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ALERT

Excess Policies Do Not Attach When Policyholder Cannot Prove that Settlements with Underlying Insurers Exhausted Policy Limits

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The New York Court of Appeals has denied permission to appeal the dismissal of a coverage suit as to five excess insurers where the trial court held under Illinois law that their excess policies could not attach when the policyholder had compromised the limits of an underlying excess policy. *JP Morgan Chase v. Indian Harbor Ins. Co.*, No. 2012-1193 (N.Y. Feb. 7, 2013). Discussion of the trial court opinion appeared in the July 2011 issue of *Executive Summary*, and discussion of the intermediate appellate court opinion appeared in the July 2012 issue of *Executive Summary*.

The Court of Appeals denied leave to appeal by order without opinion. The facts of the case as described in the lower court opinions are as follows.

The policyholder brought coverage litigation regarding its 2002-2003 insurance tower in connection with claims asserted against it for its role as indenture trustee. Ten insurers underwrote $175 million of primary and excess coverage in that policy year. The policyholder sued eight of the insurers, settling with the other two contemporaneously with the filing of its complaint. One of the settlements was with the third excess insurer for $17 million to resolve claims under both the 02-03 insurance policy and an earlier policy. The settlement consideration was greater than the $15 million limit of liability of the 02-03 excess policy but less than the total limits of both policies.

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The fourth excess insurer, joined by the excess insurers above it, moved to dismiss the coverage action because its policy required that "liability for any loss shall attach to [the excess insurer] only after the Primary and Underlying Excess Insurers shall have duly admitted liability and shall have paid the full amount of their respective liability."

The intermediate appellate court held that the third excess insurer had not "duly admitted liability" because the settlement agreement disclaimed any admission of liability by the third excess insurer. In addition, the policyholder's settlement with the third excess insurer did not allocate the $17 million settlement between the two policies, which "preclude[d] any determination of whether" the released policy's limits were reached.

The intermediate appellate court further held that the excess policies' various "full payment" provisions likewise had not been met, including provisions requiring (i) "actual payment under such Underlying Insurance," (ii) payment "by the insurers" as "covered loss," (iii) "actual payment under the Underlying Insurance," and (iv) the underlying insurers "to have paid or have been held liable to pay" the underlying limits.

The opinion is available here.