wiley

ALERT

New York Trial Court Holds Excess Policies Do Not Attach When Policyholder Compromised Underlying Limits

June 8, 2011

The New York Supreme Court, New York County, applying Illinois law, has dismissed a coverage suit as to five excess insurers, holding that their excess policies could not attach when the policyholder had compromised the limits of an underlying excess policy. *JPMorgan Chase v. Indian Harbor Insurance Company*, No. 603766/2008 (N.Y. Sup. Ct. May 26, 2011).

The policyholder brought coverage litigation regarding its 2002-2003 insurance tower in connection with claims asserted against it for its role as indenture trustee for a medical finance company. Ten insurers underwrote $175 million of primary and excess coverage in that policy year. The policyholder sued all ten insurers, but settled with the third excess and eighth excess insurers shortly after filing its complaint. The settlement with the third excess insurer compromised coverage claims under both the 02-03 insurance policy and an earlier policy for $17 million dollars, an amount greater than the $15 million 02-03 excess policy but less than the total amount of both policies.

The fourth excess insurer, joined by the excess insurers above it, moved to dismiss the coverage action against it because its policy contained a condition precedent that the excess insurer could only be liable to pay after each underlying carrier paid the full amount of its policy limits. The fourth excess insurer argued that because the policyholder's settlement with the third excess insurer did not allocate the $17 million settlement between the two policies, the policyholder would be unable to prove that the third excess policy was exhausted. The court agreed, noting that the settlement required the third excess insurer to pay $17 million to settle $28 million worth of claims under

Practice Areas

E&O for Lawyers, Accountants and Other Professionals

D&O and Financial Institution Liability

Professional Liability Defense

Insurance

two policies, and that the policyholder "deliberately chose not to allocate those payments between different policies involved in different underlying lawsuits."

The court further rejected the policyholder's argument that it could fill the gap in the 02-03 insurance tower with its own funds. According to the court, the unambiguous policy language required exhaustion of underlying limits and did not allow the policyholder to fill the gap with its own funds. The court noted that an Illinois federal court had reached a similar holding in *Great American Insurance Co. v. Bally Total Fitness Holding Corp.*, No. 06 C 4554, 2010 WL 2542191 (N.D. Ill. June 22, 2010), and that other recent decisions were in accord, notwithstanding the policyholder's assertion that those decisions were "wrongly decided." The court also distinguished the Second Circuit's 1928 *Zeig* decision, relied on by the policyholder, by noting that *Zeig* involved less specific language, and that the *Zeig* opinion itself had noted that parties could choose policy language to implement a rule other than the gap-filling rule it applied.

The court rejected other arguments by the policyholder to claim that the policy was ambiguous based on other purportedly conflicting provisions, such as provisions regarding the solvency of the underlying insurers. The court held that the provisions did not create ambiguity, and, because the policy was unambiguous, further rejected the policyholder's attempt to introduce extrinsic evidence regarding interpretation of the policy.

Noting that while the court "certainly favors and encourages settlements of cases whenever possible, it cannot do so in contravention of the clear language of the policy," the court granted the fourth excess insurer's motion to dismiss. The court likewise granted the motions of four additional excess insurers higher in the tower based on similar language in their respective policies.