

# California Appellate Court Holds Excess Policy Not Triggered Where Settlement with Primary Carrier Fails to Exhaust Primary Policy Limit

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A California appellate court has held that an excess carrier is not liable where the policyholder settles with the primary carrier for less than the full amount of the primary policy limit. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London*, No. D050433 (Cal. App. Ct. March 25, 2008).

The policyholder possessed directors and officers liability insurance coverage in the amount of \$40 million. The primary policy had a limit of \$20 million. The first excess policy had a limit of \$20 million in excess of the primary \$20 million. The first excess policy provided that, "This Policy provides excess coverage only. It is a condition precedent to the coverage afforded under this Policy that [the policyholder] maintain [the primary policy] with retentions/deductibles, and limits of liability (subject to reduction or exhaustion as a result of loss payments), as set forth in Items F. and G. of the Declarations. This Policy does not provide coverage for any loss not covered by the [primary policy], except and to the extent that such loss is not paid under the [primary policy] solely by reason of the reduction or exhaustion of the Underlying Limit of Liability through payments of loss thereunder. In the event [the primary carrier] fails to pay loss in connection with any claim as a result of the insolvency, bankruptcy or liquidation of said insurer, then those insured hereunder shall be deemed self-insured for the amount of the Limit of Liability of said insurer which is not paid as a result of such insolvency, bankruptcy or liquidation" (the Maintenance Clause). The excess policy further provided that "Underwriters shall be liable only after the insurers under each of the Underlying Policies have paid or have been held liable to pay the full amount of the Underlying Limit of Liability" (the Exhaustion Clause).

The policyholder was the target of a class action lawsuit that it subsequently settled. At mediation, the policyholder and the primary carrier reached a settlement under which the primary carrier paid \$16 million and obtained a policy release. The policyholder then sued the excess carrier, seeking \$9 million it had incurred in connection with the defense and settlement of the class action. The policyholder alleged that the policyholder, the primary carrier or other third parties had paid at least \$20 million in defense and indemnity costs for the class action suit. The excess insurer moved to dismiss, arguing that it owed no coverage because the policyholder had failed to satisfy the Maintenance Clause and the Exhaustion Clause. The trial court held that the Maintenance Clause constituted a condition precedent that the policyholder had failed to satisfy and

granted the excess insurer's motion to dismiss.

The appellate court affirmed the judgment for the excess carrier. First, the court determined that the Exhaustion Clause was unambiguous. The court held that the excess carrier had no coverage obligation because the primary carrier had not "paid or been held liable to pay" the limit of the primary policy. The court stated that the term "paid" in the Exhaustion Clause "cannot have any other reasonable meaning than actual payment of no less than the \$20 million underlying limit." The court rejected the policyholder's argument that it had a reasonable expectation of coverage because the language in the Exhaustion Clause had been interpreted by various courts and construed to mean that an insured could "fill the gap" between the amount of any settlement with its primary carrier and the attachment point of the excess policy. The court held that the reasonable expectations doctrine could not create an ambiguity in policy language. The court noted that the policyholder had not alleged that the primary carrier had been "held liable to pay" \$20 million. Rather, the record was devoid of any allegation or evidence that the settlement agreement "required [the primary carrier] to accept responsibility or liability for the full amount of the \$20 million limits on the underlying policy" or that the primary carrier "was obligated to pay the \$20 million pursuant to a court order or judgment." Second, the court rejected the policyholder's argument that public policy favoring settlements mandated a reversal of the trial court's ruling. The court held that the language of the policy was unambiguous and therefore the court was not permitted to rewrite the language for any purposes. In light of its ruling regarding the Exhaustion Clause, the court declined to reach the question whether the Maintenance Clause provided an independent ground for barring the policyholder's claim for coverage.