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Practice Group:

Insurance Coverage

Excess Policy Attaches Notwithstanding Settlement with Underlying Insurers for Less Than Full Limits

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Recently, a Texas Court of Appeals handed down a pro-policyholder opinion in the case of *Plantation Pipe Line Co. v. Highlands Insurance Co., in Receivership*, Case No. 11-12-00029-CV (Tex. App. Aug. 29, 2014). The issue before the Court was whether the trial court had erred in ruling that Plantation forfeited its coverage under a Highlands excess policy by settling with its underlying insurers for less than the full limits of the underlying policies, even though Plantation paid the difference between the underlying settlement amounts and the underlying policy limits. *Id.* at 5. The Court reversed the trial court and held that the Highlands policy attaches notwithstanding the underlying settlements for less than full policy limits.

The Court reached this determination by examining the “Exhaustion Clause” of the Highlands policy, which it determined was an unambiguous “Limit of Liability” provision that provided in relevant part:

It is expressly agreed that liability shall attach to the Company only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows

Id. at 7. The Court then examined the definition of “ultimate net loss” that was incorporated into the Highlands policy from an underlying Lumbermens policy. The definition, when integrated into the “Limit of Liability” provision, provided in relevant part:

It is expressly agreed that liability shall attach to the Company only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of all sums which the insured or any organization as his insurer, or both, become legally obligated to pay as damages, whether by reason of adjudication or settlement, because of personal injury, property damage or advertising liability.

Id. at 8-9 (emphasis in original). Therefore, based on this unambiguous language, the Court found that the “Limit of Liability” provision only requires that Plantation and the underlying insurers altogether pay a sum in excess of the attachment point of the Highlands policy, which they had done. *Id.* at 9. As such, Plantation could receive excess coverage from Highlands for amounts above the attachment point, even if it had settled with underlying insurers for less than applicable policy limits.

Importantly, the Court stopped short of adopting the “Zeig doctrine,” derived from *Zeig v. Massachusetts Bonding & Insurance Co.*, 23 F.2d 665, 666 (2d Cir. 1928), which stands for the proposition that an excess insurer has no rational interest in whether the policyholder actually collects full limits from underlying insurers, since the excess insurer is only being asked to pay amounts exceeding its attachment point. The *Plantation Pipe Line* Court reasoned that the Zeig doctrine only applies in situations in which “an excess insurance policy ambiguously defines exhaustion.” *Id.* at 11. The Court reasoned that since it had

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found that the Highlands policy was not ambiguous, it “need not decide, as a matter of first impression, whether the *Zeig* doctrine applies in the State of Texas.” *Id.* at 12.

Although it did not adopt the *Zeig* doctrine, the Court did recognize that it would hold in favor of Plantation even if the Highlands policy were ambiguous. The Court stated, “Even if we are wrong in our assessment that the policy terms involved in this appeal are unambiguous, the result of this appeal would be no different. . . . If the language of an insurance policy is ambiguous, the construction that is more favorable to the insured and affords coverage will be adopted.” *Id.*

Therefore, the Court determined that Plantation would prevail in reaching excess coverage whether the Highlands policy were ambiguous or not. Such a policyholder-friendly opinion should be warmly welcomed by the policyholder community, especially by those engaged in coverage litigation who may have already settled with underlying insurers for less than applicable policy limits. While *Plantation Pipe Line* may go up on appeal to the Texas Supreme Court, until then, the case is firmly a policyholder victory.

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