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ALERT

Insured Cannot Sue Insurer for Amounts Paid to Settle Claim Without Insurer's Consent

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The United States District Court for the Northern District of Georgia has dismissed an insured's complaint seeking coverage for amounts it paid to settle an underlying lawsuit, ruling that the insured's claim for coverage was not actionable given that it failed to obtain its insurer's consent to the settlement. *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, No. 1:13-cv-02128-WSD (N.D. Ga. Mar. 28, 2014). In so ruling, the court rejected the insured's argument that consent was not required since the insurer unreasonably withheld consent. *Id.* Wiley Rein represented the insurer.

The insured, a real estate investment trust, was sued in an underlying class action for securities fraud. In litigating that case, the insured exhausted the full primary layer of its D&O policy and incurred nearly $4 million in defense costs into its first layer excess D&O policy. During a subsequent mediation, and after it had prevailed on a summary judgment motion, the insured sought the consent of its excess insurer to settle the case for $4.9 million. The insurer refused to provide its consent, agreeing to contribute no more than $1 million towards any settlement. Without its insurer's consent, the insured settled the class action, and that settlement was subsequently approved by the district court. The insured then brought a coverage action against its insurer.

Ruling on the insurer's motion, the court dismissed the insured's complaint, reasoning that the insured's claim for coverage was not actionable given that it had failed to obtain the insurer's consent to the settlement as required by the terms of its policy. In so doing, the court rejected the insured's argument that consent was not required because the insurer "unreasonably withheld" its consent in breach of the policy terms. Instead, even assuming that the insured's assertions

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were true, the court ruled that the plain language of the policy barred it from bringing suit until a judgment exceeding the potential settlement was entered against it after an actual trial. In this case, since the insured had unilaterally settled the underlying case, the court ruled that it was barred from bringing suit.

In the alternative, the court ruled that there was no coverage for the settlement since the insured was never "legally obligated" to pay the settlement. In so ruling, the court rejected the argument that the court's approval of the underlying class action altered this result, ruling that "the district court's approval of the settlement d[id] not convert an uncovered settlement into a covered amount under the insurance agreement."

Finally, the court gave effect to the "no action" clause in the policy, which provided that the insurer could only be sued if the insured complied with all of the terms of the policy and "the amount of the [insured's] obligation to pay shall have been finally determined either by judgment ... after actual trial ... or by written agreement of the [insured], the claimant and the [insurer]." In so doing, the court rejected the insured's argument that the insurer was estopped from relying on the "no action" clause since it allegedly had breached the insurance contract by unreasonably withholding its consent, characterizing the insured's position as a "shallow argument ... based on a fundamental misapplication of basic contract law principles." Instead, the court ruled that estoppel could not apply in this case since the insurer funded the defense of the underlying claim, resulting in the insured prevailing on summary judgment, and the insured unilaterally decided to settle the litigation without the insurer's consent.