Behlmer v. Fitte (decision)

DISTRICT COURT

INSURANCE/INTERPLEADER: "Race to judgment" by 2 wildfire claimants to obtain limited policy proceeds available for payment to 30+ claimants headed off by interpleader . . . $1 million CGL policy not subject to attachment/execution because interpleader commenced before Plaintiffs attempted to serve writs, priority of claims must be determined by interpleader court . . . Reynolds.

Robert Fitte started a fire on his property 6/23/12 that burned a substantial part of Scratch Gravel Hills near Helena. Many properties were affected by the Corral Fire. On 1/2/13, Stephen Behlmer (by his dermatology practice's profit sharing plan & trust) sued Fitte for damages to his property. On 1/31/13 Kevin DeTienne filed his complaint. Before it was consolidated into this case, it was in front of Judge Menahan. Fitte had 3 policies with Mountain West: a personal liability policy with a $300,000 limit, a CGL policy with a $1 million limit, and an auto policy with a limit of $500,000. (Menahan previously determined that the auto policy covers the fire damages.) Mountain West admitted coverage under the personal policy but disputed coverage under the CGL policy, and on 2/25/15 filed a federal declaratory action. While the federal action was pending, it was apparent that there might be upwards of 35 claimants. On 3/25/13 Mountain West filed an interpleader in L&C Co. naming Fitte and citing a desire to work out informal arrangements with other claimants and save them the expense of appearing and hiring counsel. It initially sought to interplead only the personal policy limits. DeTienne intervened in the interpleader, arguing that both the personal and CGL policy limits should be interpled. On 5/31/13 Mountain West moved to deposit the $300,000 personal policy limit with the Court. It explained that whether the CGL policy covered the fire was before Magistrate Strong, and if a court of last resort ruled that it covered the loss, Mountain West would deposit the $1 million with the interpleader court. On 7/10/13, Strong granted Mountain West's motion, and it deposited the $300,000 with the Court 8/8/13. Meanwhile, Behlmer and Fitte had been negotiating.

Fitte admitted liability and stipulated to a judgment which was issued 7/12/13. The parties agreed to arbitrate damages. On 9/13/13, in accordance with the arbitration results, this Court issued a judgment for $500,000 against Fitte. The parties agreed that Behlmer would satisfy his judgment only through Fitte's insurance.

Strong ruled a month before the Behlmer judgment that the CGL policy covered the fire. Behlmer obtained a writ of execution and served notice of levy & attachment on Mountain West 9/30/13. The notice purported to attach the CGL policy and execute the judgment against it, and attach the personal and auto policies. On 10/10 Mountain West moved to intervene in this case and discharge the writ, arguing that insurance policy limits are not subject to attachment. The Court did not rule on these motions.

DeTienne obtained a $1.9 million judgment by confession against Fitte 10/16/13. On 11/6, Mountain West moved to deposit the $1 million CGL limit with the interpleader court. DeTienne obtained a writ of execution 11/14 and served it on Mountain West 11/25. On 12/19, Mountain West moved to intervene in the DeTienne case and discharge the DeTienne writ. Menahan did not rule on the motions to intervene and discharge the writ, but granted Mountain West's motion to deposit the $1 million 1/2/14.

Menahan and this Court on 1/6/14 consolidated the Behlmer and DeTienne cases into the present case. Mountain West was joined, rendering its motions to intervene moot. The parties were ordered to file cross-motions for summary judgment as to whether Plaintiffs may attach the Mountain West policies and if so, whether this gives their claims priority over all other Corral Fire claims, and the Court heard argument.

Behlmer argues that he has a right to attach the insurance proceeds to satisfy his judgment against Fitte because the $1 million policy is Fitte's property or a debt owed to Fitte. DeTienne makes a similar argument and contends that it is irrelevant whether the insurance proceeds are Fitte's property or a debt owed to him because both interests are subject to execution under § 25-13-501. They argue that by serving the writs on Mountain West before it deposited the $1 million in the interpleader, they properly attached the funds and created valid judgment liens, and because it deposited the funds without first discharging the liens, it is liable for the lien amount under § 27-18-407:

> All persons having in their possession or under their control any credits or other personal property belonging to the defendant or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice must be, unless the property is delivered or transferred or the debts are paid to the sheriff, liable to the plaintiff for the amount of the credits, property, or debts until the attachment is discharged or any judgment recovered by the plaintiff is satisfied.

DeTienne argues that Mountain West should be held in contempt for depositing the proceeds after the writ was served and in violation of it, and that it is liable for conversion for refusing to pay the judgment. Fitte argues that the proceeds should be distributed through the interpleader because Mountain West has from the beginning been trying to allocate them as fairly as possible, and that letting Behlmer and DeTienne execute outside the interpleader would be unfair to the other unliquidated claimants who have been assured by Mountain West that their interests were being protected. Mountain West joins in Fitte's argument and also argues that insurance proceeds generally are not subject to execution because they are not explicitly listed in § 25-13-501. It argues that because the interpleader was commenced before the $1 million policy was attached, the $1 million was not Fitte's property, nor was it a debt owed to him when Plaintiffs served their writs, and must remain in the interpleader. Both Fitte and Mountain West argue that the interpleader court should determine priority of the claims. Montana courts have not addressed where insurance proceeds are deposited into a single interpleader at various times and a judgment creditor attempts to execute against some of the proceeds after the interpleader is filed but before the funds are deposited.

§ 25-13-501, which describes what property is subject to execution, encompasses all types of property interests. While insurance proceeds generally may be subject to attachment and execution in a garnishment proceeding where a party obtains a judgment against an insured, the proceeds of Fitte's policies are not subject to attachment and execution because all proceeds available to cover the Corral Fire must be apportioned through the interpleader. Because the interpleader began before either Plaintiff obtained a judgment, any proceeds from Mountain West that cover the loss were bound for the interpleader and thus were neither Fitte's property nor a debt owed to him at the time Plaintiffs attempted to attach them. Money subject to an interpleader cannot be attached and executed upon because it is no longer property of the debtor. Neither Plaintiff argues that the $300,000 personal policy is subject to attachment, because that amount was deposited in the interpleader before either Plaintiff obtained a judgment. Behlmer argues that because he served its writ before Mountain West deposited the $1 million CGL limit, his interest in the proceeds was perfected before the money was subject to the interpleader and that interest cannot be altered by the subsequent deposit. But it is the date that the interpleader is filed -- not the date that the funds are deposited -- that determines when the money is subject to the interpleader, as made clear by the cases cited by Behlmer in support of his argument on priority.

Unlike federal law, Montana no longer has a general interpleader statute. RCM 93-2825 was repealed in 1961, and interpleader is provided by Rule 22, the subsection of which pertaining to a plaintiff is identical to the federal rule. With interpleader under the federal statute, a court's jurisdiction does not attach until the disputed funds are deposited with the court. Rule interpleader has no such deposit requirement. Mountain West filed its complaint in interpleader 3/25/13. Neither Behlmer nor DeTienne had a judgment at that time. In its 5/31/13 brief in support of its motion to deposit the $300,000 personal policy limit, Mountain West discussed the $1 million CGL policy, explained that it denied coverage under that policy, and noted that the issue was in litigation in Federal Court. Plaintiffs argue that Mountain West could have deposited the $1 million at the same time as the $300,000. But when the interpleader was filed, Mountain West was already contesting liability under the CGL policy in Federal Court. When it moved to deposit the personal policy into the interpleader, it made clear that if the Federal Court determined that the CGL policy covered the loss, Mountain West would also deposit the $1 million. It was not required to deposit it before Strong's ruling.

Because the interpleader is based on Rule 22, which does not contain a deposit requirement, the date the interpleader was commenced, or was initiated, or became viable -- however it is characterized -- can be only the date the action was filed, which in this case is 3/25/13. The result is that when Behlmer and DeTienne served their writs on Mountain West, the insurance proceeds were not Fitte's property, nor were they a debt owed to him, but were money owed to the interpleader. Fitte had no interest in the CGL policy because as soon as Strong ruled that it covered the loss, the proceeds were bound for the interpleader. It was not subject to attachment and execution. This is not a situation where a subsequent interpleader displaces a perfected security interest, as Behlmer and DeTienne argue, because the interpleader came before either plaintiff obtained a judgment. Because deposit of the funds is not a jurisdictional prerequisite under Rule 22, the interpleader funds were subject to the interpleader as of the date the complaint was filed. The subsequent deposit of policy proceeds was a procedural step, not a new action.

Allowing the first claimant to obtain a judgment or settlement to appropriate all or a disproportional amount of a limited insurance fund leads to manifest unfairness: "The difficulties such a race to judgment pose for the insurer, and the unfairness which may result to some claimants, were among the principle evils the interpleader device was intended to remedy." *Tashire* (US 1967). Mountain West has been aware of more than 30 property owners affected by the Corral Fire since at least early 2013. Counsel for DeTienne wrote Fitte's counsel 3/29/13 stating that "`two suits have already been filed and it is likely that more will be coming." That letter also recognized that Mountain West had already filed the interpleader, knowing that the available insurance money would be insufficient to cover the entire loss. Despite awareness of the other unliquidated claimants and of the interpleader, Plaintiffs obtained judgments and sought to execute them as soon as possible, precisely the situation the interpleader was intended to remedy.

The $1 million CGL policy was not subject to attachment and execution because the interpleader action, which was intended to distribute all available insurance, was commenced before Plaintiffs attempted to serve their writs. Priority of claims to the interpleader fund must be determined by the interpleader court.

Because the $1 million was not subject to attachment, Mountain West was not wrong to withhold payment on the writs and therefore is not in contempt and is not liable for conversion.

David Rico moves to intervene pursuant to Rule 24. He claims that he has an interest in the property which is the subject of this action, disposing of the action may impede his ability to protect that interest, and the existing parties cannot adequately represent his interest. Unlike Behlmer and DeTienne, Rico does not have a judgment

against Fitte; he has not sued Fitte. Menahan granted his motion to intervene in the interpleader 3/5/14. Because the Court determines that the $1 million CGL limit was not subject to attachment and that distribution of the proceeds must be decided by the interpleader court, Rico does not have an interest in the proceeds that cannot be adequately protected by an existing party. The Behlmer and DeTienne judgments cannot be executed against the CGL policy, the limits of which are now in the interpleader. Rico therefore has no interest in this suit and his motion to intervene is denied.

Behlmer v. Fitte; DeTienne v. Fitte; Mountain West Farm Bureau Mutual Ins. (joined party), L&C DDV-13-08, 1/18/16.

Erik Thueson (Thueson Law Office), Helena, and Scott Peterson (Morrison, Sherwood, Wilson & Deola), Helena, for Behlmer; Thomas Budewitz, Helena, for DeTienne; Curt Drake & Amy Burns (Drake Law Firm), Helena, for Fitte; Randall Nelson (Nelson & Dahle), Billings, for Mountain West.