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NEWSLETTER

No Excess Coverage Under Ohio Law When Insured Settles with Primary Carrier for Less Than Primary Limits

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The United States District Court for the Northern District of Ohio has held that an excess carrier's policy was not triggered when the insured consummated a less-than-limits settlement with the primary carrier. *Goodyear Tire & Rubber Co. v. Nat'l Union Fire Ins. Co.*, No. 08cv1789 (N.D. Ohio Sept. 19, 2011). Wiley Rein LLP represented the excess insurer.

The insured company had a primary directors and officers liability insurance policy that provided $15 million in coverage subject to a $5 million retention. The company also had an excess policy with a $10 million limit. After the insured company announced its intent to restate its financials, the company and its directors and officers were named as defendants in securities and derivative lawsuits. The company tendered the lawsuits to its directors and officers liability insurers, which acknowledged coverage for the lawsuits. After the lawsuits were dismissed, the insured tendered approximately $28 million in fees and costs incurred in responding to a Securities and Exchange Commission (SEC) investigation and conducting an internal investigation. The insurers denied coverage for the investigation costs, and the company filed suit against the primary and excess carriers. Approximately two years into the coverage litigation, after discovery was completed, the company and the primary carrier consummated a settlement for $10 million as well as other non-monetary consideration. The excess insurer then moved for summary judgment, contending that its policy was not triggered because the policy provided that coverage "shall attach only after the insurers of the Underlying Insurance shall have paid in legal currency the full amount of the Underlying Limit."

The court granted the excess insurer's motion for summary judgment. The insured company argued that, given Ohio public policy favoring settlements, it should be allowed to "fill the gap" between the amount of its settlement with the primary carrier and the excess carrier's attachment point. The court held that the Ohio cases the insured company cited in the uninsured motorist context were distinguishable and public policy did not trump the unambiguous language of the excess policy. The court also rejected the insured's argument that the excess carrier needed to and could not demonstrate prejudice from the insured's failure to exhaust the primary policy. The court held that the excess carrier's policy set forth a "triggering point of $15 million plus the $5 million self-insured retention"; the excess carrier "based the premium it charged . . . on that expectation, not some lesser amount"; and the carrier would suffer prejudice if it could not rely on its

attachment point. The court also noted that the excess carrier suffered prejudice because it had been forced to litigate the coverage issues for over two years based on the insured's insistence that its limit was implicated. Finally, the court noted that, as a sophisticated insured with the capacity to hire counsel to advise it in placing and bargaining for coverage, the insured company could have sought excess coverage with different exhaustion language.