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NEWSLETTER

Dispute Over Excess Policy Exhaustion Provision Not Ripe Unless Insured Reaches Below-Limits Settlement With Primary Insurer

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The United States District Court for the Northern District of Ohio has dismissed for lack of subject matter jurisdiction a count in an insured's declaratory judgment action concerning the proper interpretation of an excess policy exhaustion provision.

The court held that the insured's dispute with its excess insurer over exhaustion was not ripe because the insured had not yet reached a below-limits settlement with the primary insurer or an agreement to settle contingent on the interpretation of the exhaustion provision. *Goodyear Tire & Rubber Co. v. Nat'l Union Fire Ins. Co.*, No. 08-cv-1789 (N.D. Ohio Oct. 23, 2009). Wiley Rein LLP represented the excess insurer.

The insured company's primary directors and officers insurance policy provided $15 million in coverage subject to a $5 million retention. The company also had an excess policy with a $10 million limit. The excess policy specified that coverage "shall attach only after the insurer[] of the [primary policy] shall have paid in legal currency the full amount of the [primary policy]." The company sued the primary and excess insurers in an attempt to obtain coverage for over $30 million in fees and costs allegedly incurred to defend a claim. In Count II of the insured's complaint, it sought a declaration that the exhaustion provision in the excess policy should be deemed satisfied even if the primary insurer did not actually pay its entire limit. In its complaint, the company alleged that "under Ohio law, so-called exhaustion provisions are deemed satisfied when the policyholder settles in good faith with the underlying insurer and credits the excess insurer with the difference between the settlement amount and the underlying insurer's policy limits." The company also alleged that the excess insurer's position that the underlying insurer needed actually to pay its entire limit of liability would "effectively preclude a compromise" between it and the primary carrier.

The excess insurer filed a motion to dismiss on the grounds that Count II was not ripe for judicial relief because it was speculative whether the insured and its primary carrier would reach a settlement below the limit of the primary policy. The excess insurer also argued that, in any event, the plain text of the exhaustion provision unambiguously stated that coverage under the excess policy would attach only after the underlying insurer actually paid its entire limit of liability. The excess insurer further maintained that, contrary to the insured's argument that such a provision would be deemed to violate Ohio public policy favoring settlements,

Ohio law would permit sophisticated parties to bargain for such a provision.

The court granted the excess insurer's motion to dismiss, concluding that Count II of the insured's complaint sought an impermissible advisory opinion, as it was undisputed that the company and the primary carrier "have not reached any settlement nor any contingent agreement to settle the underlying claim." Although the court accordingly declined to opine on the proper interpretation of the exhaustion provision, it noted that "[u]nquestionably, sophisticated business entities, such as [the insurers and their insured], could have negotiated and bargained for policy language, prior to executing the insurance agreements implicated by this litigation. As it is, the Court agrees with [the excess insurer's] position that the exhaustion provision in its excess policy has not been triggered." Finally, the court rejected the company's position that it would be unable to settle its claim against its primary insurer absent a declaration as to the exhaustion provision in the excess policy. The court stated that the excess insurer's position "is not precluding nor preventing any settlement between [the insured] and [the primary insurer]. Rather, settlement or compromise is being stymied by [the insured's] own trepidation—that is, [the insured's] own unwillingness to risk settling or compromising its claim with [the primary insurer] and confront the uncertain legal application of a bargained-for contract term."