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NEWSLETTER

Claim against Excess Insurer Not Ripe Where Insolvent Primary Insurer's Liability Not Yet Established

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In an unpublished opinion, a federal district court, applying New Jersey law, has held that a company and one of its directors did not have a justiciable claim for coverage under an excess D&O policy where they had neither paid up to the primary policy's limits nor secured a judgment that the primary policy afforded coverage for the claim. *G-I Holdings, Inc. v. Reliance Ins. Co.*, No. 00-6189 (D.N.J. Mar. 23, 2004).

The case arose from three underlying actions against an insured company and one of its directors, seeking damages from the company for asbestos-related injuries and from the director for an allegedly fraudulent transfer of the stock of one of the company's former subsidiaries. The company's primary D&O carrier, Reliance, had been placed into statutory liquidation. The excess D&O policy provided that the excess insurer's obligations would not be modified by any financial insolvency of any underlying insurer, and that the insureds would be deemed to be self-insured for the limit of liability of any underlying insurance not paid as a result of financial insolvency. In addition, Section II.E of the excess D&O policy provided that the excess insurer "shall be liable only after the Insurers under the Underlying Insurance shall have agreed to pay or have been held liable to pay the full amount of their respective limits of liability...and, if applicable, the Insureds shall have paid the amount of the limit of liability deemed to be self insured...." (The company and the director also pursued a claim against the primary insurer in the liquidation proceeding.)

The court first granted the excess insurer's motion to dismiss, holding that the claim against the excess insurer was not justiciable because it was not ripe. The court reasoned that the parties did not have a genuine adversity of interests because the company and the director failed to allege that they had paid up to the primary policy's limits in connection with the underlying litigation, and the primary insurer had not agreed to provide coverage and had not yet been held liable under the primary policy in the liquidation proceeding.

In so ruling, the court rejected the argument of the company and the director that the excess insurer must pay once the insureds incurred costs above the underlying limits. The court reasoned that "Section II.E of the Excess Policy is a conjunctive construction prohibiting Plaintiffs from simply electing to pay the limit and avoid a determination of [the primary insurer's] liability." Until the company and the director had both (1) paid an amount equal to the underlying policy's limits and (2) succeeded in gaining a judgment against or an

agreement to pay from the primary insurer, the court held that the excess insurer had no obligation to the company or the director, and that the parties therefore lacked any adversity of interests.

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