The Harvard Law School Forum
on Corporate Governance
and Financial Regulation

SUPPORTED BY:

CSC
CORPORATION
SERVICE COMPANY

Delaware Supreme Court Rules on Excess Insurer's Coverage Obligations

Posted by Warren Stern, Wachtell, Lipton, Rosen & Katz, on Thursday September 27, 2012

Editor's Note: Warren Stern is Of Counsel at Wachtell, Lipton, Rosen & Katz, where he concentrates on corporate and securities litigation. This post is based on a Wachtell Lipton memorandum by Mr. Stern, Martin J.E. Arms and Caitlin A. Donovan. This post is part of the Delaware law series, which is cosponsored by the Forum and Corporation Service Company; links to other posts in the series are available here.

On September 7, 2012, the Supreme Court of Delaware, applying California law, ruled that an excess insurer of Intel had no payment obligation even after Intel's out-of-pocket defense costs, combined with Intel's prior settlement with an underlying insurer, exceeded the underlying insurer's policy limits — notwithstanding a provision in the excess insurer's policy providing that coverage would apply when "the insured or the insured's underlying insurance has paid or is obligated to pay the full amount" of the underlying insurer's policy limits. Intel Corp. v. Am. Guar. & Liab. Ins. Co., et al., No. 692, 2011 (Del. Sept. 7, 2012).

This dispute arose from antitrust litigation that was brought against Intel and for which Intel sought reimbursement for defense costs from its insurers. A small primary policy was quickly exhausted and Intel then entered into coverage litigation with XL, its first excess insurer, that was ultimately settled for $27.5 million of XL's $50 million policy limits. Having incurred significantly more than $50 million in defense costs, Intel then turned to its second excess insurer, American Guarantee & Liability Insurance Company ("AGLI"), for reimbursements for defense costs in excess of XL's policy limits. AGLI refused coverage and litigation followed.

The Delaware Supreme Court relied on language in a policy endorsement providing that AGLI had no duty to defend until the limits of the underlying insurance were "exhausted by payments of judgments or settlements." The Court held that defense costs did not satisfy this "judgments or settlements" requirement. With respect to a seemingly conflicting provision stating that "[c]overage under this policy will not apply unless and until the insured or the insured's underlying insurance has paid or is obligated to pay the full amount of the [underlying policy limits]," the

Court found that this separate provision addressed exhaustion due to indemnification for "damages," and could not be satisfied by payment of defense costs.

The *Intel* decision is an important new precedent in a series of cases holding that an excess insurer is not obligated to make payments in certain situations where an insured has reached a settlement with an underlying insurer for less than full policy limits, even if the insured fills the "gap" in the coverage tower by making payments itself. The holdings in these cases have been based on the specific policy language at issue and therefore underscore the importance of focusing on the relevant language in excess policies when negotiating insurance policies. In particular, excess policies should have clear language providing (1) that the policy is triggered when amounts equivalent to the underlying limits are paid by either the underlying insurer or the insured, and (2) that all amounts that are included within the coverage of the underlying policy (or that would have been included absent a settlement), whether judgments, settlements, or defense costs, serve to exhaust the underlying limits for the purpose of triggering excess coverage. These cases also highlight the risk that a negotiated settlement with an underlying insurer may harm the insured's ability ultimately to access excess coverage.