

ALERT

Less-Than-Limits Settlement With Primary Insurer Does Not Satisfy Excess Policy's Exhaustion Requirement

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The United States Court of Appeals for the Sixth Circuit, applying Ohio law, has held that an excess insurance policy's unambiguous requirement that the primary insurer pay "in legal currency the full amount of the Underlying Limit" precludes coverage where the insured enters into a less-than-limits settlement with the primary insurer. *Goodyear Tire & Rubber Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 11-4145 (6th Cir. Sept. 17, 2012). Wiley Rein LLP represented the insurer.

Following the insured's October 2003 announcement that it would restate its earnings, shareholders filed class action lawsuits against the company and several of its officers and directors, and the SEC initiated an investigation. The lawsuits ultimately were dismissed and the investigation terminated. The insured sought coverage for approximately \$30 million in legal fees and accounting costs from its primary and first excess insurers. The insurers disclaimed coverage for certain of the tendered fees and costs and the insured filed suit. The primary insurer, whose policy had a \$15 million limit of liability, ultimately agreed to settle with the insured for \$10 million. The excess insurer then sought summary judgment on the grounds that the underlying insurance had not been exhausted by the primary insurer's payment of its full limit of liability as required by the excess policy. The district court granted summary judgment to the excess insurer and the insured appealed.

The Sixth Circuit affirmed the district court. The court held that the "undisputedly clear and unambiguous" requirement that coverage under the excess policy "shall attach only after the [the primary

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insurer] shall have paid in legal currency the full amount of the Underlying Limit" precluded coverage. The court rejected the insured's argument that Ohio's public policy favoring settlements would allow the insured to "fill the gap" between the underlying limit and the settlement amount in order to trigger excess coverage. The court distinguished cases in which the Ohio Supreme Court declined to strictly construe exhaustion requirements in the underinsured motorist context, noting that underinsured motorist coverage was mandated by statute at the time of those decisions and that the Ohio court's concern about compensating tort victims was not present in the present dispute over excess D&O insurance. The court characterized the underinsured motorist cases as setting forth a "niche rule" inapplicable to an "insurance agreement into which sophisticated parties freely entered." The court held that it would strictly enforce contract language in a case in which "one corporation asks us to disregard the plain terms of its insurance agreement with another corporation."

The Sixth Circuit also rejected the insured's argument that an excess insurer must show prejudice before asserting an exhaustion provision as a bar to coverage, noting that the exhaustion requirement defined the scope of coverage afforded by the excess policy. The court stated that "this case does not concern a mere notice or cooperation requirement, which perhaps we could wave off absent any real harm to the insurer. Rather, the provision at issue here is where the rubber hits the road: the agreement's Insuring Clause, under whose terms [the excess insurer] undisputedly did not agree to provide the coverage that [the insured] now seeks."

The opinion is available [here](#).