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ALERT

New York Appellate Court Holds Excess Policies Do Not Attach When Policyholder Compromised Underlying Limits

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The New York Supreme Court Appellate Division, First Department, applying Illinois law, has affirmed the dismissal of a coverage suit as to five excess insurers, holding that their excess policies could not attach when the policyholder had compromised the limits of an underlying excess policy. *JP Morgan Chase v. Indian Harbor Insurance Company*, No. 603766/08 (N.Y. Sup. Ct. App. Div. June 12, 2012). Discussion of the trial court opinion appeared in the July 2011 issue of *Executive Summary*.

The policyholder brought coverage litigation regarding its 2002-2003 insurance tower in connection with claims asserted against it for its role as indenture trustee. Ten insurers underwrote $175 million of primary and excess coverage in that policy year. The policyholder sued eight of the insurers, settling with the other two contemporaneously with the filing of its complaint. The settlement with the third excess insurer compromised coverage claims under both the 02-03 insurance policy and an earlier policy for $17 million dollars, an amount greater than the $15 million limit of liability of the 02-03 excess policy but less than the total limits of both policies.

The fourth excess insurer, joined by the excess insurers above it, moved to dismiss the coverage action because its policy contained a condition precedent that the excess insurer could only be liable to pay after each underlying carrier paid the full amount of its policy limits. The policy provided that "liability for any loss shall attach to [the excess insurer] only after the Primary and Underlying Excess Insurers shall have duly admitted liability and shall have paid the full amount of their respective liability."

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The appellate court held that this provision imposed two conditions, neither of which had occurred. The third excess insurer had not "duly admitted liability" because the settlement agreement disclaimed any admission of liability by the third excess insurer. In addition, the policyholder's settlement with the third excess insurer did not allocate the $17 million settlement between the two policies, which "preclude[d] any determination of whether" the released policy's limits were reached.

The court further quoted language of the additional excess policies, and held that the various "full payment" provisions likewise had not been met, including provisions requiring (i) "actual payment under such Underlying Insurance," (ii) payment "by the insurers" as "covered loss," (iii) "actual payment under the Underlying Insurance," and (iv) the underlying insurers "to have paid or have been held liable to pay" the underlying limits.

The appellate court favorably cited *Citigroup Inc. v. Federal Insurance Co.*, 649 F.3d 367 (5th Cir. 2011), and *Great American Insurance Co. v. Bally Total Fitness Holding Corp.*, No. 06 C 4554, 2010 WL 2542191 (N.D. Ill. June 22, 2010), to support its holding. It further rejected the policyholder's argument that the policy was ambiguous based on other purportedly conflicting provisions, such as provisions regarding the solvency of the underlying insurers. The court also distinguished the Second Circuit's 1928 *Zeig* decision, relied on by the policyholder, by noting that *Zeig* involved different policy language, and that the *Zeig* opinion itself had noted that parties could choose policy language to implement a rule other than the gap-filling rule it applied.

The opinion is available here.