

ALERT

Insured Cannot “Fill the Gap” to Exhaust Limits of Underlying Policy

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Applying Texas law, the United States District Court for the Eastern District of Texas has held that an excess policy is not triggered where the primary carrier paid less than its full policy limit and the insured “filled the gap” up to the limits of the primary policy. *Martin Res. Mgmt. Corp. v. Zurich Am. Ins. Co.*, No. 6:12cv758 (E.D. Tex. May 12, 2014).

An insured company sought coverage under its primary and excess D&O liability policies for a shareholder derivative suit. After the insurers denied coverage for the insured’s payment of defense costs and a settlement, the primary carrier ultimately settled with the insured for less than the \$10 million limit of the primary policy. The insured argued that its payment of the remainder of the limits up to \$10 million exhausts the primary policy and triggers the excess policy. The excess insurer disagreed. Under its terms, the excess policy applies “only after all applicable Underlying Insurance with respect to an Insurance Product has been exhausted by actual payment under such Underlying Insurance.”

The court held that the excess policy is not implicated because the primary carrier had not paid its full policy limit. According to the court, exhaustion under the terms of the excess policy required “actual payment” of “all applicable Underlying Insurance.” Thus, only payment by the insurer can reduce or exhaust the underlying policy, and the insured’s payments cannot be used to “fill the gap.” Accordingly, the court granted summary judgment in favor of the excess insurer on the grounds that the excess policy is not triggered.

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