

Insured Entitled to Discovery on Extent of Limit Remaining on Policy

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The United States District Court for the Southern District of New York has held that an insurer is not entitled to summary judgment against an individual insured on the basis of exhaustion of the limit of liability by the payment of defense costs when evidence indicates that the insurer will receive repayment of some amounts previously paid under the policy on behalf of other insureds. *In re Axis Reins. Co. Refco Related Ins. Litig.*, 2009 WL 2513499 (S.D.N.Y. Aug. 17, 2009).

An individual insured reached a settlement with a putative class of plaintiffs in a securities lawsuit. The agreement with the class required the insured to obtain \$7.55 million from his directors and officers liability insurers to fund the settlement. The insurer in this case refused to contribute to the settlement. In the ensuing coverage litigation, the insurer moved for summary judgment, arguing that the policy's \$10 million limit of liability was exhausted by the payment of defense costs in the underlying litigation. In denying the motion for summary judgment, the court noted that the insurer had filed a motion to dismiss claims against other individual insureds which indicated that the insurer would be receiving at least partial repayment from other individual insureds for amounts paid by the insurer towards those insureds' defense costs. Accordingly, the court held that the individual insured was entitled to discovery regarding the amounts recouped by the insurer in its settlements with the other insureds and denied the insurer's motion for summary judgment.