

**ALERT**

# Fifth Circuit: Excess Policy's Duty to Defend Not Triggered Until Actual Payment of Underlying Limits

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July 25, 2011

The United States Court of Appeals for the Fifth Circuit, applying Mississippi law, has upheld a ruling in favor of an excess insurer, ruling that the excess policy did not attach until the underlying insurer paid its policy limits, notwithstanding the entry of a judgment against the policyholder that exceeded the underlying limits. *Estate of Bradley v. Royal Surplus Lines Ins. Co. et al.*, \_\_\_ F.3d \_\_\_, 2011 WL 2817089 (5th Cir. July 19, 2011).

The underlying wrongful death action alleged that a care facility's negligence throughout a patient's two-year stay caused her death. After the jury returned a verdict of \$12 million against the policyholder care facility, the first excess insurer agreed to pay for a portion of the appeal bond. The second and third excess insurers, however, would not agree to contribute to an appeal bond, asserting that their policies had not triggered because the underlying policies were not exhausted. The policyholder assigned its claims against the insurers to the claimant, and coverage litigation ensued.

The appellate court noted that the second excess policy specifically followed form only with respect to the professional liability provision of the underlying policy, and that this provision did not impose a duty to defend. The second excess policy terms provided that the excess insurer had no duty to defend until "the applicable limits of the underlying insurance and other insurance have been used up in the payment of judgments or settlements." Accordingly, the court held that the excess insurer had no duty to defend until the underlying insurer had actually paid its limits. Because this had not happened at the time the policyholder sought contribution for the appeal bond, the

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second excess insurer had no duty to contribute to the appeal bond.

The court also upheld the trial court's determination that the excess insurers had no duty to indemnify. The applicable coverage agreement provided coverage for claims arising out of medical incidents within the policy period. The court noted that the underlying trial evidence focused on discrete injuries that occurred after the applicable policy period. The policyholder argued that the claimant had alleged negligence during the policy period, but the court observed that the underlying jury instructions would not permit the jury to base liability on negligence during the policy period of the excess carrier. Accordingly, the court affirmed the district court's grant of summary judgment on the duty to indemnify.