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Delaware Supreme Court Unanimously Affirms Superior Court Ruling Granting Summary Judgment in Favor of American Guarantee & Liability Insurance Company

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Court Declares that AGLI Has No Obligation to Defend Intel Corporation in Underlying Anti-Trust Litigation Because Intel's Below-Limits Settlement with Underlying Insurer Did Not Constitute Exhaustion

On September 7, 2012, the Delaware Supreme Court, sitting *en banc*, unanimously affirmed the Opinion of Delaware Superior Court Judge, Jerome O. Herlihy, granting summary judgment in favor of American Guarantee & Liability Insurance Company ("AGLI") and against Intel, holding that Intel's settlement with AGLI's underlying insurer for less than policy limits did not constitute exhaustion.

Intel Corp. v. American Guarantee & Liability Insurance Co., 2012 Del. LEXIS 480, Case No. 692, 2011 (September 7, 2012). The ruling of the Delaware Supreme Court is the latest in a series of rulings across the country which have rejected the rationale of *Zeig v. Massachusetts Bonding & Insurance Co.*, 23 F.2d 665 (2d Cir. N.Y. 1928) (upholding exhaustion by a less than policy limits settlement on public policy grounds), in favor of the analysis of more recent cases such as *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London*, 161 Cal. App. 4th 184 (Cal. App. 4th Dist. 2008) (holding that clear policy language requiring exhaustion by actual payment of underlying limits will be enforced.) The case was decided under California law.

This litigation arose out of claims by Intel against AGLI for defense and indemnity coverage for suits filed against Intel by its competitor Advanced Micro Devices, Inc. ("AMD") asserting claims of anti-trust injury against Intel in connection with its sale of microprocessors. AGLI had issued a Following Form Excess Policy which did not, by its policy form, contain a defense obligation. However, by endorsement, the AGLI Policy provided that it followed form to the defense obligation contained in the underlying XL Insurance Co. Policy. The same endorsement limited the defense obligation by providing that there was no duty to defend until the XL policy was exhausted by "payment of judgments or settlements." Intel sought coverage from AGLI for the AMD claims asserting that the

claims were within the personal and advertising injury coverage grant of the XL Policy to which AGLI followed form and further contended that the XL Policy had been exhausted by settlement with XL for less than limits. The claims resulted in parallel declaratory judgment actions, the first filed by AGLI in Delaware Superior Court naming Intel and other insurers with potential exposure to the claims, the second filed by Intel in the United States District Court for the Northern District of California naming AGLI alone. While AGLI contested Intel's claim that the AMD suits fell within the Personal and Advertising Injury coverage grant of the AGLI Policy, the threshold issue in both actions was whether Intel's settlement with XL Insurance Company, for less than XL's policy limits, exhausted the XL Policy for purposes of the provisions in the AGLI Policy. The parallel litigations ultimately resulted in the grant of summary judgment on this issue in favor of AGLI in both actions. By opinion dated July 29, 2010, Judge Herlihy granted summary judgment to AGLI finding no exhaustion of the underlying policy. By opinion dated December 6, 2010, District Court Judge Jeremy D. Fogel granted summary judgment in favor of AGLI finding no exhaustion in parallel litigation in the United States District Court for the District of Northern California. Intel appealed both summary judgment rulings. Both appeals were fully briefed, but the appeal before the Delaware Supreme Court was argued and decided before the Ninth Circuit scheduled oral argument.

AGLI argued on appeal that the conditions for exhaustion of the XL Policy for purposes of Intel's defense cost claims were governed by Endorsement 1 which created the defense obligation by providing that AGLI would follow form to the defense obligation contained in the XL Policy. This endorsement provided that the defense obligation would not arise until the underlying XL Policy was exhausted by payment of judgments or settlements, a term which, under governing California law required full payment of policy limits. Intel, on the other hand, argued that exhaustion was governed by Condition H in the excess policy form which provided that exhaustion could occur by a combination of payments by Intel and an underlying insurer.

The Supreme Court held that, viewing the policy as a whole, "Intel's reading is untenable," and that only AGLI's reading of the policy properly reconciled the language contained in the policies. The Court held that under California law, the phrase "payments of judgments or settlements" cannot be expanded to include an insured's own payment of defense costs. The Court looked to the California Appellate Court decision in Qualcomm as informative to its reading of the AGLI policy and specifically stated that the holding in Zeig was inapplicable here, as the plain language of the policy, as interpreted by AGLI, controls. The Supreme Court held that Intel's "strained" interpretation of the policy language, in an attempt to read a defense obligation into Condition H of the AGLI Policy, was irrelevant to the duty to defend and would create an irreconcilable conflict within the policy terms. Instead, the Court held that AGLI had the only reasonable interpretation of the policy language in that exhaustion of the underlying XL policy by "payments of judgments or settlements," does not include Intel's own contributed payments for defense costs and therefore AGLI did not have an obligation to provide reimbursement for defense costs.

The court rejected Intel's contention that reasonable expectations would compel adoption of its

position, and found that it was not objectively reasonable to expect that AGLI's excess coverage would be triggered only after the underlying policy is exhausted by indemnity payments and not defense costs. Lastly, the court rejected Intel's request that the matter be remanded for discovery on extrinsic evidence finding that Intel had not taken that position before the trial court.

Following issuance of the Delaware Supreme Court Opinion, Intel voluntarily dismissed its pending appeal in the Ninth Circuit Court of Appeals, which had been fully briefed and was scheduled for oral argument.

The appeal was argued by Kevin T. Coughlin and both the Delaware and California litigations have been led by a team of attorneys at Coughlin Midlige & Garland. Should you have any questions about this decision, or any other matter, please do not hesitate to contact us.