

Excess Carrier Has No Obligation for Defense Fees until Primary Policy Exhausted

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The U.S. Court of Appeals for the Fifth Circuit, reversing a lower court decision, recently held that an excess insurer is not required to participate in the payment of defense costs until the limits of the primary policies have been exhausted. *Schneider National Transport v. Ford Motor Co.*, 2002 U.S. App. LEXIS 763 (5th Cir. Jan. 18, 2002).

The issue in *Schneider National Transport* was whether the excess insurer was obligated to contribute to the payment of defense costs on a pro rata basis, as set forth in one of the underlying policies. The underlying policy in question provided that "in the event any claim(s), exceed the Named Insured's self-insured retention and involve the liability of the Company, then, solely as respects each such claim the Company and the Named Insured shall prorate all costs and expenses in direct proportion to the amount of damages applicable to and payable by each of them..." The excess policy, on the other hand, stated: "Should applicable underlying insurance(s) become exhausted by payment of covered claims, this insurance will continue in force as underlying insurance and shall defend any suit arising out of a covered occurrence..." The excess policy also provided that, "[e]xcept for exhaustion of underlying limits by payment of covered claims," the excess insurer "shall not be called upon to investigate or defend any suit brought against the insured, but the company shall have the option to associate in the investigation and/or defense of suits covered under the policy..."

Based on the "plain and ordinary meaning" of the two competing policy provisions, the Court of Appeals held that the excess insurer was not responsible for payment of defense costs until the underlying policy limits are exhausted. The court held that the language of the primary policy providing for the payment of defense costs was not incorporated into the terms of the excess policy. Moreover, the Court of Appeals rejected the argument that "as underlying insurance" language in the excess policy obligated the excess insurer to pay defense costs on a pro rata basis with the primary carrier. Finally, the court noted that the excess policy clearly provided that the excess insurer was not obligated to pay defense costs "[e]xcept for exhaustion of underlying limits by payment of covered claims..." Accordingly, based on the plain language of the excess policy, the court held that the excess insurer was not obligated to pay defense costs until the primary policies were exhausted.