Negotiating Less than Policy Limits Settlements

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An "Exhaustive" Examination in the Wake of Recent Court Decisions

Consider the following situation: A corporation's employees file a class action against the corporation, seeking damages resulting from alleged rights to unvested company stock options.

During the litigation, the corporation settles the class action for $30 million dollars. The corporation then seeks coverage from its primary and excess insurers. The primary insurer issued a policy with $20 million limits while the excess insurer issued a policy with $20 million limits excess of $20 million.

Both the primary and excess insurers dispute coverage and litigation ensues. The corporation eventually settles the claim against the primary insurer for $16 million, $4 million less than policy limits. The corporation then demands that the excess insurer pay $10 million, the difference between the $30 million settlement with the underlying plaintiffs and the $20 million policy limits of the primary policy. The corporation agrees to absorb the $4 million gap between the settlement it received from the primary insurer and the primary insurance policy limits.

Is the excess insurer required to pay the $10 million? While a majority of jurisdictions in the United States answer this question in the affirmative, a growing number of jurisdictions look to the specific policy language at issue and, based upon this language, require that the primary insurer pay the full policy limits before the excess policy is triggered.

This paper describes the two approaches, known as the *Zeig* Rule (majority) and the *Comerica/Qualcomm* Rule (minority), focusing on the reasoning adopted by those courts that have rejected the majority approach and require actual payment of policy limits by an underlying insurer in order to trigger excess coverage. The paper then discusses various issues the minority rule creates and hurdles that insurers and insureds must consider prior to entering into a settlement for less than policy limits.

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