. With the negative evidence against Kroger only continuing to accumulate, Starr knew or should have known that the verdict was likely to exceed the limits of the Starr policy, underlying insurance, and Kroger's remaining retention. But Starr did not accept Mr. Taylor's demand.

28. During closing arguments, plaintiff's counsel explained to the jury that this is a "\$100 million case" and threw out numbers to the jury ranging from \$44 to \$144 million as suggested damages. Plaintiff's counsel made clear in closing that apportioning fault to the

assailants meant that Mr. Taylor would receive no compensation for that portion of any damages awarded.

29. On or about April 16, 2019, Starr raised its settlement offer, but came nowhere near Mr. Taylor's last demand and nowhere near its policy limit. Mr. Taylor rejected the offer and did not counter. Starr let the case proceed to a verdict without offering its policy limit.

30. On April 17, 2019, the jury started deliberations. By April 18, 2019, the jury reached a verdict awarding \$81 million in damages to Mr. Taylor. The jury apportioned 86% of the fault to Kroger, meaning the final judgment against Kroger was \$69,660,000.

31. On or about May 1, 2019, the judgment in the Taylor Action became final.

32. On May 15, 2019, Kroger filed a Motion for Judgment Notwithstanding the Verdict (JNOV) or New Trial or Alternatively for Remittitur, which it subsequently amended, and which Mr. Taylor opposed.

33. On June 17, 2020, the Court denied Kroger's request for judgment notwithstanding the verdict but granted a remittitur of \$8,218,505.80 for a Final Judgment against Kroger in the total amount of \$61,441,494.20.

34. Following the Final Judgment, Kroger appealed. Kroger, Great American, and Starr exchanged correspondence and participated in at least one mediation with Mr. Taylor's counsel. On August 3, 2020, Starr finally made its policy limit available to Kroger, forcing Great American to step in to settle the case and protect Kroger.

35. In late January 2021, plaintiff's counsel indicated an amount he would agree to in order to resolve the case within the Great American Policy limit. All parties, including Starr, urged Great American to resolve the case for up to that amount, which Great American did.

36. Great American asked Starr to fund the Confidential Settlement amounts in excess of its limit in full. Despite bearing responsibility for the excess verdict by virtue of its unreasonable failure to accept numerous settlement demands within its policy limit prior to trial, Starr refused.

COUNT I

DECLARATORY JUDGMENT

37. Great American repeats and realleges paragraphs 1 through 36 hereof, as if fully set forth herein.

38. Plaintiff was targeting Starr's layer and gave Starr multiple obvious opportunities to settle the Taylor Action prior to the verdict. Starr failed to settle the claims in the Taylor Action within its policy limit. At no time prior to the jury verdict did Starr offer the entirety of its policy limit.

39. Starr had a duty to act as an ordinary prudent insurer would when deciding whether to try a case and create an unreasonable risk of an excess judgment for its insured.

40. Starr's failure to settle the Taylor Action created an unreasonable risk of an excess judgment for Kroger. Starr knew or should have known that there was a substantial risk of a judgment in excess of its limits in light of the troubling facts of the case and guidance from defense counsel that an excess judgment was not only possible, but likely.

41. Starr breached its duty to Kroger and Great American and acted negligently in failing to settle the Taylor Action. As a result, Starr has caused additional insurance assets of Kroger's, in excess of Starr's policy limit, to be threatened.

42. The risk of an excess verdict rested with Starr, having elected to prioritize its own interests rather than those of its insured when it declined the demand to settle within its policy

limit, or to offer its policy limit.

43. Consistent with Great American's equitable subrogation rights, Great American is entitled to a declaration that Starr (1) negligently failed to settle the claims made against Kroger in the Taylor Action within its policy limit, or to offer its policy limit when it had the opportunity to do so, and (2) is obligated to reimburse Great American for the amount Great American contributed to the Confidential Settlement of the Taylor Action in light of Starr's negligent failure to settle the Taylor Action within its limit.

44. An actual case or controversy exists with regard to both of the aforementioned issues.

COUNT II

EQUITABLE SUBROGATION

45. Great American repeats and realleges paragraphs 1 through 44 hereof, as if fully set forth herein.

46. Starr had multiple opportunities to settle the Taylor Action within its policy limit before the verdict. Starr failed to settle the claims in the Taylor Action within its policy limit. At no time prior to the jury verdict did Starr offer the entirety of its policy limit.

47. Starr had a duty to act as an ordinary prudent insurer would when deciding whether try a case and create an unreasonable risk of an excess judgment for its insured.

48. Starr's failure to settle the Taylor Action created an unreasonable risk of an excess judgment for Kroger. Starr knew or should have known that there was a substantial risk of a judgment in excess of its limits in light of guidance from defense counsel that an excess judgment was not only possible, but likely.

49. Starr breached its duty to Kroger and Great American and acted negligently in failing to settle the Taylor Action.

50. The risk of an excess verdict rested with Starr, having elected to protect its own interests rather than those of its insured when it declined the demand to settle within Starr's policy limit, or to offer its policy limit.

51. After the verdict, Starr refused to contribute more than its policy limit toward a settlement of the Taylor Action notwithstanding that the excess judgment was a result of Starr's failure to settle the Taylor Action within its limit before the jury reached a verdict.

52. Great American subsequently agreed to contribute an amount to settle the Taylor Action in order to protect Kroger's and Great American's interests, subject to Great American's right to recoup from Starr the amount it paid. Kroger has not released any rights against Starr.

53. Starr is obligated to reimburse Great American for the amount it contributed to the Confidential Settlement of the Taylor Action.

COUNT III

ATTORNEY'S FEES UNDER O.C.G.A. §13-6-11

54. Great American repeats and realleges paragraphs 1 through 53 hereof, as if fully set forth herein.

55. Great American seeks its attorney's fees under O.C.G.A. § 13-6-11.

56. Starr has acted in bad faith, been stubbornly litigious, and/or has caused Great American unnecessary trouble and expense entitling it to recover its expenses in this litigation, including all reasonable attorney's fees and expenses.

WHEREFORE, Great American requests judgment as follows:

- A. As to Count One, Great American seeks a declaration that:
- (1) Starr negligently failed to settle the claims made against Kroger in the Taylor Action within its policy limit or to offer its policy limit when it had the opportunity to do so;
 - (2) Great American is equitably subrogated to Kroger for Starr's negligent failure to settle the Taylor action; and
 - (3) Starr is obligated to reimburse Great American for the amount it paid toward the Confidential Settlement, plus pre- and post-judgment interest.
- B. As to Count Two, Great American seeks judgment for Great American in an amount equal to the amount Great American paid toward the Confidential Settlement, plus pre- and post-judgment interest.
- C. Under Count Three, Great American seeks judgment for Great American for its attorney's fees and expenses in this action.
- D. As to all Counts, granting Great American all of its costs in this action; and
- E. As to all Counts, granting Great American such other and further relief as the Court deems just and proper.

JURY DEMAND

Great American demands a trial by jury on all issues triable by a jury.

Respectfully submitted, this 11th day of February, 2021.

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- 13 -

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