

Excess Insurer May Challenge Whether Payments Exhausted Underlying Limits

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The Court of Appeals of Minnesota has held that an excess insurer may challenge whether underlying policies were exhausted through payment of covered loss, including reasonable defense costs. *Royal Indem. Co. v. C. H. Robinson Worldwide, Inc.*, 2009 WL 2149637 (Minn. Ct. App. July 21, 2009). The court also found that a class action lawsuit and subsequent individual employment lawsuits brought by plaintiffs after they were excluded from the class were related claims.

Employees of the insured company initiated a federal class action lawsuit against the company in 2002. The primary insurer and two excess carriers agreed to provide a defense subject to a reservation of rights. Three years later, certain employees who were excluded from the class at the class certification stage filed separate lawsuits alleging violations of equal employment opportunity laws (the EEO Lawsuits).

As the litigation progressed, the insurers began to question the reasonableness of defense costs, which ultimately exhausted the primary insurer's limits of liability. A settlement was reached prior to trial in the class-action lawsuit. The first excess insurer paid the outstanding defense costs and the remainder of its limit toward the settlement. The second excess insurer agreed to pay the remainder of the settlement but specifically reserved its right to dispute coverage and to seek reimbursement for amounts paid that did not constitute covered loss or reasonable defense costs.

The court found that the second excess carrier was entitled to assert that, if the underlying carriers paid unreasonable defense costs or amounts that did not fall within the policy's definition of "Loss," the insured could not rely on those payments to establish that the underlying policies had been exhausted. The court noted that the second excess insurer's duty to indemnify was triggered only after the underlying carriers had properly exhausted their limits of liability by paying covered "Loss," including reasonable "Defense Costs," as defined in the policy. The insured could not implicate the second excess policy simply by showing that the underlying insurers made payments sufficient to exhaust their policy limits. Rather, the insured must show that the payments made by the underlying insurers were for "Loss," including reasonable "Defense Costs," as defined in the policy.

Additionally, the court ruled that the EEO Lawsuits and the class action lawsuit were "related claims" and

therefore deemed a single claim first made in 2002. The policy defined "Related Wrongful Employment Acts" as those that "arise out of, are based on, relate to or are in consequence of the same facts, circumstances or situations." The court opined that the term "related" covers "a very broad range of connections, both logical and causal." It noted that the EEO Lawsuits arose out of the wrongful employment acts alleged in the class action and were filed as a direct result of the plaintiffs' exclusion from the class action suit. But for the plaintiffs dismissal from the class-action suit, the EEO Lawsuits would not have been filed. Consequently, the court ruled that the claims were deemed a single claim first made when the class-action suit was filed.