

New York Court Finds JPMorgan Chase Settlements Preclude \$95 Million in Claimed Excess Insurance Coverage

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In the latest opinion addressing the rights of excess insurers when an insured settles with an underlying insurer for less than full policy limits, in a May 26, 2011 ruling New York Supreme Court Judge Barbara F. Kapnick granted summary judgment to our client Swiss Re and other excess insurers of Bank One, a predecessor by merger to JPMorgan Chase ("JPMC"), finding that such a settlement did not exhaust the underlying insurance under the terms of the excess policies.

This ruling, decided under Illinois law, resulted in dismissal of approximately \$95 million in claimed Bankers Professional Liability and Securities Claim coverage for underlying suits filed against Bank One. JPMC's pending coverage action [*JPMC Chase & Co. v. Indian Harbor Insurance Company, et al.*] seeks over \$175 million in insurance coverage under primary and excess policies issued to Bank One for underlying suits filed in 2002. These underlying suits sought damages based on the insured's role as indenture trustee and otherwise for certain notes issued by affiliates of National Century Financial Enterprises, Inc., a now defunct entity that was alleged to have run a Ponzi scheme involving securitization of medical accounts receivables. JPMC settled with the underlying plaintiffs and then sought coverage under Bank One's Bankers Professional Liability and Securities Claim policies. JPMC settled its coverage claims with two Bank One insurers. The settlements released policies in the Bank One 2002-2003 tower as well as other policies for a lump sum amount that was not allocated to particular policies. As a result, JPMC could not prove that the settling insurers' 2002-2003 Bank One policies were exhausted by payment of full policy limits.

Swiss Re and the other excess insurers attaching above the settling insurers filed motions for summary judgment on the grounds that JPMC's settlement with underlying excess insurers failed to comply with the condition precedent that coverage underlying the moving defendants' policies be exhausted by actual payment of full underlying limits.

Although the specific language in each of the moving insurers' excess policies varied slightly, each required that underlying policy limits be actually paid by the underlying insurers before the policy would be triggered. The excess policy immediately above the lowest settled policy was triggered only "after the Primary and Underlying Excess Insurers shall have duly admitted liability and shall have paid the full amount of their respective liability..."

The New York Court granted the insurers' motions for summary judgment, finding the excess coverage provisions at issue to be unambiguous, upholding the underlying exhaustion provisions as written, and finding the excess policies were not triggered because the full policy limits had not been paid by the settling insurers.

The Court's grant of summary judgment relied on Illinois law as set forth in *Great American Ins. Co. v. Bally Total Fitness Holding Corp.*, 2010 WL 2542191 (ND Ill. 2010) as well as decisions in other jurisdictions that have upheld the clear wording of such excess coverage clauses, such as the *Qualcomm*

decision from California's Fourth Appellate District and the *Comerica* decision from the Eastern District of Michigan. The Court expressly rejected JPMC's argument that these assertedly similar cases were wrongly decided or that a contrary result was supported by the "reasonable expectations of the insured" or on public policy grounds.

This case is significant in that it upholds the clear excess policy requirements that underlying policies be exhausted by actual payments, and in following a recent trend in the law finding no exhaustion absent payment of full underlying limits. In jurisdictions following this decision, insureds will be precluded from seeking excess coverage after settling in a piecemeal fashion with underlying insurers for less than full policy limits.

Should you have any questions or comments regarding this matter, please feel free to contact us.