NEWSLETTER

Actual Payment By Primary Insurer Necessary To Trigger Excess Coverage

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A Missouri appellate court has held that, because a primary insurer settled its liability for less than its policy's limits, its primary policy was not exhausted and the excess insurer owed no coverage to the insured as a result. *Schmitz v. Great Am. Assur. Co.*, 2010 WL 2160748 (Mo. Ct. App. June 1, 2010).

The insured minor league baseball team held an event involving the use of portable climbing wall. During that event, a climber died when one of the climbing wall's safety cables broke. The climber's parents then sued the insured, but the baseball team's insurers denied coverage, with the primary insurer asserting that coverage was excluded and the excess insurer asserting that its policy could be implicated only after the underlying insurer paid its full limits of liability. A judgment was entered thereafter against the insured in excess of the limits of the primary insurance. In the succeeding coverage litigation brought by the claimants as assignees of the insured, the court ruled that the exclusion relied upon by the primary carrier did not apply and that the primary policy provided coverage. The primary insurer then settled with the claimant for $700,000, although its policy had a $1 million limit of liability. In connection with the settlement, the claimants provided the primary carrier with a release of any obligation to pay the full $1 million.

The excess insurer asserted that its policy did not provide coverage because the primary policy was not exhausted. The insurer relied on language in the policy stating: "[I]f the 'Underlying Limits of Insurance' . . . are . . . exhausted solely by payment of 'loss', such insurance provided by this policy will apply in excess." The policy further defined "loss" to mean "those sums actually paid in settlement or satisfaction of a claim."

In ruling for the excess insurer, the appellate court rejected the claimants' contention that controlling Missouri law established that exhaustion of a primary policy occurred "when a primary insurer settles its obligation to pay its underlying limits of liability insurance coverage" irrespective of the language in the excess insurance policy. According to the claimants, so long as there was liability excess of the primary carrier's limits, once the primary carrier compromised its claim, the claimants should be able to recover any loss above the primary carrier's limits from the excess carrier. The appellate court noted that this approach was contrary to the express language of the excess policy, which limited the carrier's obligation to payments where the underlying limit was exhausted by "sums actually paid."