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ALERT

Excess Policy Triggered Even Though Underlying Insurers Paid Less Than Their Policy Limits

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Applying Virginia law, a federal district court has dismissed an excess insurer's complaint for a declaratory judgment that, by settling with underlying carriers for less than their policy limits, the policyholder had not complied with the excess policy's requirement to exhaust underlying insurance. *Maximus, Inc. v. Twin City Fire Ins. Co.*, No. 11-cv-31231, (E.D. Va. Mar. 12, 2012). The court distinguished cases reaching the opposite conclusion principally on the basis that the policies at issue in such cases specified that payment of the underlying limits had to be by the underlying insurers.

The excess policy in question provided that it "shall apply only after all applicable Underlying Insurance with respect to an Insurance Product has been exhausted by actual payment under such Underlying Insurance, and shall only pay excess of any retention or deductible amounts provided in the Primary Policy and other exhausted Underlying Insurance." The policyholder settled certain claims and sought coverage from its insurance carriers, and settled with the primary carrier and first two excess carriers. The third excess carrier disclaimed coverage. In subsequent coverage litigation, the third excess carrier filed a counterclaim for declaratory relief on the exhaustion issue, but the court granted the policyholder's motion to dismiss.

The court found that the applicable policy term "actual payment" was ambiguous under Virginia law, citing for that proposition *Zeig v. Massachussets Bonding & Insurance Co.*, 23 F.2d 665 (2d Cir. 1928). The court distinguished several contrary authorities cited by the carrier on the basis that several such cases—including *Comerica Inc.*

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v. Zurich American Insurance Co., 498 F. Supp. 2d 1019, 1032 (E.D. Mich. 2007), *Great American Insurance Co. v. Bally Total Fitness Holding Corp.*, No. 06C4554, 2010 U.S. Dist. Lexis 61553 (N.D. Ill. June 22, 2010), *Citigroup Inc. v. Federal Insurance Co.*, 649 F.3d 367 (5th Cir. 2011), and *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London*, 73 Cal. Rptr. 3d 770, 778 (Cal. Ct. App. 2008)—interpreted exhaustion provisions that specified that the underlying insurers had to pay the full underlying limits. The court stated that it did not need to follow the sole case relied upon by the carrier that applied materially identical policy language because that case—*JP Morgan Chase & Co. v. Indian Harbor Insurance Co.*, 930 N.Y.S.2d 175 (N.Y. Sup. Ct. May 26, 2011)—applied Illinois rather than Virginia law.

The court cited a case applying Virginia law—*The Mills, Ltd. v. Liberty Mutual Insurance Co.*, 2010 Del. Super. Lexis 563 (Del. Super. Ct. Nov. 5, 2010)—which had held for a policyholder on the exhaustion question in similar circumstances. The court elected to follow that precedent, holding that the exhaustion provision was ambiguous. And, accordingly, the court granted the insured's motion to dismiss the carrier's counterclaim.